

LAND TENURE IN CUBA: IMPLICATIONS AND POTENTIAL MODELS FOR FOREIGN REAL PROPERTY HOLDINGS AND INVESTMENT IN A FUTURE CUBA

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Over the years, despite its socialist agenda, the Fidel Castro government has established certain private rights in real property for its citizens, albeit with far more limitations than those rights enjoyed by individuals in non-communist countries. This particular government's gradual retreat from Marxist ideology regarding real property rights underscores the basic economic truth that certain private property rights of citizens are absolutely necessary for full and efficient utilization of the factors of production in an economy. At the end of the twentieth century, and in another philosophical departure from Marxist doctrine, the Castro government conceded that—absent large-scale assistance from the former Soviet Union—

extending certain private property rights to foreign investors was not only essential to attract investment for Cuba's future economic development, but also indispensable to its immediate survival.²

Fidel Castro's declining health and the apparent emergence of a successor regime led by Raul Castro and a six-man junta are leading Cuba to a political and economic crossroads. Despite the philosophical tug-of-war the current Cuban government faces, economic reality will increasingly mandate that it provide laws and mechanisms which adequately protect foreign investors' rights and ability to profit from their holdings in real property.³ Fundamentally, how

1. © Copyright 2006, Timothy Ashby and Scott R. Jablonski. The authors would like to thank ASCE for the opportunity to present and discuss this work in progress, as well as José Pallí, Aldo Leiva, and Matías Travieso-Díaz for serving as moderators and discussants. The opinions of the authors are their own and do not reflect those of ASCE or either author's present or past employers.

2. See Matías F. Travieso-Díaz & Armando A. Musa, *Cat on a Hot Tin Roof: The Status of Current Foreign Investors in a Post-Transition Cuba*, 37 GEO. WASH. INT'L L. REV. 885 (2005) ("One of the most important means Cuba's current government has to obtain foreign capital is to promote foreign direct investment (FDI) in the country. While firmly adhering to a socialist political and economic framework, Cuba has taken a series of measures in the last decade to promote FDI as a way to cope with the economic difficulties that have afflicted the country since the disappearance of the Socialist bloc.").

3. Socialism and, more drastically, communism, offer harsh criticism to Lockean or Capitalist theories of private property ownership and the utility of same (or priority of same) to an economy and a society. Given historical reality and experiential evidence on the imperfections and failures of communism, perhaps Aristotle's advice is most apt to describe the inevitable retreat from state ownership of all property by countries such as Cuba due to economic necessity: "[T]hat which is common to the greatest number has the least care bestowed upon it. Everyone thinks chiefly of his own, hardly at all of the common interest; and only when he is himself concerned as an individual. . . . If they do not share equally enjoyments and toils, those who labor much and get little will necessarily complain of those who labor little and receive or consume much. But indeed there is always a difficulty in men living together and having all human relations in common, but especially in their having common property." ARISTOTLE, POLITICS, available at <http://www.cavehill.uwi.edu/bnccde/PH19C/tutorial10.html> (last visited July 28, 2006). See also Hernando de Soto, "The Mystery of Capital," 38 Finance & Development 1 (Mar. 2001), available at <http://www.imf.org/external/pubs/ft/fandd/2001/03/desoto.htm> (last visited July 28, 2006) (discussing the role of private property ownership to capital in order to foster an efficient economy).

the present or any future Cuban government applies and continues to expand such rights will largely determine the pace and fate of economic growth, infrastructure development, and overall prosperity of a future Cuba. This effort will include improving security of land tenure for foreign investors through economically efficient real property holding schemes, which is the focus of this paper.

The first part of this paper briefly explores the framework for private real property rights and foreign investment laws in Cuba. The second part discusses the concept of land tenure and how security of land tenure directly relates to foreign investment, and highlights how selected Latin American States and Transitioning States⁴ have provided for certain real property holding mechanisms to accommodate and attract foreign investment, finding a legal compromise between political, social and cultural predisposition and economic essentiality. The third part offers an analysis of the implications and potential models foreign investors' rights in holding in a future Cuba. We conclude that, while the Cuban land tenure system leaves much to be desired, current law on real property and foreign investment in Cuba, with proper application, adaptations and enforcement, can serve as a basis, in the short term, for enhancing foreigners' real property holding rights in order to attract foreign investment. Systems and tools in place for foreigners' real property holdings in traditionally foreign investor-skeptical Latin American States and

Transitioning States can provide insight and ideas on how a future Cuba may enhance its framework and proceed to draw and accommodate foreign investment at a pace which is philosophically acceptable to a Castro-successor regime, whose political culture will likely maintain Marxist principles (in law and/or in spirit) for some time to come.

PRIVATE RIGHTS IN REAL PROPERTY AND FOREIGN INVESTMENT LAWS IN CUBA

Real Property Law

A few examples illustrate that, from the time of its first constitution, private rights in real property have been recognized by Cuban law, reflecting the law imposed on it during the days of Spanish colonial rule.⁵ Moving forward in history, under Article 87 of the 1940 Constitution, the "Cuban Nation" recognized "the existence and legitimacy of private property in its broadest concept as a social function."⁶ However, due largely in part to the historical public discontent with governmental policy respecting land ownership and holdings by foreigners, the 1940 Constitution introduced a milestone distinction in Cuban law by limiting foreign ownership of property and guarantying property rights of citizens only.⁷ Indeed, the principles of the 1940 Constitution, including limitations on foreigners' rights in real property, served as "a rallying point for the opposition" against Fulgencio Batista y Zaldívar's dictatorship⁸ which had suspended the 1940 Constitution because of the diffi-

4. The phrase "Transitioning States" used herein refers to those States which have undergone and/or are undergoing transition from centrally-planned economies, such as former Soviet satellites and, to a lesser extent, China and Vietnam.

5. Article 32 of the 1901 Constitution contained the following provision: "no one shall be deprived of his property, except by competent authority, upon proof that the condemnation is required by public utility, and previous indemnification." CONSTITUCIÓN DE LA REPÚBLICA DE CUBA (1901), translated in 2 INT'L BUREAU OF THE AM. REPUBLICS, AM. CONSTS.: A COMPILATION OF THE POL. CONSTS. THE INDEPENDENT NATIONS OF THE NEW WORLD 112, 119 (Jose Ignacio Rodríguez trans., 1905). See generally Eduardo Moisés Peñalver, *Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution*, 52 FLA. L. REV. 107 (2000).

6. CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 87, Título VI, Del Trabajo y De La Propiedad, Sección Segunda, Propiedad, art. 87 (1940).

7. "The law shall restrictively limit acquisition and possession of land by foreign persons and companies, and shall adopt measures tending to revert the land to Cuban ownership." CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 90 (1940). The 1940 Constitution did, however, prohibit expropriation without just cause and fair compensation. *Id.* at Título IV, Derechos Fundamentales, Sección Primera, De Los Derechos Individuales, art. 24. See also Peñalver, *supra* note 1, at 119.

8. See Michael B. Wise, *Cuba and Judicial Review*, 7 S.W. J. L. & TRADE AM. 247, 255 (2000).

culty in implementing its many social and economic guarantees.⁹

Notably, in 1952, private property rights in condominiums, at least those of citizens, were set forth in the Law of Horizontal Property (known as its Condominium Law) (which has never been repealed) and

contains sections on all essential elements of present day condominium ownership, such as co-ownership of common elements, horizontal division of property, mutual easements through, or the right to use, common elements, administration of common property by owners, and restrictions on the right of partition, lease, or sale of the underlying property and the individual units.¹⁰

In 1959, the Castro government passed the Fundamental Law of the Republic, which effectively reinstated (with modifications) most of the 1940 Constitution's provisions on social and economic rights, including its thematic protestation of foreign ownership in real property.¹¹ Through nationalization and redistribution policies, the Castro regime produced a quantum increase in private property ownership (although of smaller parcels of land than the previous

owners and under various state-imposed obligation and limitations), mostly through its agrarian and urban reform laws, and housing laws.¹² Indeed, housing laws in the 1980s "were enacted to convert remaining leaseholders into homeowners, foster self-building by both individuals and housing cooperatives, legalize most illegal and ambiguous tenure situations of self-builders, permit private rentals, and allow free-market buying and selling of housing" (although subsidized and with restrictions on price and interest rate hikes).¹³ Housing laws also established inheritance rights, but with restrictions of course, providing certain residents of real property with tenure rights superior to inheritance rights.¹⁴ Moreover, Cuba's Civil Code today recognizes joint tenancy, including ownership by married couples under certain circumstance,¹⁵ principles of adverse possession in very limited circumstances,¹⁶ and contains provisions regarding right of way, encroachment, easements and nuisance relating to real property.¹⁷

Although certainly diced up, transferred, limited and transformed, the concept of private property ownership long ensconced in Cuban law has been far from eviscerated under Castro's government. Certain pri-

9. See Jonathan Wachs, *Reviving the 1940 Cuban Constitution: Arguments for Social and Economic Rights in a Post-Castro Government*, 10 AM. U.J. INT'L L. & POL'Y 525, 539–540 (1994).

10. See Antonio R. Zamora, *Real Estate Investments in Cuba: Back to the Future*, 11 FLA. J. INT'L L. 539, 545 (1997).

11. See Wise, *supra* note 7, at 255 (2000).

12. See Peñalver, *supra* note 1, at 122–28; Nicolás J. Gutiérrez, Jr., *The De-Constitutionalization of Property Rights: Castro's Systemic Assault on Private Ownership in Cuba*, 5 U. MIAMI Y.B. OF INT'L L. 51, 55 (1996); Ignacio E. Sánchez, *Cuban Property Rights and the 1940 Constitution*, 3 FLA. ST. U.J. TRANSNAT'L L. & POL'Y, 135, 146–47 (1994). Interestingly, the Cuban government prohibited all rental housing, expropriated rental properties and offered them for sale to their inhabitants through monthly payments over a State-fixed period of time and price, canceled mortgages on urban property, and required prior approval of the Council of Urban Reform for transactions to purchase, sell, or trade urban properties—essentially, the government became the primary intermediary for private real property transactions in Cuba. See Sánchez, *supra*, at 146–47.

13. See Timothy Ashby, *Cuban Real Property—Current Laws & Future Prospects*, 33 REAL EST. J. 123, 131 (2004) (citing Jill Hamberg, *No Es Fácil: Dilemmas of Cuban Housing Policies*, 156 PROGRESSIVE PLANNING 21–25 (2003)). See also "Investigación sobre Desarrollo y Equidad en Cuba, 1999," Centro de Investigaciones de la Economía Mundial (CIEM), United Nations Development Program (UNDP) 106–107 (Editorial Caguayo 2000). By the end of 2004, an estimated ninety percent of Cuban adults held "title" to their residences. *Information gathered during field research by Dr. Ashby* from Dr. Isobel Anderson, Programme Director, Housing Studies, University of Stirling, Scotland, UK, June 2004; Dr. Jill Hamberg, Empire State College, New York; and Nelson Valdés, Ministry of Foreign Investment and Economic Collaboration (MINIVEC), Havana, May 2004 [hereinafter "Ashby Field Research"].

14. See Serafin Descalzo, "Changes in law restrict inheritance rights in Cuba," March 31, 2003, *available at* Cubanet.org.

15. CÓDIGO CIVIL, LEY NO. 59, GACETA OFICIAL, EXTRAORDINARY ED., Oct. 15, 1987 [hereinafter 1987 Cod. Civ.], arts. 128–169.

16. *Id.* art. 184.

17. *Id.* arts. 170–177.

vate property rights have even survived the radical Marxist provisions and spirit of the 1976 Constitution.¹⁸ This gradual shift to recognize (or to preserve) certain (albeit quite restricted) private property rights in Castro Cuba importantly and necessarily extended into the realm of foreign investment in the 1990s.

Foreign Investment Laws

Constitutional Reform: Faced with the collapse of the Soviet Union, Cuba's chief ally and supporter, and subsequent economic deterioration in Cuba, in 1992 the Castro regime was forced to undertake market-based reforms to survive.¹⁹ Recognizing that foreign investment was a critical element of economic reform, the 1976 Constitution was amended in 1992 to permit foreign entities to take equity positions in specific Cuban sectors such as tourism, real estate, construction, mining, manufacturing, communications, petroleum, and even the waning sugar industry.²⁰

Article 21 of the 1976 Constitution now states that *bienes* (assets) in Cuba are divided into (1) those forming the patrimony of the State, (2) small agricultural holdings, and (3) those derived from personal work.²¹ Foreign investors may acquire Cuban real estate under the first and third categories.²² After real property is acquired, Article 25 of the Cuban Constitution provides a guarantee against arbitrary expropriation without compensation.²³ Notably, Cuba's Civil Code contains additional statutory provisions concerning ownership of property and guarantees against nationalization.²⁴

Foreign Investment Law No. 77 of 1995 ("Law 77"):²⁵ Law 77 provides the first comprehensive legislation respecting the legal rights of foreign investors in Cuba. It provides that foreigners may "acquire ownership and other property rights" in: "(a) housing and structures meant for private residences or tourism activities for persons who are not permanent residents in Cuba; (b) housing or offices of foreign companies; and (c) real estate development for tourism."²⁶ Foreigners (including American citizens, who

18. The 1976 Constitution signified a more radical turning point for Castro's Revolution, enshrining Marxist language into Cuban law and proclaiming that land and property were property of the entire Cuban people. See Gutiérrez, Jr., *supra* note 11, at 60–63. Despite this, it did preserve certain rights in personal property, title to residential property, and to inheritance rights in residential and personal property. See CONSTITUCIÓN DE LA REPÚBLICA DE CUBA (1976), arts. 9,14,15,22,24, *translated in* CONSTS. OF THE COUNTRIES OF THE WORLD: CUBA 1, 9 (Albert P. Blaustein & Gisbert H. Flanz eds., Pamela Falk trans., Dobbs Ferry, N.Y., Oceana 1979). Notably, such provisions are interpreted by Cuban officials to allow title to residential structures, rather than to underlying land (which belongs to the State), with the exception of small independent farmers who can hold legal title to land up to a certain size. Ashby Field Research, *supra* note 9.

19. See John J. Coughlin, *Cuban Foreign Investment Act: Opportunities for United States Corporations in a Post-Embargo Era*, 23 SUFFOLK TRANSNAT'L L. REV. 299, 304 (1999).

20. See José A. Ortiz, *The Illegal Expropriation of Property in Cuba: A Historical and Legal Analysis of the Takings and a Survey of Restitution Schemes for a Post-Socialist Cuba*, 22 LOY. L.A. INT'L & COMP. L. REV. 321, 333–34 (2000). For a discussion of other property reforms resulting from the economic crisis of the 1990s, see Peñalver, *supra* note 1, at 129–33.

21. 1992 CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 21, 7 Oficial Gaceta, Extraordinary ed., Aug. 1, 1992; see also Zamora, *supra* note 9, at 543–44.

22. See Zamora, *supra* note 9, at 543.

23. 1992 CONSTITUCIÓN DE LA REPÚBLICA DE CUBA, art. 25, 7 Oficial Gaceta, Extraordinary ed., Aug. 1, 1992; see also Zamora, *supra* note 9, at 544.

24. See CÓDIGO CIVIL, arts. 133.1, 134.1, 135.1 (1987).

25. LEY NÚMERO 77, LEY DE LA INVERSIÓN EXTRANJERA, ch.6, GACETA OFICIAL DE LA REPÚBLICA DE CUBA, Extraordinary Ed. No. 3, Sept. 6, 1995, available at <http://www.adelante.cu/opportunidad/documentos/77.htm> [hereinafter "Law 77"]. The law was enacted to "provide greater security and guarantees to the foreign investor and allow the country to obtain financial resources, technology and new markets in any productive sector and in the service sector." *Id.* at preamble statement by Ricardo Alarcón, President of the National Assembly.

26. *Id.* at ch. VI, Real Estate Investments, art. 16.

are prohibited by U.S. federal law rather than Cuban law from investing in Cuba)²⁷ may purchase real estate in Cuba under Law 77 for use as a second home or a vacation residence.²⁸ The Cuban Government apparently interprets Chapter VI of Law 77 as applying to the purchase of structures (*e.g.*, houses, apartments or condominiums) rather than land.²⁹ Moreover, although permanent residents may not acquire real estate as individuals, Cuban citizens residing abroad have legally purchased apartments and single family homes.³⁰ In addition, developers may receive basic usufruct rights to use surface land for twenty-five years and for up to fifty years for certain tourism projects.³¹

Three types of foreign investment are allowed for development purposes: “a joint venture, an international economic association contract, and a totally foreign capital company.”³² The Executive Committee of the Council of Ministers must approve invest-

ments greater than US\$10 million, investments in projects by foreigners owning 100 percent of the equity, and investments made under “certain other special conditions.”³³ A specially designated commission on foreign investment has the power to authorize all other investments.³⁴ Real estate investments are purportedly covered by the general protection provisions of Law 77, which provide for compensation in the event of expropriation, protection from third-party claims under the Cuban court system, transfer of ownership rights, and “the right to transfer invested capital and earned profits or dividends abroad in freely convertible currency.”³⁵

While Law 77 represents a milestone for Cuban law, it is not without its shortcomings. Mainly, concerns abound with respect to including, but not limited to: the bureaucratic red tape for investment approval increasing opportunity costs for investors;³⁶ ambiguous language on when and for what reason the Cuban

27. See The Cuban Liberty and Democratic Solidarity Act, 22 U.S.C. §§ 6021–6091 (1996) (commonly referred to as Helms-Burton or the Libertad Act); The Cuban Democracy Act, 22 U.S.C. § 6002 (1992); Trading with the Enemy Act of 1917, 50 U.S.C. app. §§ 1–39, 41–44 (1971) (amended by Pub.L. 103–236, tit. V, § 525(b)(1), 108 Stat. 474 (1994)); Foreign Assistance Act of 1961, 22 U.S.C. § 2370 et seq. (1961) (as amended). For a discussion of the last three laws, see Javier J. Rodríguez, et al., *A Synopsis and Analysis of U.S. Laws Relating to the Economic Embargo on Cuba*, 4 U. MIAMI Y.B. INT’L L. 151 (1995), and for a good discussion of Helms-Burton, see Jonathan R. Ratchik, *Cuban Liberty and the Democratic Solidarity Act of 1995*, 11 AM. U. J. OF POL’Y 343 (1996). The United States maintains the embargo primarily because of its disapproval of the Castro government and its policies, particularly because in 1960 Cuba, “without paying any compensation, expropriated all property owned by United States citizens and corporations.” See Coughlin, *supra* note 18, at 302. Coughlin points out, however, that while the United States has tightened the embargo in recent years “in an attempt to remove Fidel Castro from power and replace his regime with a democratically elected government[,] . . . Castro has remained in power for over forty years, and there is no indication that he will voluntarily relinquish power in favor of democratic elections.” *Id.*

28. See Zamora, *supra* note 9, at 542. However, such sales do not occur frequently because of the highly restrictive approval procedure. Ashby Field Research, *supra* note 9.

29. Ashby Field Research, *supra* note 12 (information from Nelson Valdés, Ministry of Foreign Investment and Economic Collaboration (MINIVEC), Havana, May 2004).

30. *Id.*

31. *Id.*

32. Law 77, *supra* note 24, at ch. V, art. 12; see also Coughlin, *supra* note 18, at 306–12.

33. Law 77, *supra* note 24, at ch. VIII, art. 21. The “special conditions” have included *de facto* privatization of State-owned enterprises or real property. Ashby Field Research, *supra* note 12.

34. Law 77, *supra* note 24, at ch. V, arts. 20–21.

35. Law 77, *supra* note 24, at ch. III, arts. 3–8; see also Zamora, *supra* note 9, at 543. *But cf.* Coughlin, *supra* note 18, at 323 (“The lack of an independent judiciary within Cuba makes the guarantee against expropriation essentially a political promise with no recourse to the Cuban judiciary in the event expropriation occurs.”).

36. See Armando M. Lago, Ph.D., *An Economic Evaluation of the Foreign Investment Law of Cuba*, 2 CUBA IN TRANSITION 32–38 (ASCE, 1992). See also Coughlin, *supra* note 18, at 323 (“A major flaw in [Law 77] is its failure to establish objective criteria for approval of foreign investment entities, resulting in a bureaucratic and arbitrary approval process.”).

government may expropriate property;³⁷ the lack of a specified rate of currency convertibility creating a risk that the Cuban government may value particular profits or dividends from an investment at par with the U.S. Dollar or the Euro;³⁸ the virtual prohibition of obtaining insurance from a foreign insurance company;³⁹ the requirement that the Cuban government provide its consent before an investment is liquidated, resulting in a risk because of decreased investment liquidity;⁴⁰ non-recognition of a variety of entity forms for investment, including limited liability companies and partnerships,⁴¹ creating a disincentive for investors who prefer those entities;⁴² disincentives for the Cuban laborer who works on a project because he only receives about two percent of the contractual value of the contract;⁴³ and the dispute resolution mechanism does not offer neutral, alternative fora for investor-State dispute resolution.

Other Laws Affecting Foreign Investment in Cuba: In addition to Law 77, Cuba has enacted various implementing decrees, regulations, and other laws which affect foreign investment.⁴⁴ The implementing decrees and regulations pertain to labor and contracting relations, export processing zones, foreign invest-

ment registration and regulation, and statistical reporting.⁴⁵ Other laws include:

1. a tax code, adopted in August 1994, that levies taxes on the income of enterprises, including joint venture with foreign investors;
2. a new mining law, passed in December 1994, that sets the parameters for granting of concessions for the exploitation of Cuban mineral resources, except oil resources; and
3. reforms to the banking system, instituted in May 1997, that separated the central bank from the commercial banking system and set out the legal framework for registration and operation of commercial banks and financial institutions under the supervision of the Cuban Central Bank.⁴⁶

Cuba has also become a party to bilateral investment treaties (“BITs”) which provide for “protection from expropriation, transfer of profits from Cuba in freely convertible currency, and dispute resolution.”⁴⁷ BITs, which provide for investor-State arbitration in disputes over foreign investment, are indeed a significant trend in the international political economy, and have become a common staple of free trade

37. See Ashby, *supra* note 12, at 144–46.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. See Joseph L. Scarpaci, *Whither Goes Cuba? Prospects for Economic & Social Development Part II of II: Cuba’s Future in a Globalized World*, 14 *TRANSNAT’L L. & CONTEMP. PROBS.* 499, 503 (2004). Scarpaci notes, of course, that there are other incentives for workers in Cuba, including access to tips and “under the table” contribution for good performance, and labor conditions often better than in the public-sector. *Id.*

44. See Jorge F. Pérez-López & Matías F. Travieso-Díaz, *The Contribution of BITs to Cuba’s Foreign Investment Program*, 32 *LAW & POL’Y INT’L BUS.* 529, 537–540 (2001).

45. *Id.*

46. *Id.* at 539–40.

47. Zamora, *supra* note 9, at 544. See also Pérez-López & Travieso-Díaz, *supra* note 43, at 540 (2001) (noting that “between 1993 and the end of 1999, Cuba signed forty-five BITs[, although] [t]he Cuban government does not publish the BITs it has concluded.”). For a detailed discussion of Cuba’s BITs, see *id.*

agreements in the Americas.⁴⁸ The Cuban government is also a signatory to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the “New York Convention”).⁴⁹

Effects: Despite Cuban legal reform respecting foreign investment, the amount of direct foreign investment actually attracted by Cuba is questionable. Due to a multitude of factors, foreign investment has declined since its initial boost upon enactment of Law 77. One commentator has noted:

By June 2004, there were just over 400 joint ventures of varying scales. While in the mid- to late-1990s investment was steady, in the new millennium the joint ventures tapered off. Only half a dozen firms were added in 2003 versus an average of thirty-five per year in the late 1990s. Several factors account for this trend. . . . Events surround September 11, 2001, have curtailed international tourism. . . . In March 2003, the European Union . . . reproached Cuba for arresting and incarcerating seventy “dissidents.” Former Spanish President . . . Aznar was particularly critical, as was French Prime Minister . . . Chirac. Together, these events curtailed investment in Cuba.⁵⁰

Other scholars have aptly detailed that “[d]espite its initial successes in the early and mid-1990s, Cuba has not been able to secure foreign investment to the degree that the country requires and is capable of attracting.”⁵¹ They attribute this to “the contradictory attitude of the Cuban government towards investment, the obstacles and restrictions that are placed

before a prospective investor, and the ominous shadow of the U.S. sanctions”⁵² They conclude that “investing in Cuba must surely be seen by most foreign entrepreneurs as a perilous task.”⁵³ A more nuanced reason for Cuba’s inability to attract more foreign investment is likely its underdeveloped land tenure system and, in particular, unclear land tenure security as same directly relates to sanctioned holding mechanisms.

Nonetheless, Cuban law recognizes private property right (although such law is far from perfect with respect to same). And, foreign investment laws (also far from perfect) enable foreigners to own certain real property in Cuba and expect a certain level of legal protection for their investments. It cannot be argued with authority, therefore, that Cuba does not at least have a working framework in place for facilitating foreign investment by recognizing foreigners’ rights in real property, through varying forms of ownership and possession rights and legal mechanisms to accomplish real estate transactions.⁵⁴ However, based on the recent decline in foreign investment in Cuba despite its attempts to attract same, a conclusion could be drawn that—outside cyclical global market fluctuations based on natural and/or uncontrollable events—Cuba’s framework is not good enough.

The overarching lesson is, clearly, that a variety of factors—not just an adequate land tenure system which protects private rights in real property—determine whether investors will invest in a particular economy. In general, several macroeconomic and

48. See generally Patricia Isela Hansen, *Dispute Settlement in the NAFTA and Beyond*, 40 TEX. INT’L L.J. 417 (2005); Scott R. Jablonski, *¡Sí Po! Foreign Investment Dispute Resolution Does Have a Place in Trade Agreements in the Americas: A Comparative Look at Chapter 10 of the United States-Chile Free Trade Agreement*, 35 U. MIAMI INTER-AM. L. REV. 627 (2004) (discussing the investment provisions in the U.S.-Chile Free Trade Agreement) [hereinafter “Jablonski, Chile”]; Scott R. Jablonski, *NAFTA Chapter 11 Dispute Resolution and Mexico: A Healthy Mix of International Law, Economics, and Politics*, 32 DENV. J. INT’L L. & POL’Y 475 (2004) [hereinafter “Jablonski, NAFTA”]. See also Calvin A. Hamilton & Paula I. Rochwerger, *Trade and Investment: Foreign Direct Investment through Bilateral and Multilateral Treaties*, 18 N.Y. INT’L L. REV. 1 (2005).

49. See Zamora, *supra* note 9, at 544.

50. See Scarpaci, *supra* note 42, at 502.

51. Matías F. Travieso-Díaz & Charles P. Trumbull IV, *Foreign Investment in Cuba: Prospects and Perils*, CUBA IN TRANSITION (ASCE, 2002).

52. *Id.* at 197.

53. *Id.*

54. *Id.* at 546.

microeconomic factors, together with political and social consideration, contribute to such a decision.⁵⁵ In addition, clearly, as with the case of former Soviet-satellites, resolution of issues involving expropriated foreign property is also an important consideration (for title encumbrance as well as international relations issues), as is surely the case for Cuba.⁵⁶ For purposes of the present inquiry, however, the connection between security of land tenure through efficient holding mechanisms and foreign investment in Cuba is of particular concern. How a country's land tenure system—especially a developing country's system—accommodates the ability of foreign investors to hold real property in an efficient and profitable manner is a critical tool for such country's economic growth and development.

LAND TENURE AROUND THE WORLD

The Concept, the System, and Its Importance for Foreign Investment

“Land tenure” traditionally referred to the legal regime or scheme under which an individual owns or “holds” land, dating back to English feudalism.⁵⁷ Today, the land tenure system is commonly referred to as that which encompasses all possible ways in which an individual or entity may own or hold land in a particular legal system.⁵⁸ Thus, under a country's

land tenure system one is almost sure to find rules respecting how residential and commercial property may be held privately or otherwise (through, for example, freehold, lease, condominium, timeshare, inheritance, etc.), rules regarding joint or communal property holdings (such as, for example, the tenancy by the entirety in many U.S. states), how certain property belongs to and is held by the public (through the government), and related areas such as title administration, recording, surveying, financing (*e.g.*, mortgages) and taxation.⁵⁹ While a full analysis of land tenure systems is outside the scope of this paper, it is important to note that several aspects of a land tenure system render it adequate or inadequate including, but not limited to, the efficiency of a particular system's administration, mapping, record keeping and titling capabilities, and its enforcement of laws respecting property holdings and rights and the dispute resolution thereof.⁶⁰

Importantly, “[l]and tenure systems are one of the many tools used to regulate society,” and their deficiencies in developing countries in particular can greatly affect decisions by foreign investors on whether to invest in a particular country.⁶¹ Security of land tenure, therefore, directly affects foreign investment inflows, and is therefore vital to an

55. See, *e.g.*, Matías F. Travieso-Díaz & Armando A. Musa, *Cuba: The Next Retirement Haven?*, 11 WTR L. & BUS. REV. AM. 3, 18–20 (2005). See also Archibald Ritter, “Economic Illegalities and the Underground Economy in Cuba,” FOCAL Background Briefing on Cuba (June 2006), available at http://www.cubasource.org/pdf/economic_illegalities.pdf (last visited July 28, 2006); Cuban Research Institute, et al., “Policy Brief: Governance and Social Justice in Cuba: Past, Present and Future (March 2006), available at <http://www.cubasource.org> (last visited July 20, 2006).

56. While the resolution of issues surrounding expropriated foreign property is fascinating and in no case irrelevant to an overall discussion on property law and foreign investment in Cuba, such discussion is outside the scope of the present inquiry. For good discussions on the foregoing topic, see CUBA TRANSITION PROJECT, EXPROPRIATED PROPERTIES IN A POST-CASTRO CUBA: TWO VIEWS, INSTITUTE FOR CUBAN AND CUBAN-AMERICAN STUDIES (U. of Miami 2003). See also Matías F. Travieso-Díaz, *Courts of Limited Jurisdiction in the Post-Transition Cuba*, 39 VAND. J. TRANSNAT'L L. 125, 130 (2006); Tania C. Mastrapa, *Real Property Restitution: Risks for Claimants and Investors*, in CUBA IN TRANSITION (ASCE 2005).

57. See John W. Bruce, “Conceptos sobre tenencia de la tierra,” agosto 2000, No. 1–S, Land Tenure Center, University of Wisconsin-Madison, available at http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=2243&ftype=.pdf (last visited July 25, 2006).

58. *Id.*

59. *Id.*

60. *Id.* See also José Manuel Pallí, *Land Title Registration in Cuba: Past, Present, and Future*, in CUBA IN TRANSITION (ASCE 2005) (discussing aspects of Cuba's laws affecting mortgages and titling of real property, and the many improvements which must be made to the existing land registration framework in Cuba).

61. W.L. Dickinson, “Land Tenure and the Developing Society,” Department of Surveys and Lands, Ministry of Local Government and Lands, Gaborone, Botswana, available at <http://www.unu.edu/unupress/unupbooks/80604e/80604E05.htm> (last visited July 25, 2006).

economy—and especially to developing economies such as Cuba.⁶² It represents the degree to which other persons and governments may interfere with rights pertaining to real property and thus serves as a good risk indicator in the investment decision making process. This is not a novel concept and, as a 1995 United Nations report has accurately summarized, “[s]ince 1995, it has become increasingly clear that the issue of foreign ownership of land remains high on the agenda of many nations around the world.”⁶³

Around the world, land tenure mechanisms providing for foreign real property holding are not uniform across countries, as each country’s unique historic, political, social and economic culture mandate differing approaches.⁶⁴ Thus, security of land tenure in any given country can only be understood in relation to the political, economic and social context from and within which the land tenure system has developed and is applied.⁶⁵ It follows, therefore, that the inquiry on potential models, adaptations and changes to a future Cuba’s land tenure system cannot be detached from considerations of the country’s unique political, economic, and social tendencies.⁶⁶

For example, security in land tenure relates to the time necessary to recuperate and make profit from an investment—the longer an investor may hold the

land or rights to real property, the less risk that the investor will never recuperate or profit from the investment. The idea of a freehold estate—which is common in many developed countries and which normally provides the greatest amount of security to the holder (at least in terms of the economy and risk of investment in the real property over time)—does not usually fit well within the political, economic and social context of countries such as Cuba whose political culture is based on Marxist notions of communal and state-owned property.

The differences in concepts of real property and land ownership in different political and legal systems clearly account for variations in holding mechanisms. For example, “[i]n some legal systems, land ownership rights are described as permanent use rights although for practical purposes, the effect of such right often appears to be much the same as ownership.”⁶⁷ Also, in many countries, “there can in certain circumstances be separate ownership of land and any buildings on it.”⁶⁸ In any event, certain key, core rights characterize the holding of real property for any purpose and are important to keep in mind because they affect the perceived utility of an investment. If such core rights—rights of possession, use and enjoyment, and alienation⁶⁹—are not clearly defined or provided, the utility of the investment will

62. In fact, with respect to property rights in general, a report issued by the World Bank shows: “While peace is essential to unleash productive investment, firms require more than this. They require an environment with a reasonable level of political and economic stability, and one where personnel and property are secure. . . . Secure property rights link effort with reward, assuring all firms—small and large, informal and formal, rural and urban—that they will be able to reap the fruits of their investments. The better protected these rights, the stronger the link between effort and reward and hence the greater the incentives to open new businesses, to invest more in existing ones, and simply to work harder.” World Bank, “World Development Report 2005, Part II, Delivering the Basics,” at 79, available at http://siteresources.worldbank.org/INTWDR2005/Resources/06_WDR_PO2_Ch04.pdf (last visited July 25, 2006).

63. Stephen Hodgson et al., “Land Ownership and Foreigners: A Comparative Analysis of Regulatory Approaches to the Acquisition and Use of Land by Foreigners,” FAO Legal Papers Online #6, at 1 (Dec. 1999), at <http://www.fao.org/legal/prs-ol/lpo6.pdf> (last visited July 31, 2006).

64. See *id.* at 2. Notably: “Customary international law places on restriction on the right of states to restrict or regulate foreign ownership of land within their territories. States have sovereignty over their natural resources—including their land. Equally states are entitled to prevent entry of foreigners or to allow them entry only on terms—including a term that they may not own or use land or restricting and regulating such use.”

65. Bruce, *supra* note 56.

66. See *infra*, Part V.A.

67. Hodgson, *supra* note 62, at 5.

68. *Id.*

69. *Id.*

be less and thus the demand for same will be less—regardless of how a particular system deals with the concept of ownership.

Of course, the foregoing should not be interpreted to mean that even the most contrasting societies do not have similarities respecting their land tenure systems; “in most countries the majority of the land, in terms of percentage of total area, remains in the hands of the government.”⁷⁰ And, “in most cases,” governments have rejected outright market-based auction of public land and have elected to retain leasehold tenure, but liberalize leasehold policies, make allocation processes more transparent, and strengthen lease management systems.⁷¹ Interestingly, as one commentator has opined, “a freehold issued by a previous administration and contrary to the political opinions of a current government that has promised land reform and new land legislation would probably be viewed as less secure in the short term than a lease issued by a current government.”⁷²

Thus, for Cuba, the lack of a freehold land tenure mechanism in place does not necessarily mean that it cannot attract critical foreign investment under an improved system which contains mechanisms that fall something short of the freehold. Traditionally foreign investor-skeptical Latin American States and Transitioning States have effected various changes to their respective land tenure systems to accommodate property rights and holding mechanisms for foreign investors while restricting such rights to assuage cultural dispositions. Such changes can provide valuable insight on the needed changes to Cuba’s unique land tenure system.

Holding by Foreigners of Real Property— Selected Examples

Latin America: Greater recognition of foreign investors’ rights in their real property holdings is presently a major centerpiece of the bilateral and regional trade pacts and BITs between countries in the Western Hemisphere.⁷³ Not long ago, however, such recognition was not the case for many Latin American States. Throughout most of the twentieth century, most large Latin American States vehemently opposed the idea that foreign investors’ rights in real property should be protected by international law and subject to anything other than local law.⁷⁴ This, of course, served as a deterrent to foreign investment and a point of controversy in North/South relations.⁷⁵ In many other respects, these countries traditionally restricted land ownership and holdings by foreigners—particularly in the years of the import substitution policies of the second half of the twentieth century.

Because Cuba shares similar cultural, historical, geographic and legal background (*i.e.*, Spanish imposition and legal tradition influence) with many traditionally foreign-investor skeptical Latin American countries, and because of its continuing ties to those countries (despite the longstanding U.S. embargo), it is not extraordinary to consider how modifications pertaining to foreigners’ real property holdings in those countries may influence the shaping of a future Cuba’s land tenure system. In many cases, liberalization has not been without restrictions in the name of political and historical culture. In Latin American land tenure schemes, a pervasive theme is the historical struggle over land ownership rights of the masses

70. Grenville Barnes et al., “Land Registration Modernization in Developing Economies: A Discussion of the Main Problems in Central/Eastern Europe, Latin America, and the Caribbean,” 12 *URISA Journal*, No. 4, at 31 (Fall 2000), available at <http://207.145.30.84/Journal/protect/Vol12%20No4/barnes/10-10barnes%20extract.pdf> (last visited July 31, 2006). Limitations on foreign ownership are often—across the board—rationalized on grounds of “national security, the prevention of speculation, the prevention of foreign economic domination and the protection of rural communities.” *Id.* at 18.

71. *Id.*

72. Dickinson, *supra* note 60.

73. See *supra* note 47.

74. See Jablonski, NAFTA, *supra* note 47, at 487–88.

75. *Id.*

versus smaller groups of economic elites (which have historically included foreign investors), and the distribution (through government control) of mainly agricultural land (which is quite valuable given that agriculture is a major subsistence activity for much of Latin America).⁷⁶

(a) “Protecting” the Border: A common restriction among Latin American countries which have liberalized opportunities for foreigners to own real property is a limitation on holding rights in land that approximates a country’s border or its coastline.⁷⁷ Often, border areas are prime for foreign direct investment in industry, and coastlines obviously serve as hot spots for tourism investment. A few examples across Latin America demonstrate how such States are teetering to maintain political and cultural preference while attempting to attract foreign investment flows: in Brazil, a foreigner may own real property near a border (not more than a parcel 150 kilometers wide) only with prior approval from the government, and there are restrictions on the amount of rural land a foreigner can own; in Guatemala, a foreigner may own real property situated near waterways if granted special permission from the government, but only citizens may own property near a border; in Honduras, a foreigner may not own real property within 40 kilometers of a border, island, reefs, and cliffs, unless within an urban area; in Nicaragua, a foreigner may not own real property within 20 kilometers of a border; in Panama, a foreigner may not own land within 10 kilometers of a border; in Peru, a foreigner may

not own real property, waters or mines within 50 kilometers of a border.⁷⁸

(b) Mexico’s “Loophole”: Mexico’s Constitution provides for similar restrictions on foreign ownership of land within 100 kilometers of a border and 50 kilometers of a beach.⁷⁹ However, just as any legal framework can provide for loopholes, recently there has been frequent use of a land tenure technique in Mexico which allows foreigners to “hold” property in the constitutionally forbidden areas without outright dismissal of traditional land tenure and political preferences.⁸⁰ Basically, Mexican law now provides for foreign investors to own real property in the forbidden zones through a trust, utilizing a Mexican bank serving as trustee, which effectively converts the ownership interest into one of personal property but allows the core rights of possession, use and enjoyment, and alienation of the property.⁸¹ Although the trusts are for certain time periods and in some cases require different government approvals, they are renewable and transferable to another Mexican bank if the trustee becomes defunct.⁸²

Transitioning States: The collapse of the Soviet Union and the subsequent desire of many former Soviet-satellites to become members of the European Union have prompted major changes in those countries as they integrate market-based policies and commensurate concepts of private property ownership into their economic systems.⁸³ Privatization has included various land tenure adjustments to accommodate foreign investment to build up dilapidated infrastructure and stimulate economic growth.⁸⁴ While

76. See Barnes, *supra* note 69, at 29.

77. See “Foreign Investment Regimes in the Americas: A Comparative Study,” FTAA Working Group Study, available at <http://alca-ftaa.iadb.org/eng/invest/PREFACE.HTM> (last visited July 31, 2006) [hereinafter “FTAA”].

78. Hodgson, *supra* note 62, at 36–37.

79. CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS, Título I, Capítulo I, art. 27. See also Hodgson, *supra* note 62, at 16.

80. See Hodgson, *supra* note 62, at 16.

81. *Id.*

82. *Id.* See also “Buying Property in Mexico,” Mexonline.com, available at <http://www.mexonline.com/propmex.htm> (last visited July 31, 2006).

83. See Barnes, *supra* note 69, at 28.

84. *Id.*

much work is left to be done and some argue that policies have not been able to keep pace with transactions, progress has been made toward meeting inflow goals—just the sheer volume alone of increased foreign investment transactions supports the transition.⁸⁵

(a) Central and Eastern Europe: A sampling of foreign ownership regulations in former Soviet-satellite countries illustrates the diversity of rules that a country can fashion to accommodate simultaneously foreign investment and political and social preferences. In Albania, a foreigner may lease but not own land.⁸⁶ In Belarus, a foreigner may not normally own land but may obtain 99-year leases; however, with presidential permission, a foreigner may apply for ownership of land underlying manufacturing facilities.⁸⁷ In Bulgaria, while normally a foreigner may only own improvements on land such as buildings and may only acquire use rights to the underlying land, such rules do not apply to Bulgaria registered companies whose ownership majority is foreign.⁸⁸ In Croatia, a foreigner may own land (other than land designated as sensitive to national security) with prior government permission.⁸⁹

In the Czech Republic, foreign ownership is quite restricted—acquisition may only be through inheritance, restitution, diplomatic mission or through a citizen spouse.⁹⁰ In Hungary, a foreigner must obtain permission from the government to own land, except agricultural holdings are prohibited, although no

permission is required for lease rights.⁹¹ In Latvia, foreign ownership through joint ventures is allowed (although majority ownership in the entity must be by a Latvian citizen.⁹² In Poland, a foreigner may own land with the permission of the government, but must provide a laundry list of information and credentials, and the acquisition must be justified by the foreigner’s “actual needs”; a foreign individual may only an apartment or 0.4 hectares of urban or agricultural land without permission, however.⁹³ In Romania, a foreign-controlled Romanian company may own land, as is the case in the Slovak Republic.⁹⁴ In Slovenia, a foreigner must come from a country which has a special treaty with Slovenia in order to own land.⁹⁵ In Russia, many argue that the law is ambiguous and that it probably permits only lease rights to foreigners; in practice, many lease land to foreigners under an agreement which gives the foreigners an option to purchase the land at some point.⁹⁶ In Ukraine, while a foreigner may only lease land generally, there are exceptions for owning buildings, apartments and offices in major cities.⁹⁷

(b) Asia: China and Vietnam, both communist countries like Cuba, have undergone drastic economic reforms which arguably place their economies in sort of a hybrid state—authoritarian politics with market-based economic policies. A similar future is likely in store for Cuba which, as discussed below, has already taken steps in that direction. China has recognized that “[l]and tenure security is essential to

85. *Id.* at 33.

86. See Hodgson, *supra* note 62, at 24.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 24–25.

91. *Id.*

92. *Id.* at 26.

93. *Id.*

94. *Id.* at 26–27.

95. *Id.* at 27.

96. *Id.*

97. *Id.* at 28.

stimulate the development of land.”⁹⁸ In 1988, it enacted laws which allow foreigners to obtain long-term leases for land and business development purposes— “[i]n general, holders of granted land use rights may sell, lease, mortgage or otherwise transfer them.”⁹⁹

Foreigners can obtain such land use rights through approved joint ventures, although the law on actual land ownership has been referred to as unclear.¹⁰⁰ However, in July of 2006, the Chinese government issued an official policy statement which stands to regulate and limit foreign ownership of real property in China, which would—depending on one’s perspective—signify a step in the wrong direction for China (and thus perhaps serve as a lesson for Cuba). The new rules specifically limit the purchase of commercial and residential real estate in China by foreign enterprises and individuals by allowing such purchase only if the intent is to use the property for personal use and same is acquired directly by the purchaser.¹⁰¹ If a foreign investor plans to purchase commercial or residential property in China for any other purpose, the investor must establish a highly regulated entity called a foreign-investment enterprise.¹⁰² The new rules allow real estate purchases for personal use by foreigners only in limited circumstances.¹⁰³ As China continues to grapple with its need for foreign investment and the erosion of Marxist-Maoist real property ownership concepts, it will surely continue, from time to time, to regulate foreign ownership (although not ban the concept in its entirety).

In Vietnam, similar market-based economic reforms and enactment of foreign investment laws which have been in place for some time now have characterized reform in land use rights for foreigners.¹⁰⁴ Vietnam has been reforming its real property system—much like Cuba has been doing—utilizing cooperatives and semi-privatized land policies to stir domestic development, which has slowly spilled over into the foreign investment realm.¹⁰⁵ As for foreigners, law allows for long-term leases of land to foreigners “based on the economic and technical justification that is approved by the authorized state body”¹⁰⁶ However, like in China, foreign real property holding rights will likely remain highly restricted in Vietnam for some time to come, although the use of long-term leases indicates a willingness of such governments to depart from antiquated and inefficient policies which rejected foreign possession and use of land for investment purposes.

IMPLICATIONS AND POTENTIAL MODELS FOR A FUTURE CUBA

Political Context, Economic Reality, and Philosophical Dilemma

As discussed above, security of land tenure in Cuba cannot be addressed without understanding the political, economic and social context unique to the island. While it is axiomatic that stability and predictability of laws respecting private property rights is imperative to attract foreign investment into an economy, such precept poses particularly difficult challenges for the present and any future Cuban gov-

98. Joyce Palomar, *Land Tenure Security as a Market Stimulator in China*, 12 DUKE J. OF COMP. & INT’L L. 7, 8 (2002).

99. *Id.* at 16.

100. *Id.* at 30.

101. See Opinions on Regulating Market Access and Management of Foreign Investment in China’s Real Estate Market, issued on July 11, 2006 (copy on file with the authors).

102. *Id.*

103. *Id.*

104. See Bob Warner, “Viet Nam: Economic and financial management,” Working Paper 1, The Australian Government’s Overseas Aid Program (April 2000), at 1, available at http://www.aisaid.gov.au/publications/pdf/vietnam_wp1.pdf (last visited July 31, 2006).

105. See T. Haque & L. Montesi, “Tenurial Reforms and Agricultural Development in Viet Nam,” Part One, Sustainable Development Department of the Food and Agricultural Organization of the United Nations (1996), available at <http://www.fao.org/sd/LTdirect/LR96/haque.htm> (last visited July 31, 2006).

106. *Id.*

ernment, given such context. Allowing foreigners to own and profit from real property is quite contrary to Cuba's Marxist political system. Thus, Cuba faces a true philosophical dilemma as it reaches out to foreign investors in the global economy who demand legally adequate mechanisms and safeguards for their holdings. The practical question is, of course, how can a future Cuba reform the foreign holdings aspect of its present land tenure system to promote and protect the large-scale foreign investment that it needs?

In analyzing this issue, a few presumptions, which find support in history and logic, are appropriate. First, foreign investment is absolutely vital to Cuban economic growth and development, and the Cuban government will actively seek ways to attract such investment even while assuaging its current political preferences. It is no secret that the current Cuban government recognizes the need for foreign investment, and Law 77 and constitutional reform, along with proliferation of its BIT program, evidences same. Cuba will continue to seek foreign investment and will make necessary political and philosophical concessions to achieve such end, thus, while not necessarily recognizing the freehold, moving toward it on the spectrum.

Second, given Fidel Castro's declining health, Cuba is probably already undergoing a political succession which will maintain authoritarian, socialist principles and policies in the short term, but will increase the Cuban economy's pace toward a "guided" free-market model. A radical transition to democracy is a remote possibility; examples from around the world

and a close study of Cuban politics indicate that such a transition is unlikely in the short term. As such, market reforms will not follow a pure neo-liberal track and will rather conform to a hybrid solution which enhances growth through market-based policies while preserving (at least for the short term) the role of a one-party, strong central government. This presumption is not that radical; since the 1990s the Cuban government has implemented many economic reforms which have placed it on a similar path to that taken by China and Vietnam, for example, where communist teachings do not completely govern economic policy today despite authoritarian socialist regimes.¹⁰⁷ Whether such a model will work for Cuba remains to be seen; however, it is the likely route a Castro-successor regime will take.¹⁰⁸

Lastly, while one can neither accurately assess historical phenomena nor postulate about future developments in international affairs without considering both political and economic aspects, economic considerations will predominate in Cuba, facilitate the continuing transition to some form of a market economy, and motivate substantive improvement in the expansion and application of laws on real property and foreign investment. In other words, the philosophical dilemma will largely be resolved by economic necessity; as a corollary, there will be greater opportunities and respect for foreign holdings of real property. While Marxist goals will likely instruct a Castro-successor regime's policies, the need and desire to grow and develop will ultimately render traditional hard-line communist policies in Cuba what

107. See Lucy V. Katz, *Arbitration as a Bridge to Global Markets in Transitional Economies: The Republic of Cuba*, 13 WILLAMETTE J. INT'L L. & DISP. RESOL. 109, 117 (2005) (discussing Vietnam reform); See also Larry Catá Backer, *Cuban Corporate Governance at the Crossroads: Cuban Marxism, Private Economic Collectives, and Free Market Globalism*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 337, 375–82 (2004) (discussing China reform).

108. See Daniel P. Erikson, *The Future of American Business in Cuba: Realities, Risks, and Rewards*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 691, 694–98 (2004) (discussing what the author calls "Cuba's Emerging Capitalism"); Matías F. Travieso-Díaz, *Cuba's Perfeccionamiento Empresarial Law: A Step Toward Privatization?*, 23 U. PA. J. INT'L ECON. L. 119 (2002) (discussing Cuban legal reform and creation of Cuba's state-owned enterprises to function similar to private companies in the marketplace of buying and selling goods and services). See also Backer, *supra* note 106, at 346 (surmises that, "[n]either China's Maoist Marxist-Leninist theory, nor Cuba's Stalinist version have satisfactorily solved the central contradiction of Marxist-Leninist engagement—the privatization of economic activity essentially directed by autonomous economic collectives, which in turn are regulated by the state.").

they are everywhere in the world except in North Korea¹⁰⁹—a thing of the past.

Foreign Holdings of Real Property in a Future Cuba

Implications: In Cuba, the demand for tourism-related real estate development, commercial office space development, and residential housing for foreign company employees as well as Cubans will continue to increase.¹¹⁰ Moreover, there is enormous potential for infrastructure-related projects such as in utilities like electricity, in “knowledge-intensive” industries such as biotechnology, pharmacology and telecommunications, in entertainment and sports facilities, such as baseball, and in natural resource extraction such as oil and nickel.¹¹¹ Foreign participation in these and other areas have potential to produce large-scale development on the island which will be beneficial for Cubans as well as the investors. However, the fundamental issue of how foreigners can hold the underlying real property in connection with such projects—even when it is an ancillary matter to any given investment project—will affect the investment volume and quality in Cuba.

A 2001 report issued by UNESCO concerning Transitioning States highlighted that “[s]everal countries in transition stated that allowing foreigners to acquire land without restrictions would result in considerable internal economic and social problems.”¹¹² It is not uncommon, even in countries where foreigners have traditionally enjoyed more liberal land tenure rights, to read about backlash against foreign

property holding laws and efforts to modify same.¹¹³ One could predict with reasonable certainty that the same would apply to a post-Castro Cuba, especially when one takes into account the myriad problems which will invariably arise regarding settlement of claims for expropriated property (*i.e.*, possible restitution) involving property which is currently held by Cuban citizens in Cuba.

Potential Models: Thus, of the potential improvements to the foreign holdings aspects of Cuba’s land tenure system, which could range from allowing unrestricted freehold estates by foreigners to allowing no holding rights to foreigners (which is unlikely because, despite Cuba’s oil supply lifeline from Venezuela, it needs foreign investment, and because this is not the case under present Cuban law), we may expect to see variations and combinations of the foreign property holding aspects of land tenure systems in Latin American States and Transitioning States. In any event, as stated stressed this paper, changes in Cuba’s land tenure system are necessary for its survival and growth, and this is particularly true for foreign investment purposes in infrastructure projects involving the potential acquisition, development and sale of land and existing improvements thereupon.¹¹⁴

The key lies not necessarily in establishing and sanctioning holding mechanisms identical to those in democratic countries, but in modifying the current legal framework to provide greater protection and opportunity respecting the core rights of a holding—the rights of possession, use and enjoyment, and

109. See Human Rights Watch, “North Korea: Policy Changes May Foster New Hunger,” available at <http://www.hrw.org> (last visited July 20, 2006) (discussing North Korea’s persistent employment and return to antiquated and dysfunctional communist economic policies which have contributed to massive hunger and chronic persistent famine problems in the country, to name just one of many problems).

110. See Douglass G. Norvell, “Cuban Real Estate: The Next Boom?,” Illinois Real Estate Letter (Summer 1999) (copy on file with the authors).

111. See Erikson, *supra* note 107, at 701–11.

112. UNESCO, Economic Commission for Europe, Committee on Human Settlements, *Workshop on EU Accession from a Land Administration Perspective*, Report prepared by the delegation of Sweden in cooperation with the secretariat, Sep. 11, 2001, available at <http://www.unece.org/env/documents/2001/hbp/hbp.2001.9.e.pdf> (last visited July 25, 2006).

113. See, e.g., David Blair, “South Africa Moves to Ban Foreign Landowners,” Free Republic, Feb. 18, 2006, available at <http://www.freerepublic.com/focus/f-news/1580908/posts> (last visited July 28, 2006) (discussing efforts in South African legislature to curtail foreign freeholds and restrict them to 99-year leases because of public outcry of price inflation).

114. See World Bank, *supra* note 61, at 92.

alienation. As is the case in many Transitioning States and in Latin America, it is likely that restrictions on foreign land holdings in general will remain for quite some time in Cuba, even if a transitional government follows more market-oriented policies, and therefore new models will have to accommodate the need for foreign investment and political, social and cultural realities.

Contention and public unrest would most likely surround any significant changes that allow foreign investors to own agricultural or sizable tracts of land outright. The majority of the Cuban populace is used to a different way of thinking about and trading in real property now, similar to persons who lived in Eastern and Central Europe before the collapse of the Soviet Union. Moreover, a post-Fidel government will not likely open up the land market. Even before Fidel Castro's revolution changed Cuba's way of life, Cubans were skeptical of foreign ownership of agricultural lands (much like has been the case in many Latin American States). Thus, even with certain land tenure reform, it is likely that any new model will maintain a higher degree of restrictions on agricultural holdings than on any other type of holding (perhaps even more than coastal holdings). While such policy may not be the most economically efficient avenue to pursue a growth strategy in domestic agricultural production, it may be a necessary and inevitable tradeoff taking into account political and social dynamics.¹¹⁵

Core rights of possession, use and enjoyment, and alienation could be best captured (at least in the short term) by enhanced real property leasing mechanisms in a variety of other types and uses of land and real property. Following the lead of many Transitioning States and commensurate with appropriate amendments to Law 77, Cuba could expand lease terms for real property and surface land in terms of length (*e.g.*, utilizing the 99-year, renewable lease instead of only granting 25 to 50-year usufruct rights) and increas-

ing the number of categories of real property and types of land which could be leased by foreigners. As a related measure, Cuban law could provide for less restrictions and bureaucracy concerning lease transfers, increasing the marketplace of transactions for real property and hence facilitating more efficient use of the property. This would likely serve to increase foreign investment in coastal land and even in areas where Greenfield investment could bring jobs and infrastructure (such as upgraded electricity, telecommunications, etc.) to Cuba. With such long-term holding mechanisms in place (together with, of course, a functioning, predictable and accessible dispute resolution system in place), land tenure security may be enhanced to attract investment even if holding rights fall short of the freehold. Creative solutions like that found in Mexico, for example, abound.

Equally important is reform of holding mechanisms for urban property, where laws in Transitioning States may be particularly instructive. In some former Soviet-satellites, foreign investors may acquire land and property in urban centers outright, with minimal requirements. A transparent approval process or even limitations on lot sizes depending on the type of project would not likely serve as a major deterrent to foreign investors if they can own urban property outright and develop it and/or sell it without many restrictions. This, in fact, may be critical for widespread improvement of dilapidated urban areas in Cuba.

Of course, other considerations must be taken into account in order to foster foreign investment, such as enforcement of whatever land tenure mechanisms are developed. Harsh enforcement mechanisms, such as outright forfeiture of land purchased by a foreigner in a restricted zone, could serve to deter foreign investment on a rather large scale if investors do not have confidence in the local legal system and in professionals to ensure that all laws (and restrictions) are being and at all times are followed.¹¹⁶ Moreover, at-

115. The potentially net adverse affect on the Cuban economy from such a policy may be mitigated in the short term by implementation of a more open trade policy and market for foreign agricultural goods.

116. For example, under Peruvian law, "land unlawfully held by foreigners is simply forfeit to the government." Hodgson, *supra* note 62, at 43.

tempt at overregulation (and not normal regulation such as is the case in former Soviet-satellites attempting to strike a balance between economic necessity and social culture), like China's recent move to restrict and control real property transactions by foreigners, would be counterproductive. While certain limitations on foreign investor transactions in real property may be necessary for political and social reasons, overregulation of investment vehicles and restricting transactions for personal use only will not stimulate the quantity of investment needed in Cuba.

CONCLUSION

In the years to come, Cuba will face an increasing need to modify its land tenure system to provide for efficient land tenure security for foreign investors. Long-term lease rights, as one example, may provide the type of compromise necessary to provide foreign investors with incentive to invest in more infrastructure and other projects. Making exceptions to ownership rules in urban areas may be another. The experi-

ence of other Latin American States and Transitioning States demonstrates that transitions to more secure tenure systems to attract foreign investment can accommodate greater use, possession and even alienation rights of foreigners—even while at the same time restricting outright ownership of certain land or certain types of real property. Cuba's gradual recognition of certain property rights and the evolution of its laws respecting foreign investment can provide a basis for extension of holding rights in Cuba in order to attract the necessary foreign investment. Although there are many aspects of Cuba's property and foreign investment laws (as well as macroeconomic changes) which must be modified to provide a more stable foundation for foreign direct investment, reforming Cuba's land tenure system, specifically with respect to real property holding mechanisms available for foreign investors, is necessary to support the country's plan for economic development.