

GLOBALIZATION AND THE SOCIALIST MULTINATIONAL: CUBA AND ALBA'S *GRANNACIONAL* PROJECTS AT THE INTERSECTION OF BUSINESS AND HUMAN RIGHTS

Larry Catá Backer

The Cuban Embargo has had a tremendous effect on the way in which Cuba is understood in the global legal order. The understanding has vitally affected the way in which Cuba is situated for study both within and outside the Island. This “Embargo mentality” has spawned an ideology of presumptive separation that, colored either from the political “left” or “right,” presumes isolation as the equilibrium point for any sort of Cuban engagement. Indeed, this “Embargo mentality” has suggested that isolation and lack of sustained engagement is the starting point for any study of Cuba. Yet it is important to remember that the Embargo has affected only the *character* of Cuba’s engagement rather than the possibility of that engagement as a sustained matter of policy and action. This suggests that to study Cuban global engagement requires a recognition and rejection of the “Embargo mentality” as the ordering device for analysis.

Conventionally understood, Cuban engagement has been episodic and opportunistic. It has been (and continues to be) confrontational at times and always ideologically driven in large part, perhaps, because those strategies have worked well for Cuba on the international stage. Since the 1959 Revolution, Cuba has fought a number of wars on multiple fronts in the service of its national interests and internationally significant ideological campaigns. Virtually every lever of state power has been used in these efforts—including military, diplomatic, organizational, economic, media, cultural, religious and ideological ef-

forts. Most of these have used the United States, and its socio-political, economic, cultural and ideological values as the great foil against which to battle. Over the course of the last half century, these efforts have had mixed results. But they have had one singular success—they have propelled Cuba to a level of influence on the world stage far beyond what its size, military and economic power might have suggested. Like the United States, Cuba has managed to use internationalism, and especially strategically deployed engagements in inter-governmental ventures, to leverage its influence and the strength of its attempted interventions in each of these fields. (e.g., Huish & Kirk 2007). For this reason, if for no other, any great effort by Cuba to influence behavior is worth careful study.

Yet, over the last decade that engagement has assumed an important *economic* as well as military and diplomatic character. Globalization has not left Cuba untouched (despite Cuban and American protestations to the contrary). But Cuba has sought to engage globalization on its own terms. The engagement must be understood as increasingly bound up within the context of Cuba’s external relations, especially those in which Cuban has participated in the construction of a multi-national institutional architecture and in which it may not appear to take the lead.

But Cuba is quickly learning one of the great lessons of global engagement. “Seven Cuban doctors and a nurse have accused their government of engaging in a ‘modern form of slavery’ with Venezuela after barter-

ing their services for cheap Venezuelan oil.” (Galliot 2010). This is a not unusual consequence when state operated enterprises that combine sovereign and private activity collide with emerging international human rights rules. This collision, and its particular potential effects on Cuba’s recent efforts to define a space for itself within global economic frameworks, is the subject of this paper.

Since the start of the 21st century, conventional economic globalization has been the object of one of the principal long term ideological wars waged by the Cuban state. (Castro 2003). The Cuban state has been active in its attacks on the organizational framework of global conventional economic organization, from sovereign debt (Backer 2006) and business organization (Backer 2004) to the basis of private power to effect trade between states. (Castro 2000). Among its many activities in this realm, the Cuban state has undertaken two significant efforts. The first seeks to develop an alternative basis for inter-governmental management of trade through the *Alternativa Bolivariana Para los Pueblos de Nuestra América* (ALBA). (Backer & Molina 2010). The second, realized in large part within the ambit of the first, seeks an alternative basis of the organization of economic activity for the production of goods and provision of services.

The basic theory and objectives of the *grannacional* generally, is offered as a new form of transnational public enterprise, one that is meant to provide a viable challenge to current conventional global systems of economic organization. These ideas have been articulated as the “*concepto grannacional*” being given effect through the inter-governmental arrangements of ALBA. *Grannacional* economic activity, ideologically based, is divided into two categories. The first, *proyectos grannacionales* (PGs), are inter-governmental in character. These include efforts to create alternatives to dollar-denominated trade transactions grounded in the “*sucre*” (Venezuela July 9, 2010) but also embrace enterprises targeting education, tourism and the provision of medical services. The second, *empresas grannacionales* (EGs), focus on the creation of entities controlled by ALBA states and geared to

the production, sale and distribution of goods. (Venezuela August 21, 2009).

These projects and enterprises are still at a very early stage in development. But all of them share certain characteristics founded on their organizational framework: control by the state, a conflation of labor and capital as components of production and a focus on state policy for the production and distribution of goods and services in the service of state determined economic welfare maximization. Yet, these enterprises, arguably created as a challenge to the conventional global economic framework still must operate within the general parameters of human rights and other norms with respect to which international consensus has been developing, many with Cuba’s approval. Among important new developments in the rules of business behavior, especially those touching on internationally recognized human rights, are soft law instruments developed through the Organization for Economic Cooperation and Development (OECD), and the principles of business and human rights being developed by the United Nations through the Secretary General’s Special Representative, John Ruggie—the Protect-Respect-Remedy framework. (Backer 2010). In particular, the relationship between enterprise, state, and worker appears to serve as a flash point for conflict between the *grannacional* conception of business and global consensus on the rights of workers—especially in areas of pay, forced labor, and trafficking. There is already an indication of potential conflict in recent cases filed in the United States in which these issues have been raised. (*Licea v. Curaçao Dry Dock Co.* 2008). “For multinational corporations facing allegations of human rights abuses, the stakes have never been higher.” (Drimmer 2009). That applies, in equal measure, to economic enterprises sponsored, owned or controlled by Cuba. And this is an area in which state sovereignty will provide little protection to enterprises geared to projection within world markets.

This paper considers Cuba’s new efforts at global engagements through the device of the *grannacional* in its ALBA framework. The paper starts by examining the basic theory and objectives of the *grannacional* generally as articulated in ALBA publications as the

“*concepto grannacional*” that serves as the organizing framework of these multi-state socialist enterprises. It considers distinctions and implications for the division of *grannacional* efforts between *proyectos grannacionales* and *empresas grannacionales*. It then focuses on a specific *grannacional*-related project—the *Misión Barrio Adentro* (MBA), a socio-political barter project in which Cuba exchanges doctors and other health field related goods and services under its control for Venezuelan goods, principally petroleum. (Convenio 2000). MBA is analyzed as an example of the application of Cuban-Venezuelan approach to economic and social organization through the state. The MBA is also useful as an illustration of the difficulties of translating that approach into forms that might conform with emerging global expectations of economic conduct by private and state actors. The recent litigation in which Cuba has been accused (directly or indirectly) of violating international law by operating enterprises based on forced labor by both laborers and doctors, and soft law systems of governing business conduct (Galliot 2010) serve as a backdrop against which this analysis is undertaken.

For Cuba programs like MBA have served as a means of engaging in economic globalization and of leveraging its political intervention in the service of its ideological programs in receptive states like Venezuela. (Bustamante & Sweig 2008; Kirk & Erisman 2009). It has also provided a basis for expanding Cuba’s commercial power by permitting large scale state-directed barter transactions. But when bartering involves labor as well as capital, the fundamental premises of the ALBA system—and Cuban ideological notions of the fungibility of labor and capital in the service of the state—may collide with emerging global frameworks for human rights and economic activity. That collision is examined against (1) recent litigation in which Cuba has been accused (directly or indirectly) of violating international law by operating enterprises based on forced labor, (2) the possi-

bility of conforming to the OECD’s Guidelines on Corporate Governance of State Owned Enterprises, and (3) the possibility that these enterprises will not be able to conform to the United Nation’s developing business and Human Rights project. MBA serves as a template both to understand the character of the operationalization of social sector *grannacionales* and also to illustrate the way in which these projects raise significant questions of international law compliance, especially the ability of these enterprises to comply with emerging standards of business conduct.

THE GRANNACIONAL—CONCEPT, PROJECT, ENTERPRISE

To understand the *grannacional* project, one must start with the presumption that its contours are a construct of applied ideology. It serves as an application of the fundamental ideological premises of ALBA, grounded in opposition to what Castro has long derided as “neo-liberalism.” Those ideological premises include a deep suspicion of private sector globalization without strong state control and the understanding of the deployment of economic globalization as a means of deepening the dependence of developing states to the great national economic powers, headed by the United States. Castro has made that clear in speeches since the mid 1980s. (Backer 2006). ALBA is meant to provide an inter-governmental context within which these ideological confrontations with conventional globalization can be implemented.¹

The conception of *grannacional* projects is understood as essentially political. (ALBA Jan. 27, 2008). This political conception of the *grannacional* function is divided into three components, historical and geopolitical, socio-economic, and ideological. The first, historical and geopolitical, is grounded in the sense that the business of the construction of Latin America, started with the wars of liberation of the 19th century, is unfinished. Its object is integration at the supra-national level, that is, to understand *gran-*

1. “En este sentido, constituye una ruptura con la visión economicista clásica de la integración y la cooperación internacional. El ALBA, en tanto que alianza política estratégica tiene el propósito histórico fundamental de unir las capacidades y fortalezas de los países que la integran, en la perspectiva de producir las transformaciones estructurales y el sistema de relaciones necesarias para alcanzar el desarrollo integral requerido para la continuidad de nuestra existencia como naciones soberanas y justas.” (ALBA Jan. 27, 2008).

nacionales as the formal expression of efforts to create a single nation (“la visión bolivariana de la unión de las repúblicas latinoamericanas y caribeñas para la conformación de una gran nación.” (ALBA Jan. 27, 2008). Thus the derivation of the name *gran-nacional* is meant to suggest a national grouping cemented through its political-economic relations but which would also respect national peculiarities and sovereignty.²

This vision of the *grannacional* as a means to integration of Latin American and Caribbean states is augmented by the second component of the political conception of the use of the *grannacional*, its deployment as a functional means to reach the political ends of integration. It is in this functional sense that the *grannacionales* are understood to have a socio-economic foundation. (ALBA Jan. 27, 2008). *Grannacionales* are meant to serve as the great vehicle for state directed development. They are the embodiment of an ideology that sees economic activity as a means to satisfy public policy rather than as an end in itself (that is as a vehicle to maximize individual welfare). This development is meant to maximize national and regional needs rather than aggregated global needs.³

Third, taken together, the *grannacional* is understood as an ideological vehicle advancing political and economic aims of the state. Specifically, the *grannacional* enterprise has as its objective the manifestation of a united front by generating a multi-national block for the structuring of sovereign regional politics. (ALBA

Jan. 27, 2008).⁴ This functional manifestation of a united front is best understood in its Marxist-Leninist form: “It is particularly important when using the united front tactic to achieve not just agitational but also organisational results. Every opportunity must be used to establish organisational footholds among the working masses themselves.” (Communist International 1922, ¶10). The *grannacional* enterprise contributes to united front tactics by contributing functionally to the structuring of a successful supra national trade system that counters the deleterious effects of the conventional global economic order, supports what ALBA states understand to be sustainable development that is socially just, preserves national sovereignty and self determination.⁵ That focus has consequences beyond the cultivation of old fashioned Marxist-Leninist internationalism. The most important, perhaps, is that efficiency is measured differently than in classical economics or under the framework of conventional economic globalization. It is understood only in relation to the aims of the state in meeting its political goals, measured to some extent on the state’s assessment of its ability to meet the needs of a majority of its people. Both the political and needs objectives are also constructs of state policy. This produces something of an inversion from concepts in classical economics.

As a consequence, the *grannacional* enterprise is understood as a process of experimentation in the application of ALBA principles. (ALBA Jan. 27, 2008).⁶ It is the means through which the ideological framework of ALBA is to be manifested among its member

2. Id. “El concepto grannacional puede asimilarse al de mega estado, en el sentido de la definición conjunta de grandes líneas de acción política común entre estados que comparten una misma visión del ejercicio de la soberanía nacional y regional, desarrollando y desplegando cada uno su propia identidad social y política, sin que ello implique en el momento actual la construcción de estructuras supranacionales.” (ALBA Jan. 27, 2008).

3. Thus understood, development is “basado en la constatación de que la estrategia de desarrollo de las economías de nuestros países hasta el grado de producir la satisfacción de las necesidades sociales de las grandes mayorías, no puede limitarse al ámbito local.” (ALBA Jan. 27, 2008).

4. Thus the grannacional is to generate “bloque en la perspectiva de estructurar políticas regionales soberanas.” (ALBA Jan. 27, 2008).

5. These specific aspects of this *grannacional* objectives echoes language from the Fourth Congress of the Communist International (Communist International 1922). “One of the most important tasks of the Communist Parties is to organise resistance to international fascism. . . . The united front tactic is simply an initiative whereby the Communists propose to join with all workers belonging to other parties and groups and all unaligned workers in a common struggle to defend the immediate, basic interests of the working class against the bourgeoisie.” (Id., ¶5).

6. “En consecuencia, lo grannacional es el proceso que experimentamos hoy bajo los principios del ALBA.” (ALBA Jan. 27, 2008).

states, with the objective of moving the ALBA states toward political union. That union is bound up in notions of Marxist economic determinism: union will be achieved as the inevitable consequence of global dynamics dominated for the moment by the great industrial powers and blocks of economically hegemonic states. (ALBA Jan. 27, 2008 (“hacia la cual nos empuja la dinámica del mundo actual dominado por las grandes potencias industrializadas y los bloques económicos hegemónicos.”)). “Now, more than ever, the strictest international discipline is necessary, both within the Communist International and in each of its separate sections, in order to carry out the united front tactic at the international level and in each individual country.” (Communist International 1922, ¶13). The *grannacional* enterprise is meant to provide a framework for that discipline.

This experimentation manifests in two concrete forms—*proyectos grannacionales* (PG) and *empresas grannacionales* (EG). PG programs are meant to organize integrated ALBA member state activity around key fields of activity, encompassing political, cultural, economic, scientific, and industrial activity. (ALBA Jan. 27, 2008). PG include all programs undertaken to benefit the greatest number under the ideological framework and goals of ALBA, approved by ALBA Member States, and whose execution requires the participation of two or more ALBA Member States. This organization is grounded in ALBA’s normative construction of principles of “just trade” and solidarity commerce, which is sometimes reduced to three principles—barter transactions, non-reciprocity in trade relations, and differential treatment of trade partners to advance national and development objectives (*comercio compensado, no-reciprocidad, y trato diferenciado*). (Girvan 2008, 5–9). Since 2009, the

ALBA Member States agreed to the creation of a permanent commission to oversee the development of PGs. (Venezuela Feb. 27, 2009).

If PGs are meant to organize productive activities, EGs are meant to implement them in an orderly way. (ALBA Jan. 27, 2008).⁷ But the relationship between PG and EG is not strictly linear—though it is clear that every EG must derive from a PG, not every PG will require the establishment of an EG.⁸ This is especially the case with respect to political, social and cultural projects for which the apparatus of the state may be used directly to implement PG objectives. Nor are all PG and EG projects required to be established at the supra-national level—single state PGs and EGs may be created as long as they are consonant with ALBA principles and goals. (ALBA Jan. 27, 2008).

EGs are meant to embody an alternative to the model of the private multinational enterprise, which seeks to maximize the welfare of its shareholders and other important stakeholders. EGs are said to invert the traditional maximization model by seeking to maximize the welfare of the objects of economic (or other) activity, rather than those involved in the production or financing of that activity.⁹ That effective inversion is what is meant by the ideological focus on “just commercial zone” within the ALBA region. EGs are all state owned enterprises, established a separate juridical persons, interest in which is measured through share ownership by participating ALBA Member States. (ALBA Jan. 27, 2008). But they might be organized in other ways. In any case, EGs will be established under special legislation, rather than under the incorporation rules of any one of the participating ALBA Member States, a supra-national sovereign joint venture operating in private form. (Telesur Jan.

7. “En resumen, tenemos que un proyecto grannacional es todo programa de acción dirigido a cumplir con los principios y fines del ALBA, que haya sido validado por los países integrantes y cuya ejecución involucre a dos o más países, para beneficio de las grandes mayorías sociales.” (ALBA Jan. 27, 2008).

8. Thus, “grannacional projects and enterprises . . . are materializing the social and economic projects of integration. Not every grannacional project will become a grannacional enterprise, but every grannacional enterprise has to respond to a grannacional project, which must guide its development.” (Diaz 2009).

9. “El concepto de empresas grannacionales surge en oposición al de las empresas transnacionales, por tanto, su dinámica económica se orientará a privilegiar la producción de bienes y servicios para la satisfacción de las necesidades humanas garantizando su continuidad y rompiendo con la lógica de la reproducción y acumulación del capital.” (ALBA Jan. 27, 2008).

29, 2010) EGs are understood to be autonomous and might enter into joint venture arrangements with private sector enterprises. (ALBA Jan. 27, 2008). The primary focus of activity is within the ALBA zone, directed toward economic development therein.¹⁰ Thus, in a sense, the EG presents a modified form of globalization—a regionalist model meant to construct a supra-national internal market established through the direction of economic power in private form by states asserting sovereign authority for that purpose. A recent example includes the effort to create a Food EG (ALBA-Alimentos) to control the market for agricultural products within the ALBA zone. (ALBA Aug. 25, 2008). This suggests a new face for traditional command economy activity, but it is unclear whether it also suggests a change in function.

To their ideological ends, EGs are subject to a number of general parameters. EGs should operate to maximize the use of the existing capacities of the economies of each ALBA state in their operation for the purpose of aiding economic development in each of the participating states.¹¹ EG production should be directed to satisfy the needs of the ALBA zone first; excess production might be directed to international markets.¹² Though the EG maximization model posits a focus on the needs of consumers, EGs must arrange their internal operations to be self-sustaining, a task acknowledged to be difficult.¹³ To this end, EGs must also ensure environmental sustain-

ability, promote equitable labor conditions and an equitable distribution of wealth.¹⁴ It is understood, however, that EG earnings will be distributed to the ALBA Member States shareholders for their use for social ends, or retained by the EG. (ALBA Aug. 25, 2008). While the EGs are grounded in a rejection of the welfare maximization principles of multinational corporations, they embrace the form of organization and production of those entities, including supply and production chain principles, and resource procurement optimization. But their intense connection to states makes them both regulatory and commercial vehicles. Their activity, whether organized as judicially distinct corporate legal personalities or as joint venture divisions of several state governmental ministries, represented a variant of coordinated supra-national state sovereign activity effectuated through markets (Backer 2010a)—state dominated markets in some parts of the ALBA zone and markets increasingly private in character the farther from the ALBA zone the activity occurs.

The notion of “fair price” is identified, though its definition is ambiguous, though likely grounded in principles of “just trade” and solidarity identified above. As such it can be understood as a political rather than a conventionally economic principle. But that is in line with ALBA’s core notion of the conflation of politics and economics. And with respect to the exploitation of natural resources, there is a sug-

10. “Así tenemos que empresas grannacionales serán aquellas empresas de los países del ALBA integradas productivamente, cuya producción se destinará fundamentalmente al mercado intra-alba (zona de comercio justo), y cuya operación se realizará de forma eficiente.” (ALBA Jan. 27, 2008).

11. “[D]eben partir de la noción de integración productiva y tener en cuenta las necesidades de complementación económica entre las naciones que la integran, en áreas fundamentales para el desarrollo económico-social. Esto supone utilizar al máximo las capacidades de cada país: recursos energéticos, disponibilidad financiera, disposición de materias primas, recurso humano calificado, desarrollo científico y tecnológico.” (ALBA Jan. 27, 2008).

12. “La producción de estas empresas debe destinarse prioritariamente a satisfacer el consumo final o industrial del mercado intra-ALBA, a objeto de conformar la zona de comercio justo. Sus excedentes podrán colocarse en el mercado internacional.” (ALBA Jan. 27, 2008).

13. “Las empresas grannacionales deben basar su existencia en la eficiencia productiva, inscribiéndola en los principios del ALBA. Esta no es una tarea fácil, pero tampoco imposible de lograr. Las empresas grannacionales tienen que ser autosostenibles.” (ALBA Jan. 27, 2008).

14. “Las empresas grannacionales operarán bajo los principios de complementariedad, solidaridad, cooperación, reciprocidad y convivencia armoniosa del hombre con la naturaleza explotando racionalmente los recursos naturales y ejecutando proyectos ambientalmente sustentables, promoviendo condiciones de trabajo digno y redistribución equitativa de las riquezas.” (ALBA Jan. 27, 2008).

gestion of a melding of state and private function.¹⁵ That, in turn, is in line with ALBA's core political principle of the inseparability of public (sovereign) activity and market activity of state or private actors.

PGs and EGs have been used increasingly to organize state sector economic activity within and across ALBA states. In states like Cuba with minimal private sector activity of any significance, the use of these vehicles merely suggests a rearranging of the economic sectors affected. In other ALBA states, especially Venezuela and Bolivia, the result has been to effect a nationalization of economic sectors by a process of public privatization—that is the use of private sector entities “owned” by the states that also regulate the enterprises operating in that sector. This is the sort of double-edged activity that has been rejected as inequitable under principles of market integration within the European Union, for the very reason that it tends to disadvantage non-state private competitors in these markets. (Backer 2008). Since ALBA's inception, a number of PG and EG projects have been initiated or announced. (Regueiro Bello 2007). These include plans for a fisheries EG (Venezuela May 10, 2010), forestry EG (Venezuela July 3, 2008), a coffee EG between Venezuela and Dominica (Venezuela July 1, 2010), four energy related EG between Venezuela and Bolivia (Venezuela April 30, 2010), an ALBA zone Hotels EG (TeleSur January 30, 2010), a mining EG between Ecuador and Venezuela (Venezuela March 26, 2010), an import-export bank to facilitate trade (ALBAexim) (Los Tiempos Oct. 19, 2009), an energy EG among Cuba, Venezuela, Ecuador and Nicaragua (El Ciudadano Jan. 27, 2010), a number of mining and extractive minerals EGs (FM Bolivia Oct. 18, 2009), and a transport EG between Cuba and Venezuela to stimulate trade within the ALBA zone and internationally. (Ramírez Cruz et al. 2007, at 3.1.1.1).

PGs predate EGs in many fields. They predominate in the social, cultural and political areas, though they also encompass important service sectors—principally the health and health care fields. Many of these were organized early on as “Missions” (*Misiones*). *Misiones* have been defined as large scale strategic interventions to guarantee fundamental rights to the most excluded sections of the population. (Venezuela May 2007). They are thus meant to combine the political, functional and ideological within identified sectors of economic activity, in which the political and ideological objectives may trump conventionally understood notions of economic efficiency in the private markets in which such interventions are targeted. These function like PGs, and formed the basis of early bi-lateral arrangements in the service sector between Cuba and Venezuela leading up to ALBA. (Aponte García 2009, 95). Among more recent PGs are projects for the provision of quality medicines (ALBA-MED) between Cuba, Venezuela, Bolivia, Ecuador, and Nicaragua (PL 2009). A number of other PGs involve literacy, cultural identity and diversity and genetic studies.¹⁶

Most PGs and EGs remain in the planning stage. Many of them are only recently announced. A number of them seem to serve their greatest purpose for their ideological rather than their functional value, appearing in most concrete form on the media sites of ALBA organs. Virtually all of the PG and EG initiatives appear aimed at organizing an economic or social sector under state direction and then marshaling productive capacity within a state controlled entity or otherwise within a state ministry. What is new is that this fairly common form, with origins in commend economy practice, is within the *grannacional* context now practiced as a series of joint or multilateral ventures among states. The great innovation of the *grannacional* concept, then, lies in this internationalization of state-based central planning and con-

15. “Del control de las fuentes de materia prima: afortunadamente ésta es una ventaja real en nuestros países, en virtud de que el estado controla dichas fuentes.” (ALBA Jan. 27, 2008).

16. “Asimismo, los 9 países de la Alianza prevén impulsar la constitución de varios proyectos “grannacionales,” como la empresa de comunicaciones ALBATEL y el Fondo Cultural de la ALBA, destinado al desarrollo y defensa de la identidad y la diversidad cultural. Otros proyectos son el de alfabetización y postalfabetización, el ALBA-Educación, y la realización de un estudio clínico genético y psicosocial de personas con discapacidades, que ya se ha realizado en países como Cuba y Bolivia.” (Noticia al Día Dec. 14, 2009).

trol model within a regional trade zone. ALBA Member States now seek to create a web of economic arrangements, of state generated and controlled markets, that flow from state public policy based determinations of appropriate production, sale, distribution and development. The ultimate stakeholder in these enterprises thus shifts from the shareholder (and lender), to the national *demoi* of participating states, whose interests are represented by the state apparatus. Rather than maximizing shareholder value, the EG must now maximize national welfare, as those things are measured by the states who participate (and regulate those markets). ALBA Member States have sought to turn the conventional economic model from one that privileges private interests to one that adopts the forms of private organization, but in which the state acts as both regulator and shareholder. (Backer 2004). ALBA Member States have also sought to expand the utility of the *grannacional* form of sectoral organization by extending the use of these PG and EG projects to functions traditionally the province of religious and social organizations, or the state. Having conflated politics and economics, the *grannacionales* also merge the public and private. This amalgamation is then organized as state controlled enterprises, projects, missions, and the like. To date, PGs have sought to organize the following sectors: energy, finance, commerce, transport, telecommunications, education, culture, health, manufacturing, tourism, and mines. (Regueiro Bello 2007). Newer ventures include agriculture, fishing and other economic sectors.

Organizational form assumes less importance than the ideological framework and the functional objectives of these programs. Yet legal consequences follow organizational form. Those legal consequences may affect both the state as shareholder or as principal in the implementation and operation of these programs. As supra-national programs, the *grannacionales* will be subject to the rules (and protections) of the domestic legal orders of the ALBA Member States that have an interest in specific programs. But they may also incur obligations to critical stakeholders—workers, consumers, lenders, and others—under international law. Moreover, to the extent that these *grannacionales* operate outside the

ALBA zone, they may also incur obligations under the domestic law of host states. Precisely because the *grannacionales* are meant to challenge the basis of conventional economic (and legal) organization, it is likely that some of its practices may be incompatible with legal norms outside the ALBA zone. That incompatibility may give rise to significant legal liability where *grannacional* activities are judged outside of the ALBA zone. Where this liability touches on issues of human rights, it may suggest implications well beyond the legal. It is especially in those areas that ALBA's ideology of "just commerce" may come in conflict with global human rights norms, especially with respect to the power of the state over individuals as citizens and as workers.

FROM THEORY TO PRACTICE: JUST COMMERCE, GRANNACIONAL ORGANIZATION, AND THE MISIONES

It is easy to assert in generalities that ALBA-system forms of economic activity might conflict with international human rights norms, with political and legal consequences. It is more helpful, perhaps, to provide a possible example of that potential conflict. For that purpose, Cuba and Venezuela's trade arrangements under an ALBA-related PG focusing on the health sector is examined. This is not meant to suggest that either only health sector economic activity might breach human rights norms or that the potential breach suggested in the example is the only possible form of violation of human rights norms. But the example is chosen because both the health care sector, and Cuba's economic model for commerce in this area, are an important element of ALBA programs and Cuban economic activity.

PGs and EGs function on the basis of the principle of the fusion of political and economic objectives under the direction of the state in which the state, as shareholder, supplies both capital and labor. In functional terms, many PG and EG operations are accomplished on a barter system in which each state maximizes the value of transactions in organized sectors of activity by trading capital, goods or labor among themselves. These transactions are memorialized by the states directly through Conventions (*Convenios Comerciales Compensados* or CCC) memorial-

izing the terms of the barter transactions.¹⁷ A number of these projects were organized as *misiones* (missions), an organizational term with origins in the revolutionary politics of Venezuela. *Misiones* were originally produced to privatize traditional state activity in Venezuela after the 1999 election of Hugo Chávez. “A ‘mission’ was aimed at concentrating efforts of different sectors and public organizations in order to rapidly satisfy urgent social needs, increase community participation, circumvent bureaucratic obstacles, and to employ the organizational and logistic facilities of the Armed Forces in the development of civil social actions.” (Muntaner et al. 2008, 236).

The organization of the health sector in Venezuela was particularly susceptible to this form of organization. The privatization was necessary as a means of subverting the opposition of the state sector to Chávez’s programs reforms. (Muntaner et al. 2008, 235). If the state apparatus opposed the reforms, and if these organs were within their rights in doing so, then it might be possible to reconstitute these activities in private form and proceed as a state based but private endeavor.¹⁸ Eventually these programs were brought back within the state administration but by then they had acquired their own distinctive form. (Aponte García 2009). Health care sector *misiones* were also particularly important to Cuba, Venezuela’s ally in this revolutionary transformation.¹⁹ It was a small step from conceptualizing a project for state organization of the medical treatment sector to the creation of a bi-lateral arrangement for the imple-

mentation of the program. The lubrication necessary to make this step possible was the ideological framework of ALBA, especially its notions of non-reciprocal trade as a basis of commercial activity between (or directed by) sovereigns. (Aponte García 2009).

In the health care sector, two *misiones*, *Misión Milagro* and *Misión Barrio Adentro* (MBA) were expanded as a vehicle for bi-lateral and multi-lateral exchanges among states, principally at first, between Cuba and Venezuela. *Misión Milagro* was conceived as a program to provide people of Latin America with certain eye care services.²⁰ These envisioned a set of programs, projects and cooperative arrangements, directed by the Cuban and Venezuelan states. To that end, both states would organize within joint ventures established in any number of formally and informally constituted entities, into which each state would contribute the appropriate mix of both public and private sector entities, universities, research organizations, and non-governmental organizations. (Convenio 2000, art. I). The more important effort, for purposes of this paper was in the organization of health care to the poor in Venezuela in the form of MBA. That effort was memorialized as part of a wide ranging Convenio (2000) between Cuba and Venezuela meant to establish programs to aid in the development of both states in a variety of sectors—agriculture, tourism, medical products, education, transportation, and sports. (Convenio 2000, Annex I). To that end, each state would contribute in accordance with its economic strengths and state-directed economic development objectives. It was agreed that

17. “Mediante los CCC, cada república propone acciones propias donde expone lo que necesita y lo que otorga. Los convenios compensan bienes y servicios según las necesidades y capacidades de cada cual.” (Regueiro Bello, 2007, 95).

18. Aponte García noted:

Aunque su juramentación como Presidente de la República en febrero de 1999 le daba el control de las instituciones estatales y la mayoría en la Asamblea Nacional, los Ministerios y las demás instituciones del Estado resultaban ser organismos muy pesados, lentos y con un enorme lastre de burocratismo. El Gobierno opta entonces por llevar a cabo sus reformas mediante estructuras paralelas, más ágiles, vinculadas directamente a los sectores populares que se quería impactar.

(Aponte García 2009, 96).

19. Cuba had demonstrated the capacity on the supply side with its response to the Vargas mudslides of 1999. (Muntaner et al. 2008, 236).

20. “Es un programa social humanitario creado el 08 de julio de 2004 y diseñado por los gobiernos de Venezuela y Cuba, para atender de manera gratuita, la enorme población de escasos recursos que presenta problemas de salud visual. La internacionalización de ésta misión se inició el 06 de diciembre de 2005, cuando llegó a Venezuela el primer grupo de pacientes latinoamericanos, procedente de Santo Domingo de Los Colorados, Ecuador.” (Venezuela nd “¿Qué es la Misión Milagro?”).

Cuba “prestará los servicios y suministrará las tecnologías y productos que estén a su alcance para apoyar el amplio programa de desarrollo económico y social de la República Bolivariana de Venezuela.” (Convenio 2000, art. II). Venezuela agreed to provide petroleum among other goods and services. (Convenio 2000, Art. III). It has been reported that by 2005, the petroleum supply obligations of the Convenio amounted to 2.44% of Venezuelan petroleum production. (Oletta 2007, at 447).

Importantly, Cuba also agreed to the provision, at no cost to Venezuela, of the services of doctors to serve in the health care sector in Venezuela.²¹ (Convenio 2000, art. IV). Under the terms of the Convenio, Cuba was to supply these medical personnel to work in underserved areas of Venezuela, and bear the costs of their salaries. These medical personnel were to provide medical services and training of locals. Venezuela was obligated to pay only the costs of food, lodging and internal transportation of the medical personnel supplied by Cuba.²² These programs were to be administered at the state level through the establishment of a “Comisión Mixta” (Convenio 2000, art. V) headed jointly by representatives of the Venezuelan Production and Commerce Ministry and by MINVEC, the Cuban Ministry for Foreign Investment and Economic Collaboration. (Id.). The details of the programs undertaken, and their day to day running were to be delegated jointly within each of these ministries. (Id.). For all of its commercial character, a principal focus of the MBA was political. (Oletti 2007, at 451).

The MBA started through a pilot program arrangement with the municipal government of Caracas. According to one source:

Based on the humanitarian support provided by Cuba during the Vargas tragedy, Caracas Mayor Freddy Bernal, with the support of President Chávez, agreed on a pilot project with the Cuban government. In April 2003, 58 Cuban doctors specializing in integral general medicine (a form of family medicine) were established in several peripheral neighborhoods (barrios) of Caracas, to provide primary health care. Health team personnel live in the same barrio in which they work . . . and an assistant known as a “Defensor de la Salud” (“Defender of Health”), is chosen from the community and trained by the Ministry of Health to provide basic support to the physicians. (Muntaner et al. 2008, 236).

Judged a success after a few months of operation, it was converted into a national program and given its name by Chávez in September 2003, and officially inaugurated in early 2004, despite substantial opposition by the Venezuelan medical establishment. (Muntaner et al., 2008, 236–237). It was administered through a special Venezuelan Presidential Commission, the Black Gold Civil Association (*Oro Negro*) that emphasized both the public character of the mission and the ideological objectives of the program.²³ Cuban doctors enrolled for these programs signed up for two year tours of service. (Brouwer 2009). The principal purpose of the initial phase of MBA was to provide primary care and instruction. MBA I was followed by a second phase, that sought to provide secondary, hospital and extended care as

21. The Convenio made it clear that such doctors were to be provided to work in underserved areas of Venezuela, and that the costs of their salaries would be paid by the Cuban state.

22. The Convenio provided:

La República de Cuba ofrece gratuitamente a la República Bolivariana de Venezuela los servicios médicos, especialistas y técnicos de la salud para prestar servicios en lugares donde no se disponga de ese personal. Los médicos especialistas y técnicos cubanos en la prestación de sus servicios en la República Bolivariana de Venezuela ofrecerán gratuitamente entrenamiento al personal venezolano de diversos niveles que las autoridades soliciten. La parte venezolana cubrirá los gastos de alojamiento, alimentación, transportación interna. El gobierno de Cuba garantizará a todos los galenos y demás técnicos sus salarios y la atención adecuada a los respectivos familiares en la Isla.

(Convenio 2000, art. IV). The actual working conditions and compensation of Cuban doctors in Venezuela are described in Pérez & Haddad 2008, 336–38).

23. Oro Negro included “participation by the ministries of Health, Labor, Energy, Defense, the president of PDVSA and Frente Francisco de Miranda (an organization of defenders of social rights) and the mayors of two Caracas municipalities, Sucre and Libertador.” (Muntaner et al. 2008, 237).

well as more advanced training of locals. MBA III had a more ambitious agenda, the consolidation of a significant portion of the Venezuelan public hospital system within its ambit. (Muntaner et al. 2008, 240). The latest phase, MBA IV, focuses on the construction of specialized care hospitals. (Id.). “At its peak in 2006, the Cuban presence numbered about 14,000 physicians plus thousands of other medical personnel. By 2008, the number of Cuban doctors had declined as some moved on to work in Bolivia and other countries or returned home.” (Brouwer 2009). In addition, many of the facilities remain unbuilt, a number of other have had to be abandoned because of structural problems, and the programs have been criticized for the use of Cuban doctors for political purposes and the Programs’ effects on the wages and working conditions of Venezuelan health care workers. (Pérez & Haddad 2008, 333–34).

The MBA programs have been lauded as a great advance in compliance with international obligations with respect to health care. It is said to demonstrate the “validity of incorporating health as a universal right and confirms the relevance of principles contained in the Alma Ata and Ottawa Declarations.” (Muntaner et al. 2008, 242). However, the operations of the program, rather than its objectives, might measure differently under those standards. The issue relates to Cuba’s end of the MBA barter—the provision of doctors. Within the ideological parameters of ALBA, this construct, the Cuban doctor, is also painted in heroic strokes. (Brouwer 2009). Cuba has been using its doctors as instruments of state policy since the early days of Che Guevara, who understood the use of medical personnel as weapons of revolutionary solidarity. (Id.). The MBA program was described as

the newest reflection of how Cuba, in concert with the people of many nations in Africa, Latin America, and the Caribbean, is transforming the training of doctors, nurses, and other health professionals while also delivering medical care to poor popula-

tions that in the past seldom received any attention at all. This dynamic notion, planted by Che and others at the beginning of the Revolution, has taken decades finally to develop, and now has come to fruition: thousands of doctors have been created who are capable of practicing and teaching revolutionary medicine, and they are putting this “weapon” to good use. (Id.).

The political nature of this economic enterprise was well recognized. (Saney 2009; Kirk & Erisman 2009).²⁴ The political importance of these programs, solidarity through enterprise, was also recognized by the Americans at the time. If “the brigades of Cuban doctors working abroad represented the front lines in a struggle to assert that alternatives to profit-centered human interactions were viable,” (id.) then it was also likely that the United States would respond politically. They instituted a program, the Cuban Medical Professional Parole Program, encouraging Cuban doctors abroad to defect to the United States. (Feinsilver 2008). The Americans have taken the position that these doctors have been conscripted by the Cuban government. “Under Cuban Resolution 54, these same Medical Professionals are often denied exit permission by the Cuban Government to come to the United States when they qualify under other established legal channels to migrate from Cuba. Doctors, nurses, paramedics, physical therapists, lab technicians and sports trainers are examples of groups that may qualify for the CMPP program.” (U.S. Dept. of State. Jan. 26, 2009). Though successful, the United States did not always grant asylum petitions from doctors. (El Universal March 2, 2007).

The Venezuelan medical community also mobilized against the importation of Cuban doctors as an instrument of the nationalization of a portion of the medical sector. “The Venezuelan Medical Federation, the largest association of medical doctors in Venezuela, has lobbied vigorously against the use of Cuban doctors in *Misión Barrio Adentro*, and was in

24. “En Política Interna sus efectos beneficiosos han sido inmediatos: proselitismo, hegemonía y continuidad en el poder. En Política Externa es una herramienta de la Nueva Hegemonía Internacional que busca sustituir y neutralizar la vieja hegemonía Norteamericana mediante el Socialismo del Siglo XXI, alianza ideológica de los pueblos latinoamericanos que propone una transformación socio-política con carácter transnacional.” (Oletta 2007, at 450).

a legal dispute with the Chávez administration over the legitimacy of the Cuban doctors' licensure and practice." (Mundoandino.com 2009). Though the Venezuelan doctors succeeded in their court challenges, eventually a compromise was reached permitting MBA to be staffed with foreign (Cuban) doctors.

But these political movements would be of little interest for corporate or enterprise governance except that the issue of the employment of Cuban doctors by the Cuban state in Venezuela proved to be more ambiguous. The Cuban state never explained many of the conditions under which it recruited and maintained the doctors gathered for participation in MBA. It has not been transparent with respect to salaries and working conditions. But it is clear that while the MBA program is founded on political goals, it also understood in its commercial context by the Cuban state, especially with respect to its potential to sustain positive revenue streams.

International missions have allowed Cuba to fulfill dual goals of capitalizing on its highly educated population as a source of export income while pursuing its humanitarian goals of international solidarity. Cuba's model of charging below-market rates for professional health services has expanded exponentially since 2003 in a win-win situation for poor countries with insufficient medical care. Revenues for services earned from international missions (as well as the licensing and export of Cuban biotechnology and medical treatment to foreigners in Cuba) have become a major source of hard currency earnings, surpassing tourism earnings every year since 2005. (Blue 2010).

It was also valuable for the commercial ventures and ancillary trade it generated for Cuban goods and services outside of the barter of medical personnel. (Oletta 2007, at 450–51). For Venezuela, the benefits have been more personal to the leadership of the present government and the deepening of Mr. Chávez's ideological and political campaign. (Id.).

Thus, MBA functions at a variety of levels. It serves the ideological goals of the Cuban regime. It is an important means of advancing Cuban international relations. It serves as a template for Marxist-Leninist development models. It provides a different basis for state-to-state relations and commerce, based on government-directed, non-reciprocal trade in furtherance of divergent objectives. Yet it is also a business. (Pérez & Haddad 2008). For Venezuela, Cuban doctors serve as a valuable input in the business of creating a viable public health sector. For Cuba, it serves as the core of the business of hiring out labor. Cuba has a long history of hiring out labor to foreigners within the Island. But the business of hiring out workers to outsiders—whether to directly advance state objectives, like the MBA program, or merely to serve the economic interests of foreign partners—essentially treats individuals like factors in the production of national wealth. That wealth is produced by the profit generated in those transactions. That profit is related to the differences between the compensation paid by the Cuban state to its employees sent abroad, and the amounts it charges its "clients" for the services of these individuals. "Loaned" individuals do not participate in discussions over the pricing of their services to third parties, and they are required to accept state-determined compensation for their services.

While many thousands of individuals employed by the Cuban state abroad in this program have complied with their obligations, a number of doctors have not.²⁵ "The need for hard currency and their inability to earn it legitimately is clearly a factor in individual health care workers' decisions to endure difficult two-year assignments abroad. When tens of thousands of health workers accepted temporary overseas posts, their absence was acutely felt at home. Though health indicators have not declined, Cubans who were used to the highest and most accessible doctor-to-patient ratios in the world are now adapt-

25. Sarah Blue has noted that since 2000 Cuban health care workers have lost their place as the highest paid professionals. Moreover, they have not been able to access the informal "favor economy" to the extent of other professionals because of their social role as "model revolutionaries." Blue notes that the salary incentives paid to doctors working overseas helps bridge the gap. "The fact that licensed self-employment is strictly forbidden in the health sector further limits the earning potential of health workers, as the moonlighting dentist's case illustrates." (Blue 2009, 42).

ing to a restructured health system that can accommodate an expanded medical presence abroad.” (Blue 2009, 43). And it was among those doctors dissatisfied with the terms of their service that the possibilities of collision between Cuban medical internationalism and international human rights norms were realized.

The issue of compulsion is at the heart of that collision. The loan system conflates notions of individual citizen duty and individual dignity with respect to labor. On the one hand, it appears that, as a formal matter, individuals are not formally coerced to serve the interests of the state’s business and political dealings abroad. On the other hand, some have argued that as a functional matter the state effectively coerces service, and then, once abroad, tightly controls the freedom of movement of bartered employees. Yet what might appear to the Cuban state as appropriate behavior to compel its citizens to do their duty within the substantive parameters of the domestic legal order might be characterized as compulsion under the substantive parameters of other systems. The characterization is important for its consequences under international law.

POINTS OF CONFLICT AND INTERSECTION BETWEEN ALBA JUST COMMERCE AND INTERNATIONAL HUMAN RIGHTS REGIMES

The potentially explosive intersection between international human rights governance regimes and the ALBA system of economic activity can take a number of forms. This section focuses on three variations that appear to be most likely venues of that interaction. The first includes litigation in national courts under the laws of a specific national legal order applying international governance norms as law. This form has been most extensively exploited within the United States under the Alien Tort Claims Act and related national regulation. The second includes litigation in national and international fora targeting non-ALBA business partners of ALBA PG or EG projects. The most likely basis of this litigation revolves around corporate complicity for state violation of human rights norms. The third includes proceedings under international soft law systems. The two most likely to

be used are those developed by the Organization for Economic Cooperation and Development (OECD) through its Guidelines for Multinational Corporations, and the emerging system of business and human rights principles being developed under the auspices of the United Nations. (Backer 2010).

Two recent cases highlight a new reality for the socialist construct within the broader context of emerging regimes of international human rights systems. They also point to the shape of the future with respect to these ALBA-zone enterprises as they expand beyond and seek partners from outside the ALBA zone. Both cases suggest that the ways in which the ALBA model of social and economic organization, in which the state directs sovereign or market economic activity directly, or through an entity formed for that purpose, can arguably present a case of human rights violations in the way in which the state conducts its business. In addition, whether as sovereign or market based activity, the commercial activities of public actors may also constitute violations of soft law frameworks. Lastly, non-state foreign partners or other entities participating directly or indirectly in these activities might also face liability for complicity in the human rights violations of the state. There is irony here, of course. Especially GPs like MBA, created in part as an ideologically pro-active response to human rights disparities within developing states may themselves serve as a basis of violation of those human rights.

But both cases have been brought in the United States. From the Cuban perspective, the United States is in no position to neutrally judge the Cuban state’s compliance with international human rights norms. But as important, the United States does not have a strong reputation for adhering to or imposing internally international human rights norms. To use the U.S. courts for the purpose of determining compliance of the Cuban state with international norms with respect to activity that occurs within the territory of a third country suggests a political motive and reduces the authority of the cases, at least outside the United States. And yet, the United States has served as the best site for the vindication of international human rights within the court system of a state. As

such, though the cases present a judgment about the character of Cuban state business activity in the context of its barter arrangements with third countries, those determinations should be understood as less authoritative outside the territorial borders of the United States. Still, each serves as a warning, harbinger and template of possible future actions against the Cuban state and others tied to the arrangements at issue—especially the bartering of individuals for other goods and services, not only for the state but also for its non-state partners.

The first case suggests the potential exposure of states with respect to their economic activities in the form of PGs or EGs. In February 2010, a group of Cuban doctors who had participated in MAP filed a lawsuit in the United States against Cuba, Venezuela and Venezuela's state run petroleum corporation, *Petróleos de Venezuela (PDVSA)*. (Galliot 2010).

The doctors told reporters at a press conference in a Miami suburb on Tuesday that they were forced to enroll in the programme with Venezuela due to dire economic circumstances and political pressure at home. According to several US and Venezuelan media sources, the plaintiffs described being held captive in crowded lodgings or with families affiliated with the Venezuelan regime, and forced to work seven days a week. "We were under strict surveillance at all times. We weren't allowed to go out when we wanted to or interact with Venezuelans other than our guardians," plaintiff Frank Vargas, a 33-year-old general practitioner from Havana, told reporters. His colleague María del Carmen Milanés, 34, added that interacting with known regime opponents was especially forbidden. . . . Had they protested, the doctors explained, they would have been forced to return to Cuba where they would have paid for their insubordination. (Id.).²⁶

The complaint painted a picture that served as a perverse reflection of the amalgamation of political and economic factors on which ALBA itself is based, suggesting, for example a tie between Venezuela and

what it described as terrorist regimes in Cuba and Iran. (id.). The complaint also specified a number of legal violations grounded in the arrangements between Cuba and Venezuela for the management and control of Cuban medical personnel.²⁷ The legal basis of this complaint, grounded in the Alien Tort Claims Act (ATCA), is similar to another complaint recently concluded in Miami. (*Licea v. Curaçao Dry Dock* 2008). The object is to draw on international norms applicable to non-U.S. citizens in American courts. Traditionally, these provisions have been applied against right wing dictatorial regimes, especially in developing states. (e.g., *Filartiga v. Pena-Irala* 1980) These cases represent a reversal of sorts, where they are applied to test the legal validity under international law as understood by American courts, to a Marxist-Leninist organization of economic activity.

More importantly, litigants have begun to seek to apply ATCA to the activities of corporations and other economic enterprises for violations of international law outside of the United States. (*Presbyterian Church of Sudan v. Talisman Energy* 2009). The MBA program, and the *Convenio* giving that program its Cuban labor component, provides both a basis for suit against a sovereign for direct violation of international law, and also for suit against the corporate instrumentalities of such sovereigns for their own violation (or complicity in violation) of those norms. Indeed, one of the great movements at the global level has been the search for means to police the conduct of economic enterprises, in whatever form economic activity takes, for breaches of international norms, especially those touching on human rights. (Taylor, et al. 2010). Systems that tend to barter labor, however consistent that transaction might be within the ideological framework from which it is derived, may not stand up to examination under international standards applied from outside the state system that sustains it. And it appears that business

26. "Nos mantenían bajo vigilancia total, no nos permitían salir ni a un restaurante ni tener amistades, y hasta me privaron de alimentos" dijo Frank Vargas, un especialista de Medicina General de 33 años, nativo de La Habana." (Ocando 2010).

27. "Además de los testimonios, la demanda incluirá una selección de las violaciones legales cometidas por los gobiernos de Cuba y Venezuela, y aspectos inéditos de la presencia cubana en Venezuela como los reglamentos internos sobre lo que los médicos podían o no podían hacer, y el nombre de los funcionarios de inteligencia cubana implicados en las áreas de vigilancia, dijo Pablo De Cuba, asesor de la demanda." (Ocando 2010).

conduct is increasingly open as a basis for testing the legal sufficiency of rules that support such conduct under national or bi-lateral governance arrangements (for example through the *Convenio* (2000)).²⁸

The second case suggests the potential exposure of non-PG or EG entities for complicity. The Curaçao Dry Dock Company learned that lesson the hard way. (*Licea v. Curaçao Dry Dock* 2008). That case involved a number of Cuban workers who, having emigrated to the United States, brought suit against the Curaçao Dry Dock Company for complicity in the Cuban government's business of bartering labor for goods and services.²⁹ The court determined that the agreement between Curaçao Dry Dock and Cuba to barter Cuban workers to pay off the debt owed by Cuba amounted to forced labor under international law norms. (*Id.*, at 1359–63).³⁰ The court summarily dismissed the bartering arrangement as inherently violative of an individual's human and labor rights on the basis of its characterization of the Cuban political and labor system.

Cuba is a totalitarian state that abuses human rights; that Cuba has a long history of forced labor and routinely compels labor under threat of imprisonment in violation of international law; that any Cuban who resists performing work is subject to persecution; that Cuba imposes prosecutions or "therapy and reeducation" at police discretion for the crime of "potential dangerousness" on those who refuse to work for the socialist cause; that Cuba imprisons those who refuse to work at worksites in prisons that are particularly inhumane and dangerous; that Cuba employs outrageous means to persecute those who resist the will of the state; that the Cuban state was

particularly concerned with the laborers it was deploying to Curaçao because they generated hard currency; that the punishment workers would receive if they refused to work in its forced labor program would be particularly harsh because the program generated foreign currency that allowed the state to survive economic sanctions on it; and that the laborers provided by Cuba were not free individuals. (*Id.*, 1359–61).

The basis of these conclusions were drawn from a report prepared by the U.S. State Department (United States Department of State 2008), which the court took as uncontroverted because of the procedural posture of the case. Although the violations of international law were committed by the Cuban state, the company was exposed to liability on a complicity theory.

The Defendant in this case, one of the largest dry-dock companies in the Western Hemisphere, with tens of millions if not hundreds of millions of dollars in annual revenues, conspired with the Republic of Cuba to force Cuban citizens to travel to facilities the Defendant owns in Curaçao, to hold them in captivity there, and to force them to work repairing ships and oil platforms. (*Id.*, at 1360).

Despite its result, even in the United States, the precedential value of the case may be limited. The court initially entered a default judgment against defendant (*id.*, at note 3), because the Curaçao Dry Dock Company refused to defend the matter. Critical facts leading to the conclusion were never controverted or effectively put at issue either by the Cuban state or by Curaçao Dry Dock. The company eventually offered evidence, though it was only produced during the

28. As Taylor et al. (2010) note: "The problem becomes greater when a state weighs in on behalf of business. This is especially common where a state has a pecuniary interest in the success of a particular business operation, whether as equity power or as the recipient of royalties or taxes from a project." Taylor et al. 2010, 27).

29. The allegations, along with assertions that those allegations amount to a violation of the International Labor Organization Convention on Forced Labor can be found at Unitary Council of Cuban Workers 2009.

30. These international norms were incorporated through the Alien Tort Claims Act, 28 U.S.C. § 1350 (2000), and the Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. § 1962(b) (2000) under which the case was asserted.

more limited damages phase of the proceedings (*id.*, at 1357–58).³¹

Yet, despite these caveats, the sweeping language of the court does suggest the potential difficulties of exporting a labor barter system *grannacional* concept outside of the ALBA zone in a way that would minimize exposure to risk, for Cuba or its trading partners, for lawsuits and claims of this type. This is especially the case for non-ALBA trading partners, or entities involved in GP or EG production or supply chains. Three factors are especially important in this regard. First, *Licea* increases incentives to bring additional cases of this kind before U.S. courts. While future cases are likely to see more aggressive defenses, the fact of litigation exposure itself may serve to chill economic activity involving ALBA Member States under GP and EG arrangements. Because of the extensive jurisdictional reach of U.S. courts, a large number of enterprises, especially those that produce assets resident in or subject to the reach of the American government, will be sensitive to these issues.

Second, liability for violations of human rights under a complicity theory has become more important as a mechanism for enforcing human rights norms, especially against businesses. (Clapham & Jerbi 2001; Ramasastry 2002). The legal basis of complicity remains unsettled as a matter of transnational law. But this basis for liability extends beyond U.S. law in the form of aiding and abetting the violation of human rights or humanitarian law.³²

“Corporate complicity” is a relatively new concept. Although it has echoes in the law of accomplices in criminal law, those active in the area of business and human rights are seeking to describe what “corporate complicity” means in terms of legal policy, good business practices, as well as in different branches of the law. But there remains considerable confusion and uncertainty about when a company should be considered to be complicit in human

rights violations committed by others. (Backer 2010).

Despite its recent emergence, notions of corporate complicity are likely to become more important. They play a significant role in the liability framework under emerging corporate governance soft law frameworks at the international level. The issue of complicity will tend to revolve around a number of factual determinations: whether through action or inaction, a company enabled, exacerbated or facilitated the specific abuses, intent or reckless disregard, and proximity. (Clapham & Jerbi 2001).

Third, emerging international hard and soft law systems are likely to increase the scope of exposure of states, their controlled enterprises and trading partners to liability for violations of international human rights norms. Cuba’s EGs and PGs are likely to play a role in the development of these bases for liability. Consider a recent complaint filed by the Unitary Council of Cuban Workers to the International Labor Organization related to the *Licea* case (Unitary Council of Cuban Workers 2009). The object was to use the standards of the international agreements to which Cuba is a party, against it. (*Id.*). The complainant argued that the basis of Cuban state labor policy, and its implementation in its economic regulations and commercial activities, violates ILO Convention Article 29 on forced labor ratified by Cuba in 1958. (*Id.*) The complainants echoed language from ILO documents that assert that the “prohibition of the use of forced or compulsory labor in all its forms is considered now a preemptory norm of modern international law on human rights.” (*Id.*) The complaint suggested that the Cuban barter system, grounded in a state power to command behavior coupled with the use of that power to engage in economic and commercial transactions in which workers are contributed to the enterprises by Cuba in exchange for goods, money or services, amounted to

31. However, “Because all of Defendant’s pleadings had been stricken and the Defendant chose not to defend this matter at trial, this Court accepts as true Plaintiffs’ uncontroverted factual allegations from the Amended Complaint” (*Licea v. Curaçao Dry Dock Co.* 2008, 1357–58).

32. It has been most clearly spelled out in the field of international criminal law, in the context of knowingly providing practical assistance or encouragement that has a substantial effect on the commission of a crime. (United Nations Special Representative of the Secretary-General on Business & Human Rights 2008, ¶¶ 73–81).

forced labor of the kind prohibited under international law. (Id.).

Similar claims might be asserted under the Organization for Economic Cooperation and Development (OECD) principles and the United Nations business and human rights framework—“Protect-Respect-Remedy” principles. The OECD is an intergovernmental organization representing most developed states. (OECD and, About OECD). It has developed three principle sets of norms for corporations that might be understood usefully in their constitutive role. These have become “an international benchmark for policy makers, investors, corporations and other stakeholders worldwide. (OECD 2004, at 3 (Forward)). The three include the Principles of Corporate Governance (OECD 2004), the Guidelines for Multinational Enterprises (OECD 2000), and the Guidelines on Corporate Governance of State-Owned Enterprises. (OECD 2005).³³ Under these rule frameworks, corporations, including state owned enterprises are obligated to conform to international norms. Though the OECD framework applies only to signatory states and their enterprises, recent decision shave evidenced an expanding willingness to apply these frameworks to the worldwide operations of multinational corporations without regard to corporate organization and to aggressively apply notions of complicity. (Backer 2009). In addition, the OECD framework can reach economic activities that have been deemed to comply with the law of the state in which the activities occurred. (U.K. National Contact Point Sept. 2009). Though this soft law framework does not have strong sanctions elements, its potential to expose companies to media scrutiny might substantially affect its consumer and investor relations sufficiently to make avoidance of liability important.

The United Nations’ Three Pillar “framework rests on three pillars: the State duty to protect against human rights abuses by third parties, including busi-

ness, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which in essence means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.” (Ruggie 2009, ¶2). Like the OECD framework, where liability is grounded in breaches of international norms, the U.N. three pillar framework (Protect-Respect-Remedy) includes an expansive understanding of complicity liability, extends liability up and down the supplier and consumption chains and is not limited to private enterprises. (Backer 2010). The remedial framework looks with approval to the remedial framework provided under the ATCA in the United States and suggests it as a useful template for the enforcement of the Three Pillar framework against either states or corporations for human rights violations. (United Nations 2008). This framework, unlike that of the OECD, would require all states and enterprises to provide adequate venues for the determination of claims, and is not limited to certain groups of states, but applies to all actors. These provisions are not yet effective. They are likely to come into effect sometime in the next several years. It is important, though, to remember that Cuba has been an active and willing supporter of the work of John Ruggie in the formulation of this framework within the Human Rights Council. Yet, if read broadly enough, Cuba’s barter system and notions of just trade, might contribute to a violation of the (Cuban) state’s duty to protect and the state sponsored enterprises responsibility to respect human rights. To the extent that remedies are not available for complaints, both may also breach their obligations to provide a remedial framework for complaints.

These emerging frameworks point to a more global future for Cuba as people seek to test the legitimacy of its singular and ideologically driven establishment of trade and commercial relationships and methods.

33. The Principles of Corporate Governance have assumed an important role as a model for state legislation on the internal constitution of corporations. The Guidelines provide voluntary principles of business behavior covering virtually every aspect of the operations of an economic enterprise. “Although many business codes of conduct are now available, the Guidelines are the only multilaterally endorsed and comprehensive code that governments are committed to promoting.” (OECD Policy Brief 2001).

A globally engaged Cuba will not be able to expand on its own terms. It will inevitably have to confront global standards that it may not share. In the area of human rights, that may pose significant difficulties for the program of economic engagement conceived through ALBA. The result is potentially significant for Cuba. This is not to suggest that Cuba's system of bartering its labor force for goods and cash is in fact a violation of international norms. But it is to suggest that Cuba's economic activity—whether undertaken in its sovereign capacity or through enterprises—will be increasingly subject to attack on the bases of these norms. Those attacks will become more potent as Cuba emerges more vigorously within networks of global trade. Cuba's efforts within ALBA provide a substantial exposure point. Cuba's efforts to engage in joint ventures with private and public trading and commercial partners from non-ALBA states will provide a basis for expanding liability through notions of complicity. Some of Cuba's ALBA partners, particularly Venezuela, might have a substantial exposure to suit in the United States through its U.S. oil subsidiary, Chevron. (Mend 2010). Though some of these engagements will be politically motivated, especially by those who would see a fundamental change in Cuba's political, social and economic regime, it is important to note that the Cuban labor barter system might well present an important instance of conflict between conventional notions of labor rights and conceptualization of labor under Marxist Leninist regimes. Moreover, such an amalgamation of the ideological with law is, ironically enough, the essential notion underlying both the organization of the Cuban state and the implementation of ALBA's economic activity. That such amalgamations are applied against the Cuban state and its enterprises reminds us that international law, and its substantive norms, is not captive to any one state, but may reflect a foundational ideology inconsistent with some of the complementary applications of ALBA ideology through PGs and EGs. To that extent, Cuba's exposure to liability provides a window on the ideological basis of international law norms as well.

CONCLUSION

Cuba has begun the process of seriously integrating itself within an international economic architecture. It is seeking to engage in globalization on its own terms. It means to use global engagement to open another front in its great ideological campaigns against the emerging conventional system private markets driven economic globalization in favor of a more state directed and controlled system of commercial activity among states. An important venue for that engagement has been through ALBA. ALBA has served as a vehicle for regional integration through which the ideology driving the Cuban state is leveraged, applied and furthered by others, principally Venezuela. In the form of ALBA's *grannacional* projects and enterprises, ALBA states seek to mimic, and by mimicking to subvert, the conventional framework for economic globalization.

It is one thing to describe the ideological and functional framework for the *grannacional* project. It is quite another matter to consider the way these enterprises might operate on a day-to-day basis. And more importantly, it is necessary to consider the implications of such operation of these supra-national corporations under standards of international soft and hard law. This paper has suggested the contours of the violation exposure of *grannacional* projects under these international norms. The very ideological foundation of the *grannacional* projects serves as the basis for conflict with normative standards in effect elsewhere. In a command economy in which there is no distinction between the political and economic sphere and where the line between obligations of citizens and of workers is blurred, the difference between a citizen's duty to the state and involuntary servitude can be quite thin. It is unlikely that international standards will bend to accommodate substantial deviations where the functional effect of state action appears to substantially impede recognized human rights, as those are generally understood. It suggests that while Cuba and the ALBA states may avoid the consequences of breach within their own territories, their assets elsewhere may be exposed to actions based on those breaches. And, perhaps more importantly, private and public enterprises of other states will also be exposed to liability for complicity

in the violations of *grannacional* enterprises with which they might partner. That can have significant effects on the ability of *grannacional* enterprises to forge significant business relationships outside the ALBA area. Global human rights norms, then, might confine *grannacional* activity to the territory of the sponsoring states more effectively than any sort of politically motivated embargo. The possible exposure

of Cuba for human rights violations in connection with its labor barter transactions illustrates the nature of the problem. Cuba (and ALBA) may well have to pay a price for the choice of their collective form of economic global engagement as it collides with the emerging legal and normative framework for international human rights applies to economic activity that, ironically enough, Cuba has helped to construct.

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