Superficie Rights and Usufruct in Cuba: Are They Real, Title Insurable Rights

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“SUPERFICIE” RIGHTS AND USUFRUCT IN CUBA: ARE THEY “REAL,” “TITLE INSURABLE” RIGHTS?

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FOREWORD

THIS paper was originally written in May 2013, and was presented at the 9th Conference on Cuban and Cuban-American studies staged by the Cuban Research Institute (CRI) at Florida International University—May 23rd to 25th, 2013.1 At that time, the Cuban Foreign Investment Law had not been updated, the new U.S. policy towards Cuba—announced on December 17th 2014—was not in place, and the two countries were still pretty much at each other’s throat, whereas now diplomatic relationships have been reestablished after over half of a century.

Even if it is sheer nonsense to claim that nothing has changed in Cuba since Raul Castro took over from his ailing brother Fidel seven years ago, there is one thing that has not changed: the lack of precision regarding the nature and extent of the property rights a non-resident foreign investor in Cuba—even one holding one of the new real estate investor visas2—gets when he or she “purchases” real estate in Cuba. The “new” Cuban Foreign Investment Law3 is almost a carbon copy of the old one, and it sheds no light on that question.

Because that question was at the core of the paper I wrote back in 2013, I decided to update it without altering it at all, but simply adding to it to the extent those additions are warranted.

I believe that by doing so, I am giving the reader a better sense of the high level of caution that permeates the process whereby Cuba is “adjusting” its socialist model, which, despite all the hollering by those who ad-

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vocate for a thorough dismantling of that model, is all those who hold power in Cuba have said they will do.

I. INTRODUCTION

I have been a lawyer for the better part of the past forty years of my life, first trained as one in Argentina, where my classmates still call me el cubano, and later (since 1985) becoming a member of the Bar in Florida, where few believe me when I tell them I am as Cuban as they are.

If I had to single out one valuable lesson that I have learned over years spent acting as an interpreter and bridge between the Civil and the Common Law systems, mostly in the area of property rights and international real estate transactions, it would be avoiding the logical pitfall of trying to translate legal terms and concepts from one system into the language—or legalese—and “culture” prevailing in the other one. That is why I have stayed away from using “surface rights” and opted for sticking to the Spanish Superficie—which happens to match the name given to this right in its original version under Roman Law—used in the Cuban Civil Code for this type of derecho real—here we go again—that is the central topic of my little essay.

I do not mean to write for lawyers. And I believe the topic of property rights in Cuba should first be considered from the perspective, priorities, and needs of regular Cubans on the island (the proverbial cubano de a pie) and not those of investors. But this paper has to fit into what my colleagues on the panel and I have chosen as the general theme of our respective presentations, so I will try not to digress away from what I assume are (or will be) the main concerns of those who may eventually venture with their capital into Cuba.

What is a derecho real? A derecho real is a right that its holder can exercise directly over the thing (the land in our case) that is subject to it, without the intercession of anybody else and to the exclusion of all other persons.

Where does the derecho de superficie fit into the realm of the derechos reales? It is a derecho real over land that does not belong to its holder (the superficiario), but that the owner of the land in question concedes while retaining the title (dominio or ownership) to the land itself. The superficiario is thus allowed to build and/or plant on the land while the laws acknowledge his own rights over the buildings or structures and plantations so emplaced as independent from the title-holder or land-

4. I have also seen them called “top-soil”, “land use,” and even “very long lease” rights.
6. For example, there is no “landlord” to speak of in superficie or usufruct situations. For that reason, they are not, as some claim, leaseholds or even “ground leases.”
owner’s rights.7

Superficie rights are usually only temporary in nature. Once the superficie rights expire—when the term stipulated in its title (the grant or concession creating it) runs its course, or when it is otherwise extinguished—a reversion takes place and the owner of the land takes title to the buildings or improvements made on his land by the superficiario.

The derecho de superficie has a long history of rejections by the codifiers of the Civil Laws of several countries. This type of real property right—anchored in time and space, as so many Common Law purists love to say when describing their “estates in land”—has been shunned in many Civil Law jurisdictions where they see little value in conserving medieval legal institutions that fragment property rights into a mosaic. It was explicitly excluded from the Argentinian Civil Code (together with enfiteusis rights and other rights which have an effect similar to the one long-leases have on land) by its drafter, Dalmacio Velez Sarsfield.8 He did so because having multiple rights over a single parcel of land is a source of permanent conflicts and claims that can impede the productive exploitation of the land, as well as the free and agile transfer of its title. For example, at the death of the title-holder, the title or ownership right is divided among a number of heirs and the land itself cannot be divided due to the existence of the superficie rights.

It was similarly kept out of the Spanish Civil Code that was applicable in Cuba until 1987, when the Cuban Revolution adopted a new Civil Code, which includes the derecho de superficie under articles 218 to 225.9

Over the past few years, the derecho de superficie has been enjoying a comeback in the eyes of legislators in a number of countries—in Spain, in Argentina, even in China. The Cuban Civil Code’s provisions on this topic are often cited as an example by those who urge their countries’ legislatures to make superficie rights part of their laws.10

One of the reasons behind this resurgence is intrinsically tied to societal models that, even if presently evolving (some faster than others), seek to keep the direct ownership of land in the hands of the State. In Cuba, for instance, the Civil Code bans the use of the derecho de superficie over lands—housing mostly—held as individual property or propiedad personal, apparently sharing the concerns of Velez and other jurists.11

7. There are other theoretical explanations of the nature of superficie rights in Civil Law, but this one depicting the situation as coexistence or duality of rights is, in my humble opinion, the preferred one.

8. An in-depth reading of the footnote to Article 2503 of the Argentinian Civil Code is enlightening on this matter, and also helps distinguish the rationale that underlies property law in our Anglo-American legal system from that prevailing under Civil Law. See Código Civil [COD. CIVIL] [CIVIL CODE] art. 2503 (1871) (Arg.).

9. Compare Código Civil [C.C.] [CIVIL CODE] (1889) (Spain), with Cuban Civil Code, arts. 218–25.

10. This may come as a surprise to those who hold on to the often recited slogan / mantra that claims “There is no Law in Cuba” (“en Cuba no hay Derecho. . .”).

11. Cuban Civil Code, art. 218.1.
There are indications that Cuba will resort to superficie rights as the lynchpin for an expected surge in foreign investment in Cuban real estate, especially in the development of touristic resorts and foreign retiree settlements. In July 2010, Cuba issued Decreto Ley 273/10, which modified the articles in its Civil Code that deal with the derecho de superficie, allowing the foreign superficiario—or an entity in which the foreign investor’s interests would participate—to build on State owned land and to use and enjoy those improvements for the length of his or her rights.\(^{12}\) Cuba now even allows for the granting of such rights in perpetuity (to Cuban companies) for the construction of houses and apartments for tourists.\(^{13}\)

My hope was to be able to include more precisions on this at the time I first presented this paper. Those precisions have been slow to come—a revision of Cuba’s foreign investment law was still “pending”\(^{14}\)—which makes it very hard to determine the exact extent and limitations of the rights foreign superficiarios in Cuba could enjoy in the future. But I intend to give it a try.

There is a new Ley Cubana de la Inversion Extranjera, Ley 118 / 2014, that has been in place now for over a year, but it sheds little if any new light onto the core issue I am trying to address: what are the nature and extent of the real property rights a foreign investor who purchases real estate in Cuba has?

Usufruct presents less of a challenge in terms of interpreting the Civil Law concept of usufructo—the right to use, enjoy and receive the benefits or profits from property that belongs to another—under the light of our Common Law, because we do have what are called “legal usufructs”—those created by operation of law—in our system.

Usufruct is the derecho real of choice under present-day Cuban laws when the State wants to grant out public lands to those Cuban citizens and agricultural production cooperative associations who want to farm them. As in the case of the derecho de superficie, the State retains the title (the ownership) over the lands in question. But to date, it has not been used widely for ventures where foreign investment is involved (although it could be, under Article 16, paragraph 2 of the Cuban Foreign Investment Law discussed below).

Both the superficiario and the usufructuary own a right that is exercised over the property of another, in re aliena. And while both are usually limited in duration, superficie rights can be granted to corporate entities for a longer period of time under present Cuban law than usufruct rights can. The derecho de superficie has another key advantage over the derecho de usufructo: it is usually transferable to a third party.


\(^{13}\) Cuban Civil Code, art. 222.1.3.

\(^{14}\) The new Foreign Investment Law does not address the nature of the property rights available to foreign investors.
The personal obligations owed by the usufructuary to the land owner, by contrast, tie the derecho de ususfructo to the individual the land owner chose, and it is usually extinguished if said person dies or ceases to exist. Usufruct is further limited by the obligation of the usufructuary to, at the expiration of his usufruct rights, return possession of the land to its owner without having altered its substance. For example, if the land was agricultural land when the usufruct rights were created, it must remain agricultural land because changing its economic destiny would alter its substance.

II. THE DERECHO DE SUPERFICIE IN CUBA

Over the years, I have been frequently approached by people who want to know how they can best prepare for a post-Castro Cuba, especially with regard to property rights once held by their families or ancestors. In most cases they are taken aback by my response to their queries, as I do not share the expectations most of them have about what the legal landscape in Cuba will look like in the years ahead. It is not that I do not share their hopes with regard to the societal model they expect to see in a post-Castro Cuba—essentially identical to ours in the United States—but I am simply far from certain that such a societal model will be the one the Cuban people will freely choose to adopt. So the only advice I can give them is that which is based on Cuba’s present laws—advice that citizens of those countries who maintain a normal relationship with Cuba can and should seek from the many well trained colleagues of mine on the island— which usually falls short of satisfying my prospective (until they hear me out) clients.

When the Cuban government decided to allow the relatively free transfer of rights over residential real estate in Cuba by way of Decreto Ley 288/11, in effect since November 2011, we all began hearing about people in Miami and elsewhere “buying properties” in Cuba. In many cases, they used relatives, friends, and even lovers on the island as straw men (or women) to skirt the Cuban laws that restrict such purchases to those who both live on the island and mean to occupy those properties as their main residential units. Few seem to pause to ask themselves what sort of rights (and potential problems) they are “buying” into.

It is far fetched to speak of “buying properties” in Cuba if we do so assuming what we are doing is similar to buying properties in the United States. It is also questionable to assume that, under the laws presently in force in Cuba, anything resembling our own real estate markets (where most transactions, until recently at least, were financed) can flourish.

15. My distinguished colleague, Lic. Marta Fernandez Martinez is arguably the preeminent Cuban authority on superficie rights, having written extensively and with great clarity on the topic.
It is a long-standing and universal rule of International Private Law (what we American lawyers call Conflict of Laws) that when you are dealing with real property, the governing laws that define and apply to real property rights are always those of the country where the real property in question is situated.\textsuperscript{17} Cuba’s Constitution, in Article 14, clearly delineates the limits to “buying properties” in Cuba, when it defines the concept of property as social property, as opposed to private property.\textsuperscript{18} It enshrines the concept of social property (or socialist property, if you wish) as the foundation of Cuba’s societal and economic model. This concept of property underpins another key phrase also found in Article 14: the principle of social distribution.\textsuperscript{19}

Even though Cuban Law recognizes certain forms of individually owned property (\textit{propiedad personal}), this does not mean that, when you buy a house from a Cuban individual who can prove to you he owns that house, what you are buying is equivalent to what we call private property rights. According to Article 129.1 of the Cuban Civil Code, a property (or ownership) right in Cuba gives the individual person who holds it possession over the thing (\textit{bien}) he or she owns, the right to use and enjoy that thing, and to dispose of it, \textit{pursuant to the socio-economic purpose such thing is destined to fulfill}.\textsuperscript{20}

Such socio-economic purpose is the one that the Cuban Constitution defines. In the case of a housing unit, it fulfills every Cuban’s constitutional right to housing, which is to say it is not the one we ascribe to private property rights. For instance, Cubans still cannot mortgage the houses they live permanently in.

The changes made in Cuba in November 2011 were made exclusively to its housing laws, and neither the Cuban Constitution nor the Civil Code has been changed. Therefore, the scheme of things described in the preceding paragraphs has not changed one bit and applies to all the different \textit{derechos reales}\textsuperscript{21} in Cuba, including \textit{superficie} rights and usufruct.

\begin{itemize}
\item \textsuperscript{17} See, e.g., United States v. Crosby, 11 U.S. 115 (1812) (applying \textit{lex loci rei sitae} to a property dispute some two-hundred years ago).
\item \textsuperscript{18} \textsc{Constitución Nacional}, art. 14 (Cuba), available at http://www.walterlippmann.com/cubanconstitution.html.
\item \textsuperscript{19} \textit{Id. “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.”} (The Republic of Cuba is ruled by an economic system based on the socialist nature of property where all the people (collectively) own the fundamental means of production, and on the elimination of man’s ability to exploit his fellow man. It is also ruled by the socialist principle of distribution ‘from each person according to that person’s abilities, to each person according to that person’s needs.’ The law implements those regulations that guarantee the effective abidance with this principle.”).
\item \textsuperscript{20} Cuban Civil Code, art. 129.1 (“\textit{La propiedad confiere a su titular la posesión, uso, disfrute y disposición de los bienes, conforme a su destino socio-económico.”}) (emphasis added).
\item \textsuperscript{21} Also referred to as \textit{derechos sobre bienes}. See Cuban Civil Code, tit. II.
\end{itemize}
The Cuban Civil Code does not tell us a lot about the nature, characteristics and practical effects of *superficie* rights in Cuba. It suggests only the state can grant *superficie* rights—with the exception raised in Article 220 below—to both natural and juridical persons; that *superficie* rights can be granted not just for housing but for other purposes too; and that a *derecho de superficie* can be either gratuitous or onerous (in which case the payment of the price, or of a first installment, appears to be a prerequisite for its existence).

Under Article 223, *superficie* rights are transferrable unless the law or the title document that creates them says they are not. This means *superficie* rights in Cuba can be inherited by the heirs of the *superficiario* (Resolution 2/91 of the National Housing Institute, below, confirms this).

Article 220 of the Cuban Civil Code allows an agricultural cooperative association to grant *superficie* rights to its members over land owned by the cooperative but solely for the member to build his house on it.

The duration of the *superficie* rights, the type of buildings or structures to be built by the *superficiario*, and the kind of activity or business contemplated are all found in the “title document” (*titulo constitutivo*) of the *superficie* rights, which in Cuba usually means an administrative decision implemented by a resolution issued by an agency of the state.

The Cuban Civil Code originally stated, under Article 222, that the maximum term for *superficie* rights was fifty years, a term that could be extended by half the time originally conceded if the *superficiario* requested an extension before the term expired. Article 222 was modified in 2010 and now allows for the concession of *superficie* rights for up to 99 years, as well as the conveyance by the state (the word used is *entregar*, which suggests it is not just a concession) of *superficie* rights in perpetuity over state owned lands to national enterprises or business entities (*a empresas o sociedades mercantiles nacionales*) for the building of houses and apartments destined for tourists. Whether these tourists (presumably foreign) will be able to acquire any rights such as *derechos reales* over the houses and apartments so built is the kind of precision which I expected Cuban laws and regulations to have provided by now but have not.

It is usual in present day Cuba to resort to Special Laws to expand or restrict those rights legislated in its General or Basic Laws, such as the Civil Code. The Cuban Housing Law and the resolutions issued by the National Housing Institute (*Instituto Nacional de la Vivienda*)

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22. Id. art. 218.1.
23. Id. art. 218.2.
24. Id. art. 218.1.4.
25. Id. art. 223.
26. Id. art. 220.
27. See id. art. 221.
go a little more in depth into certain aspects of *superficie* rights, but since these laws and regulations are essentially and specifically concerned with housing rights for Cubans, they can give us only a hint as to what may be in store if the rights future foreign investors may eventually be able to acquire in Cuba are in the nature of *superficie* rights.\(^{30}\) There is a clear need to undo the atomization or dispersion of Cuban rules of law affecting this and many other rights and legal topics, a need that is currently being addressed by Cuban authorities.

INA VI Resolution 2/91, issued January 14, 1991, already regulated the *Derecho Perpetuo de Superficie* or *superficie* rights issued in perpetuity to those who need a parcel of state-owned land on which to build their house.\(^{31}\) Cuban housing laws are aimed at mitigating the housing needs of the less affluent. In these cases, there is no reversion to the owner of the land—the Cuban state—of the house built on the premises by the *superficiario*. Many of the housing units that are “changing hands” in Cuba these days, whether among Cubans with a legitimate housing need, or in transactions involving investors using *testaferros* while seeking a return from what they see as Cuba’s incipient residential real estate market, are likely to be grounded on state grants or concessions of the nature I just described. The owner/seller will show the buyer his or her title, in most cases a resolution from the INAVI naming him as “owner” of that house, and the recording data showing said title was properly recorded.

That is perfectly fine, as long as those buyers fully understand what they are buying into. I could even see how, satisfying as it does the main tenets of what makes a “title” good enough for it to be “insured” by one of our title insurance underwriters, the buyer’s title as the new “owner” of the house would be deemed insurable—this is covered more extensively below, in the section about “title insurance”.

The old Cuban Foreign Investment Law, Decreto Ley 77/1995, which was very similar to those of other less developed countries, had relatively few articles specifically addressing foreign real estate investments.\(^{32}\) Paragraph 1 of Article 16 authorized foreign investment in real estate through ownership or through the exercise of other *derechos reales*, which encompasses *superficie* rights.\(^{33}\) Paragraph 2 then listed the purposes or ends foreign real estate investments must have in order to be allowed under Cuban laws: residential units and buildings meant for natural persons who are not permanent residents in Cuba (this triggered the Cuban

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33. Id. art. 16.1.
“real estate market spring” of the nineties); residential units or office space meant for foreign juridical persons or entities; and touristic developments or resorts.\textsuperscript{34} It appeared not to allow foreign investment in support of one of the most critical social problems Cuba has—meeting the housing needs of the Cuban people.

Chapter VI of Cuba’s new foreign investment law (Ley 118/2014), which covers foreign investment in real estate, is couched in the same language found in Chapter VI of Decreto Ley 77/95, which the new law supersedes.\textsuperscript{35} The new Chapter VI has only one article, Article 17, which is identical to Article 16 in the old law but for the fact it omits a clause that used to ban foreign investment in the area of housing to be used by Cuban individuals who resided permanently on the island.\textsuperscript{36} The omission of that little clause — foreign investment in the housing sector was restricted to housing for those “who are not permanent residents in Cuba”—is what appears to open that area of the Cuban economy to foreign capital.

The version of Chapter VI found in the old foreign investment law included two additional articles.\textsuperscript{37} One covered investments that consisted of plainly acquiring real estate as an entrepreneurial activity per se, which the law considered to be a form of direct foreign investment. The other related to the terms and conditions governing the acquisition and transfer of real estate, which the article said would be set in the document whereby the investment was approved by the Cuban authorities, and should conform to the property laws of Cuba. The new Chapter VI contains one single article, Article 17 (16 of the old law).

I do not read as much into the omission of the second of these two articles in the new Chapter VI as I do with regard to the restrictive clause omitted from the text of Article 17 in the new law. It seems clear from reading the procedures whereby approvals for foreign investment are obtained, that these approval documents are always used for purposes of fixing the terms and conditions to any foreign investment the Cuban government approves.

But I do wonder what the omission of an article similar to Article 18 of the old law may mean in the context of the new law. Why choose to no longer characterize the acquisition of real estate for entrepreneurial purposes as foreign direct investment, if that is what the omission of old Arti-

\textsuperscript{34} Id. art. 16.2.
\textsuperscript{35} New Cuban Foreign Investment Law, ch. VI.
\textsuperscript{36} Id. art. 17.
\textsuperscript{37} Old Cuban Foreign Investment Law, arts. 17-18. The property laws of Cuba (or the property rights available in Cuba) are defined broadly in the Cuban Constitution that lays out Cuba’s socio-economic model, and specifically in the Cuban Civil Code. Again, in the process of adjusting its socio-economic model over the past seven or eight years, Cuba has tinkered with property rights through changes made in special laws such as its Housing Law, but it has not modified its property laws through amendments to its Constitution nor its Civil Code beyond the changes to the articles dealing with superficie rights in the Civil Code discussed above.
Article 18 in the new law means? And my concern is not with the Cuban legal system itself, or with the way any of its laws are drafted; what I dread is the confusion they may create in the minds of those who tend to take for granted that what they understand to be the case is exactly what others should understand is the case. And that confusion can be lethal when you are dealing with property rights, especially when you believe there is, and can only be, but one conception (yours) of what property rights are.

Article 5 of the old Cuban Foreign Investment Law guaranteed the protection of the Cuban State to foreign investments when they are attacked by third parties alleging a legally sound claim against them pursuant to Cuban laws and before a Cuban court, an indication that in those foreign investments involving real estate, a foreign investor could look to the Cuban State in case of an adverse claim against real estate assets which are part of the foreign investment.38 This remains unchanged under the new FIL.39

Under Paragraph 2(f) of Article 21 of the old Cuban Foreign Investment Law, investors needed an authorization issued by the Executive Committee of the Council of Ministers (Comité Ejecutivo del Consejo de Ministros) in order to make a foreign investment involving the conveyance of State owned assets or any kind of real estate the Cuban State held title to.40 One of the forces driving the recent “flexibilization” of Cubans’ housing rights was my Cuban colleagues’ complaint about the excessive “administrativization” (or bureaucratization) of Cuban Law. And some voices are beginning to be heard raising the same issue with regard to foreign investments. The “title document” in any foreign investment where real estate is involved (the título constitutivo for the land in question) is the aforementioned authorization (acuerdo) by Cuba’s cabinet and the resolution implementing it.

The new FIL is almost a carbon copy of the old one, but when read together with its regulations, it does give you a sense that the Cuban authorities are bent on expediting the process whereby foreign investments projects/proposals are approved and implemented.41 It remains to be seen how this works out in practice.

III. USUFRUCT IN CUBA

Having defined usufruct in the Introduction and described how it differs from superficie rights, I wanted to assess the impact its use in Cuba has had—especially due to some of the recent measures taken by the Cuban government to incentivize agricultural production—but it seems too soon for a conclusive assessment.

38. Old Cuban Foreign Investment Law, art. 5.
39. New Cuban Foreign Investment Law, art. 5.
40. Old Cuban Foreign Investment Law, art. 21.2.f.
41. See New Cuban Foreign Investment Law, art. 21.2.
Yet what should be pointed out because it may give us a hint about what to expect in other areas where Cuba is changing its socio-economic stance (even if tentatively and with the avowed purpose of going no further than adjusting its very particular brand of socialism), is the pace at which the reforms aimed at increasing agricultural production are taking place, including corrections to measures taken only recently.

In 2008, the Cuban government began handing out unproductive state lands in usufruct to individuals and cooperative associations who agreed to farm them.42 These usufruct rights were granted for a maximum term of ten years in the case of individuals (twenty years in the case of cooperatives and state controlled entities), a term that can be extended for another ten years if the usufructuary meets all his obligations. As it befits usufruct rights, the grantees are not allowed to transfer them, and the State retains title to the lands in question.

In 2011, the rights of individual usufructuaries who could show they had increased the lands’ productivity were strengthened, and the size of the parcels was increased fivefold, to sixty-seven hectares (slightly over 165 acres)—the maximum size contemplated three years before was 13.4 (or 33.5 acres). Usufructuaries are now also allowed to build a house on the premises.43

One of the most lucid, meticulous and unbiased observers of Cuba from the outside, Professor Carmelo Mesa Lago, suggests in his most recent book44 that even if it seems clear that when it comes to agricultural production the estate sector is losing ground to the usufructuaries and the small private farmers,45 the statistical information is still not sound enough to predict whether this approach will bring Cuba closer to the goal of being able to feed itself with its own resources.

IV. “TITLE INSURABILITY”

I suspect fewer readers of this paper are likely to have a thorough understanding of what title insurance is and why it is an “only in America” financial service than those who knew beforehand what usufruct and superficie rights are all about. This is in spite of the fact that paying for

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43. The 2008 law forbid this, presumably because it is in the nature of usufruct that the usufructuary cannot alter the substance of the thing he possesses, having to return it to the owner when the term of the usufruct runs in the same state and conditions he received it. See id. These “could” raise a question with regard to the kind of right the usufructuary holds over the house he builds on the land subject to usufruct; is it a superficie right?

44. For an excellent analysis of the impact—and the shortcomings—of the socio-economic reforms Cuba is experimenting with, see CARMELO MESA LAGO, Cuba en la era de Raul Castro (Cuba in the Raul Castro era) (2012).

45. The property rights of farmers who privately owned small tracts of agricultural land back in 1959 are among the very few that “survived” the Cuban Revolution.
Title insurance is unavoidable for anyone in the United States who buys a piece of real estate and finances his or her acquisition: we all pay for it (usually a fraction of a percentage point of the price we pay for the property) any time we get a loan for the purchase of a house or condo. And still, because we see it as just a small portion of the transactional or closing costs and are told the bank will not lend us the funds unless we buy a title insurance policy (for the protection of the bank and its position as a secured creditor with a first shot at the asset we are buying in case we do not repay its loan), we just do not ask many questions about it. We "know" we "need" it, and we just go ahead and pay for it.

I have written extensively on the difference between our puerile land title recording system—which is the reason behind our "need" for title insurance—and the more developed and secure ones existing almost everywhere else in the world. Suffice it to say that the title recording system Cuba had until 1959 was much better at achieving the main goal land title recording systems have, which is to provide legal certainty to real estate transactions, than anything we have ever experienced in the United States. We rely on our courts of law to solve title problems, whereas most other countries rely on solid recording systems and other safeguards, such as Civil Law notaries, to prevent lawsuits over titles.

Title insurance needs title documents that: (1) describe the land or real property sufficiently to identify it; (2) are recorded and thus traceable in a search; and (3) in the case of a conveyance to a person whose "title" is to be insured (the buyer, the mortgagee, the holder of superficie rights in a prospective Cuban scenario), are recordable so as to make the insured parties the title holders of record.

Cuba has spent the last couple of decades working in all these areas. It has improved its land title recording system, depleted by a number of "revolutionary" measures over the first thirty some years of the Cuban Revolution, and its cadaster, working on the very poor quality of the legal and physical descriptions for lots and premises of all kind that has plagued Cuban real estate conveyances for years. It has also enhanced the quality and completeness of its "title documents," mostly issued through administrative acts by housing authorities or agrarian reform bureaucrats, through a resurging notarial profession.

So assuming Cuba succeeds in its ongoing efforts to revamp and restart the pre-revolutionary land title recording system it inherited from Spain, our title insurance industry may have it easy when the time comes to navigate title chains in Cuba (and few industries are as fond of "easy" or low hanging fruit—mango bajito in Cuban—as is our title insurance industry). Cuba is bound to be an attractive playground for title insurers because of the controversy about what to do with those pre-revolutionary

46. For a good place to begin reading on this topic if you are interested, or else if you need to fend off insomnia, see José Manuel Palli, Analysis: Cuba's Title Recording System Part 1, CUBA STANDARD (Dec. 1, 2011, 10:03 PM), https://www.cubastandard.com/?p=5407.
owners whose properties were expropriated, confiscated, or deemed abandoned by the Cuban government, a controversy that, in all likelihood, will have a collective political solution. This is not to say that title insurance underwriters will boldly take on the risks associated with the prior owners; they will almost certainly exclude that risk from primary coverage and leave it open to insurance via an endorsement expanding coverage (for an additional fee, of course), provided the steps are taken and all the underwriters’ requirements are met that appear to have eliminated or sufficiently mitigated said risk.

So would a title insurance underwriter insure Cuban housing rights anchored by superficie rights as described in Section II above? My answer is it will, or at least it should. They claim to be doing it in the People’s Republic of China, and Chinese real property rights are no more similar to ours than Cuban real property rights are. But they are “real” enough for the industry to make money amid a frenzy of eager buyers (many of them foreigners) and resales that keep Chinese real estate prices bubbling despite governmental efforts to keep them down.

Without having a clear picture as to what the long-expected changes in the rules under which foreign real estate investors (developers and consumers) will operate will look like, it is hard to say what role title insurance might play in Cuba. But again, given the fact that their initial market will likely be made almost exclusively of American buyers of real property—they are the only ones who are “familiar” with title insurance—it is hard to see how American title insurance providers may miss the boat to Cuba once it becomes legal to board under American law.

The experience with foreign direct investment in real estate in Mexico is a good reference point for purposes of projecting what might—and might not—happen in Cuba. Mexico’s Constitution bans the direct ownership of real property by foreigners in areas adjacent to its coasts and its borders. In the early 1970s, foreigners were buying real property in Mexico through testaferros, or straw men, in a very similar way to what is said to be happening in Cuba today. Mexico modified its foreign investment law so as to channel these investments through fideicomisos, a type of trust in which a Mexican bank holds title as the trustee for the benefit of a foreign investor beneficiary.

Originally, these fideicomisos had a limited duration of thirty years and, at the end of that term, the foreign beneficiary had to transfer its

47. Constitución Política de los Estados Unidos Mexicanos (Political Constitution of the United Mexican States), as amended, art. 27, Diario Oficial de la Federación [DO], 5 de Febrero de 1917. The lower house of the Mexican Federal Congress tried yet again in early 2013 to pass a proposal to change Article 27 of the Mexican Constitution to allow foreigners to directly own residential property in the restricted zones. It would have been a ground shaking historical event if this were turned into law and were confirmed by the legislatures in each of Mexico’s states. But the Mexican Senate did not approve it. Dane J. Dehler, Buying Property in Mexico’s “Restricted Zone”: The Opportunity that was the 2013 Beltrones Proposal to Amend Article 27 of the Mexican Constitution, 32 Ariz. J. Int’l & Comp. L. 309, 310 (2015).
interest in the property to a party that, by definition, could not be a foreign national. This limit was later expanded to fifty years, renewable for another fifty. Still, over the past forty years or so, Americans have invested profusely in Mexico (both as developers and consumers of Mexican real estate products) with little if any risks to fear from the somewhat confusing—in their minds, though, crystal clear and carefully designed from a Mexican perspective—legal environment they found across the border. Only the violence that has gripped certain areas of Mexico in the last decade has been able to slow down the pace of such investments.

China is another good example of what to expect in Cuba with regard to title insurance. In China, neither the foreign investors nor the locals can have a right of ownership over the land they build upon. What they buy into is something akin to a superficie right while the land continues to be owned by the State. But whatever the rights are, there is a generalized perception that they are valuable and marketable, which is why China has the ebullient real estate market it has.

Real estate “purchasers” in China cannot hold the land vacant for long, nor can they transfer their rights before they have substantially completed the improvements they commit to emplace on the land. But once the improvements are completed, they can sell (though neither the

48. The foreign beneficiary would instruct the trustee to sell and convey the title to a purchaser that could not be other than a Mexican national. Surprisingly, this type of arrangement where the foreign investor sells and keeps the realized value of the property he bought thirty years before has been described as a “long lease” by the most sophisticated in our media (and even by more than a few colleagues of mine). But even more surprisingly, the original thirty-year limit placed on the investment and the structure imposed by the Mexican authorities to indirectly permit what their Constitution said could not be done directly was not a deterrent for many Americans who wanted to “own” real property in Mexico.

49. For over twenty years I issued thousands of title insurance policies on title to property situated in Mexico and, to the best of my knowledge, not one of the underwriters I was an agent for has ever lost a single penny on claims against those policies.

50. There was so much enthusiasm about China in our title insurance industry even before the Chinese Property Law was adopted five years ago, that a friend in the industry once told me his company (one of the largest among our title insurance underwriters) was about to introduce the mortgage concept in China.


52. One of the few well-versed commentators on this topic is Professor Patrick A. Randolph Jr. from Missouri. He refers to the granted Chinese property rights as “land use rights for construction”, while mentioning that the Property Law of the People’s Republic of China refers to them as a species of usufruct. Patrick A. Randolph, The New Chinese Basic Law of Property: A Real Estate Practitioner's Perspective 3–9, available at http://lawprofessors.typepad.com/china_law_prof_blog/files/basicpropertylaw_comments.pdf. But given the fact that China’s laws have historically been inspired by Civil Law—and because it looks, walks, and quacks like a duck—I just feel I must stick to superficie rights. Usufruct is, in almost every place where it is legislated, intransferable, and the fact the Chinese recording system calls for separate recordation of the rights over the land and the rights over the improvements reinforces the superficie flavor.

53. Id. at 2.
original owner of this right nor its transferee can alter the use assigned to the land in the “title document”), devise, lease, or even mortgage their superficie rights over them (which is more than they can do in Cuba under its presents laws and regulations) subject to the duration of its term (seventy years maximum—though “automatically” renewable—for residential purposes in China, and from forty to fifty years for diverse industrial and commercial purposes, which the State “can” extend). I am not aware of the existence of perpetual superficie rights in China that a foreigner can buy into, so here the advantage “may” go to Cuba, depending on what the still-pending regulations and amendments to its laws may say. The reversion back to the State seems inevitable in China, without any provision I am aware of that implies any indemnity to be paid for the value of the improvements or structures built by the superficiario upon the land. And yet, everyone seems to want to own a piece of the Chinese real estate market.

Of course, what no title insurance policy will ever do is insure for you a property right that is any better than the one your seller or source had, which is why it is so important that every buyer (in Cuba, Mexico, China, or anywhere else) fully understands the nature and the extent of the rights he or she is buying into.

V. SUGGESTIONS (FOR THE DARING)

American business lawyers tend to look at their client’s real estate investments from a very particular way, tied to their own professional experiences in their country’s legal environment. They frequently have a laundry list of items to check and questions to ask that reflect that bias. They are also trained to see real estate transactions—and the laws in general—through an economic lens that replicates our views, and they assume that what works for us must work for everyone else.55

Some of the things they focus on also suggest that, as in the case of the title insurance industry, American lawyers will not shy away from advising their clients to invest in Cuban real estate. Despite the fact that, under its present laws, the Cuban State will hold on to the title to the lands invested in (in a touristic development joint venture situation as well as, for now, in the case of individual purchases of real property by foreigners) the cash flow generated by such ventures and the benefits of enjoying a residence in Cuba at the individual investor level may make

54. Id.
55. For instance, they assume that a steep escalation of property values measured by square foot is necessarily a good thing for an emerging economy, when most people and some governments in those countries tend to fret at the social convulsions real estate bubbles often cause. We are still experiencing the social costs of bursting bubbles as they affect those already invested in the real estate market at ground zero. The less visible but no less ominous effects of real estate bubbles are felt while prices are still escalating by those who are priced out of the market when housing prices become inaccessible due to lack of correspondence with their wage levels or purchasing power.
those investments worth the trouble.\textsuperscript{56}

Assuming the foreign investor gets \textit{superficie} rights over state-owned land for the funds he invests in Cuba, there are some precautions he may want to take:

1. Make sure the title documents (in all likelihood an administrative resolution implementing the decision of the Cuban authorities approving the investment) do not negate the transferability of the \textit{superficie} rights.

2. Negotiate for the inclusion of a \textit{pacto de equidad} (an agreement by the Cuban State to indemnify for the value added to its land by the \textit{superficiario} in case a reversion takes place).\textsuperscript{57}

3. Negotiate for a flexible term in which to begin building the improvements and engaging in the activities the \textit{superficie} rights call for to avoid a revocation of said rights by the State due to the inactivity of the \textit{superficiario}.

4. Make sure the grant or concession document says the State must collaborate with the \textit{superficiario} and not impede his activities (building and others) on the land, including any re-building the \textit{superficiario} is entitled to do in case the structures he emplaces on the premises are destroyed during the term of his \textit{superficie} rights.

5. Ask for a reaffirmation in the “title document” of the State’s obligation to respond in case someone else tries to evict the \textit{superficiario} from the land (an equivalent to our warranties of title).

6. When negotiating the price for your rights as \textit{superficiario} consider, among other items, the relocation costs of those presently on the land (in case the land is not already vacant) and the infrastructure costs your activities may incur (what we call impact fees).\textsuperscript{58}

In the unlikely event that our hypothetical foreign investor has to deal with usufruct rights as part of a real estate investment in Cuba, the one thing he or she should make sure of is that the document through which those rights are conceded by the Cuban State makes clear that the extension of those rights (for a second term of twenty years if the usufructuary is a \textit{persona juridica} or corporation) is not conditioned other than by the fulfillment by the usufructuary of his obligations under the concession (say, producing a certain crop, or planting on a minimum area of the land). The investor may also want to give himself as much flexibility as possible when negotiating with the Cuban State the terms and conditions for the usufruct rights so as not to fall captive to a single type of exploita-

\textsuperscript{56} Foreign investors in Cuba are allowed to repatriate 100\% of their after tax profits. New Cuban Foreign Investment Law, art. 9.1(a).

\textsuperscript{57} It would be ideal to find a way to negotiate so as to completely rule out a reversion in cases of perpetual \textit{superficie} rights, but absent new regulations it is not clear this can be achieved in Cuba today. And even without an indemnity agreement of this nature, \textit{superficie} rights of a sufficient length (say, 99 years) could be deemed long enough to attract most real estate investors, giving them ample time to recover their investment and obtain a handsome return on it.

\textsuperscript{58} Some claim that the “real estate market” for foreigners that evolved in Cuba during the “special period” of the nineties was short-lived because of unforeseen infrastructure (and social inequality) costs.
tion that, should he alter it, may result in an inability to return the land in the same conditions he received it. He should try to keep his options open, but that goal must be made part of the negotiating process and be clearly stated in the language of the administrative resolution approving the usufruct grant (i.e., the "title document").

VI. CONCLUSION

The centrality of property rights is evident in all the different societal models in the world. We all have a right to believe in our own societal model and the framework it provides for property rights. Many will also feel they have the right to claim that their socio-economic design is the only viable one, the only one capable of fostering development and economic growth, and the only one which satisfies the cravings of unfettered human nature. We, in the United States, mostly feel that way.

Even so, other societies may dispute our feelings and beliefs. What is more, their own national experiences may disprove our feelings and beliefs. For instance, China passed its current Property Law (described in Section IV above) in 2007, a law that was first discussed among Chinese lawmakers fourteen years earlier (Raúl Castro's "cosmetic reforms" seem to be moving at the speed of light when compared to this). During those fourteen years, the Chinese economy grew to six times what it was, and the average income for urban Chinese increased fivefold.⁵⁹ All this happened with weak and ill-defined property rights and in a society that barely resembles ours.

Cuba is said to have given the go-ahead to a touristic development project involving foreign investment in real estate, including the first of several golf courses to be built on the island, which has been in the works for years. The Carbonera Club, a U.S. development costing $350 million proposed by the U.K. firm Esencia (led by the younger brother of the Mac-Donald clan chief in Scotland), is set to be built in a 420-acre site near Varadero and will offer luxurious life in a gated community with close to 650 apartments and villas.⁶⁰ The developers claim foreigners will be able to buy property there, but again, few precisions are given as to exactly what kind of property.⁶¹ The real estate investor visas now available to foreign real estate investors in Cuba—which allow them to skirt the permanent residence requirement and still "own" a house in Cuba—seem to address the needs of buyers in resorts just like this one.⁶² The question, then, is whether these foreigners will be able to enjoy stronger property rights (as if they were buying property in Edinburgh, say) greater in extent than those Cuban citizens can have?


⁶¹. Id.

This may be the right time to take a more realistic tack when navigating the Cuban laws regarding property rights, and not just dismiss them outright on grounds that they do not meet our expectations. Ultimately, it will be up to the Cuban people to freely decide what kind of real property rights they want for themselves and for those foreign investors who may want to invest in Cuban real estate.