So much has changed in international relations over the last five years, much less the last 50, that it is remarkable how some of the conversation about Cuba seems frozen in time.

Certainly, the US embargo, first imposed in 1960, and the passionately fraught relationship of Cuba with the US and its unique Cuban community continues to cast a long shadow from the past upon the present. That shadow still has the power to dominate the headlines and the rhetoric of politicians and elected committees.

However, beneath this shadow, Cuba has been moving for some years to meet foreign investment interest, slowly expand private enterprise and more lately, attract capital with tax incentives, investment “guarantees” and treaties. The world, parts of which have long been willing to re-engage with Cuba post-revolution, has taken notice.

The US during the Obama Administration took a definitive set of steps toward embracing that change with its own liberalising policies. Currently, the mood and rhetoric has sharply shifted, but, as will be described further below, a number of the key Obama era changes remain in place.

These changes would tend to indicate that more relationships between US and Cuban business and government interests will expand in the years ahead.

To review the investment risk and opportunity scene in Cuba today, let’s begin with what Cuba’s policy and procedures are for foreign investment. Then we will turn briefly to tax and investment protection elements any foreign investor should consider. Finally, we will return briefly to the big question: where are US-Cuban relations headed and what impact will they have on Cuba and its people in the years ahead?

AGGRESSIVE INCENTIVE PROGRAMME
In the Cuban Foreign Investment Act of 2014 (the “Act”), Cuba’s policy explicitly seeks to attract foreign investment to develop and advance as a country.

Its ambitious goals include attracting $2-2.5bn in foreign direct investment per year, with the aim...
of 7% GDP growth per year. Cuba’s Ministry of Foreign Trade and Investment issues an annual Foreign Investment Opportunities Portfolio identifying areas where Cuba seeks foreign investment.

Given the notorious history of Cuba’s expropriations following the revolution, it is no surprise that Cuba’s foreign investment stimulation program explicitly seeks to assure foreign investors of protection from uncompensated expropriation.

These stated commitments include a guarantee of compensation for a property’s commercial value by payment in freely convertible currency, and states that if parties cannot agree on a property’s value, an organisation of “international renown” in business assessment will determine valuation.

The policy also allows free transfer abroad of dividends, profits, and proceeds obtained from liquidating or selling the interest. Of course, like so many of these policy pronouncements, the lack of a free market and the heavy hand of government bureaucracy may render the reality of selling a Cuban business quite uncertain. Non-permanent residents rendering services can transfer 66% of their earned income abroad.

MODERN MODES OF AUTHORIZATION

There are three modes of authorized foreign investments: (i) Joint Ventures (JVs), (ii) International Economic Association Agreements, or (iii) Totally Foreign Capital Companies. Regardless of type, all such investments require an application and prior authorization (“enabling resolution”) from the Ministry of Foreign Trade and Investment.

In the case of JVs, generally an entity is established (ie, a corporation) with one or more national investors (generally, a Cuban person domiciled in the national territory of Cuba) and one or more foreign investors as shareholders.

Such a JV is registered in the Business Register via a public deed. The public deed includes Articles of Incorporation, the Authorization from the Ministry of Foreign Trade and Investment (hereinafter, the “Authorization”) and Investment and an Association Agreement. Shareholders decide the organisation and operation of the company, and may change shareholders in accordance with their private agreement, subject to the Authorization.

JVs may establish offices or branches within Cuba and abroad. Dissolution of any JV is governed by its Articles of Incorporation, also subject to local law.

An International Economic Association Agreement is similarly established by an agreement between one or more Cuban national investors and one or more foreign investors, but not by forming an entity separate from its parties.

The national investors negotiate with the foreign investors terms of their investment: including capital contributions and form of management and the Authorization obtained limits the Association’s activities and purposes to the extent authorised.

Similar to a partnership or other transparent enterprise, each party makes a contribution creating a common fund where ownership rights and obligations are allocated.

In hotels, production or service agreements take a different form, probably because they are more divided in their contribution and management by foreign know-how and capital.

There is no common fund, the foreign investors act on behalf and in representation of the national investors, profits are not shared, and payments to the foreign investors are conditioned on performance.

In the case of professional services, an association may engage with foreign consulting companies to provide accounting, auditing, valuation and financial services, as well as marketing, business management and insurance services. There is no change in parties except with mutual consent and government authorisation. Termination is also governed by the Agreement subject to the Authorization.

“Totally foreign capital companies” require foreign investors to prepare and present a proposal to a Cuban entity indicated by the Ministry of Foreign Trade and Investment to obtain its approval. Such an investor may theoretically operate in one of three ways: (i) as natural persons acting on the foreign investor’s own behalf; (ii) as a separate entity in the form of a Cuban subsidiary of a foreign corporation with registered shares (which can establish offices or branches within Cuba and abroad); or (iii) as a separate entity, establishing a branch of a foreign entity.

HIRING AND FIRING

One of many key elements of government control and associated risk for foreign investors in Cuba today remains in labour force participation.

Foreign investors cannot hire directly, but instead go through a government controlled employment agency.

A notable exception to this rule is in the case of International Economic Association Agreements, where hiring is done by the national investor. Employees may be both Cuban citizens and foreign citizens permanently residing in Cuba. Exceptions may be made for top administrative or technical positions, which are held by non–permanent residents. All Cuban or foreign workers residing permanently in Cuba are paid in Cuban pesos.

Real estate, an area of investment of much interest to foreign investors, is technically authorised under any of the modalities noted above. Real estate investments are authorised...
for tourism-related purposes as well as for private housing. A Foreign investor may theoretically own their residence or company office either in their name or in the company’s name.

Despite the broad guarantees of investment protection and expatriation of profits it remains true that state control is dominant and in practice the dominating form of permitted and practical investment exercises involve JVs with Cuban nationals or government enterprises. Still, the overall scope of the regime is broader and allows for the considerable expansion of types of investments in different areas of the economy.

THINKING ABOUT TAXATION
Under Cuban domestic laws, and the foreign stimulus program outlined above, there are in place a number of special tax holidays and incentives for foreign investment. Among the most important of these, for JVs and most International Economic Association Agreement, there is no tax imposed on profits for the first eight years, and then the tax is 15% thereafter.

In contrast, Totally Foreign Capital Companies are taxed at 55%, illustrating the substantial effort to advantage investments in which Cuban nationals share.

For ease of reference, Table 1 (below) illustrates the main categories of taxes and special regime tax holidays and rates.

In an environment of low taxation at the source of Cuban operating investments, the impact on the foreign investor’s incentive to invest is of course affected by whether this may positively impact return after compliance with the foreign investor’s home country regimes. To explore that fully requires consideration of both conventional double tax treaties, as well as national taxes on foreign income which may determine whether income and profits from Cuban investment returns may be deferred or reinvested abroad. In addition, to add to the complexity, special regimes to discourage or prohibit business with Cuba, also must be taken into account, especially for investors subject to US jurisdiction.

CONTINUED EXPANSION OF TAX TREATY NETWORK
At last count, Cuba was party to 13 double tax treaties (DTA) in force, with several others in discussion.

Amongst this not insignificant group of potential options for triangulating international investments into Cuba are major European nations such as Spain, Italy, Portugal and Austria as well as Barbados in the Caribbean. Luxembourg has been in discussions to sign a DTA with Cuba, which could add another important fund and holding company jurisdiction to this mix.

The impact of national taxation of currently tax-free Cuban investment returns may be significantly impacted by structuring through the use of such treaties.

BITS AS PIECES OF THE PUZZLE
While tax efficiency is no doubt an important factor in the risk-reward analysis that may influence investment decisions with Cuba, international investors should also take important account of the role of bilateral investment protection treaties (BITs) in organising any such investment.

While those without direct experience or study of the impact of BITs on government behaviour and investment protection may discount the value of such protections in the case of countries like Cuba, they would in our view be wrong to do so. Cuba, like other countries seeking confidence from foreign investor markets, puts store in signing up to, and indeed, themselves utilise their

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Table 1. Special tax regime

<table>
<thead>
<tr>
<th></th>
<th>Joint Venture</th>
<th>International Economic Association Agreement(s)</th>
<th>Totally Foreign Capital Company</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal income tax</td>
<td>Exempt</td>
<td>Exempt</td>
<td>15%</td>
</tr>
<tr>
<td>(for revenue received from business dividends or profits)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Profits tax</td>
<td>Exempt for first 8 years; then 15% on net taxable profit; may be up to 50% for exploitation of natural resources</td>
<td>Exempt for first 8 years; then 15% on net taxable profit; may be up to 50% for exploitation of natural resources</td>
<td>35%; may be up to 50% for exploitation of natural resources</td>
</tr>
<tr>
<td>Sales tax</td>
<td>Exempt for first year; then 50% discount on tax rate applicable to wholesale sales</td>
<td>Exempt for first year; then 50% discount on tax rate applicable to wholesale sales</td>
<td>5% on wholesale sales; 10% on retail sales</td>
</tr>
<tr>
<td>Services tax</td>
<td>Exempt for first year; then 50% discount on applicable tax rate</td>
<td>Exempt for first year; then 50% discount on applicable tax rate</td>
<td>10%</td>
</tr>
<tr>
<td>Labour force tax</td>
<td>Exempt</td>
<td>Exempt</td>
<td>Gradual reduction to 5% in 2016</td>
</tr>
<tr>
<td>Use or exploiting natural resources tax</td>
<td>50% discount during investment’s recovery period</td>
<td>50% discount during investment’s recovery period</td>
<td>To be determined by Annual Budget Law</td>
</tr>
<tr>
<td>Customs tax</td>
<td>Exempt during investment process</td>
<td>Exempt during investment process</td>
<td>To be determined by Customs Tariffs</td>
</tr>
<tr>
<td>Land tax</td>
<td>Exempt during investment’s recovery period</td>
<td>Exempt during investment’s recovery period</td>
<td>To be determined by Annual Budget Law</td>
</tr>
</tbody>
</table>

1. Article 47 of the Act provides that the Ministry of Finances and Prices, on the advice of the Ministry of Foreign Trade and Investment, may grant total or partial exemptions, on a temporary or permanent basis, or grant other tax benefits according to what has been established in the taxation legislation in force.
2. Does not apply to parties to an International Economic Association Agreement for hotel, production or services management and rendering of professional services, with the exception that foreign investors who are parties to such Agreements shall be exempt from paying taxes on sales and services.
3. Does not automatically benefit from Foreign Investment Act. May benefit from Article 47.
It is difficult to believe that the world's investors – including American business – will not continue to push toward greater integration of Cuba into the international economy.

rights under BITs for their dealings abroad.

BITs vary in their application in important ways and require expert advice in the investment structuring stage (and assertion of rights phase, if any) to be most effective, however, what they commonly do is provide international leverage, and neutral bodies for adjudication, not only of outright expropriations, but also significantly, regulatory or legal changes that materially impact the economic benefit or logic of an investment.

Cuba has been prodigious in adopting bilateral investment treaties with over 63 executed and 40 in force.

A number of nations have both BITs and DTAs in place with Cuba, creating the possibility of triangulating both treaty tax advantages with the protection of a BIT. However, beware the differences in BITs between what sort of investors (nationals of the country where the investing entity is formed versus third county nationals, for example) qualify to avail themselves of rights and claims. Expert advice is warranted both in relation to strategy of BIT selection, as well as process in asserting claims under a BIT so as not to prematurely exhaust or eliminate remedies.

CONTINUING IMPACT OF US EMBARGO

In brief review, the US imposed an embargo on most exports to Cuba in October 1960 and extended it to almost all imports in February 1962. This set of policies and its progeny are primarily enforced through six US statutes and the Cuban Asset Control Regulations issued on 8 July 1963 by the Department of the Treasury.

Today, the embargo remains in place and most transactions between the US, or persons subject to its juris-
makes more tax efficient US investment possible in Cuba today than at any time in recent years.

**AMERICA’S CUBA POLICY UNDER TRUMP**

On 16 June this year, President Trump made an appearance in Miami’s Little Havana to announce that he was “cancelling the last administration’s completely one-sided deal with Cuba”.

He stated his aim would be to deprive the Cuban government of US dollars and promote private enterprise of ordinary Cubans at the same time.

As a result of actual policy changes then announced, Americans desiring to visit or do business in Cuba are again subject to much tighter restrictions. Where under Obama, travelers had to qualify under 1 of 12 categories of permitted travel, the actual activities of travellers were not heavily monitored.

Under the new policy, they will be audited, and the “people to people” educational activity category that was broadly applied in the Obama era has been eliminated.

The policy also promised various restrictions on where US business visitors could spend US dollars, to bar spending at a list of hotels and other businesses under the control of the Cuban Military or its affiliates.

While these changes, and the rhetoric of again seeking to actively weaken the Cuban government, present a shift in tide in US-Cuban relations, at this point they appear more symbolic than substantive.

Against the backdrop of some of the recent developments reviewed here – reopening of diplomatic relations, liberalisation of permitted investment licensing, tax code blacklist removal, and freer spending rules for US travellers – most continue.

Only time will tell where the future leads but for now it is difficult to believe that the world’s investors – including American business – will not continue to push the envelope toward greater integration of Cuba into the international economy. ■