US Tax Services
International tax

Alternative fund investments in Latin America*

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I. Introduction

The Latin American alternative investment funds segment (which includes hedge funds, private equity funds, and real estate funds) has begun to flourish. Many new funds are being formed in the region, with Brazil and Argentina serving as hosts in many cases. While emerging market funds around the world are, on average, four times larger than Latin American funds, the growth of the alternative fund industry in Latin America has been outstanding.

The economic landscape in Latin America has improved dramatically in recent years. Most countries are running current account surpluses; inflation has, for the most part, been under control; and the region's players have accounted for a much larger share of global trade than in the past. In the political arena, the recent elections during 2006 proved to have little impact on markets, demonstrating that, despite the political climates in Bolivia, Nicaragua and Venezuela, there is relative political stability in the region.

Today's alternative funds generally experience solid liquidity when trading in Latin American assets, including, for example, currencies, futures, external debt receivables, corporate debt, equities and derivatives (e.g., credit default swaps, over-the-counter options). Assets from Brazil and Mexico comprise a large share of the overall pool of instruments available in Latin America. Additionally, more and more investment opportunities are arising in other countries in the region, including, but not limited to, Argentina, Colombia, Chile, Ecuador, Peru, Venezuela and several Central American countries.

Alternative funds expanding into or operating in the Latin American region have tended to invest in the following types of asset classes:

- **Private equity:** Traditionally, alternative fund investors looking for exposure to Latin American markets focus on private equity. The context for private equity investing has improved with higher volumes of trade.

  Private equity investments in the Latin American region increased from $1.07 billion USD in 2005 to over $1.54 billion USD during the first half of 2006 alone—with Argentina, Brazil and Mexico accounting for the largest share of these investments.[1]

- **Loan portfolios:** Latin America offers good financing opportunities for alternative funds since they typically do not have the lending constraints that regulated lenders have. These opportunities arise primarily when traditional funding alternatives are not available. Latin American banks and credit providers often concentrate on the largest companies operating in specific sectors and, therefore, do not address credit needs in all segments of the market.

  US alternative funds have engaged in asset-based lending for some time, in some cases investing directly in cash flow-producing projects linked to critical assets that can also comprise an adequate collateral package as additional security for the loan. Alternative funds are now identifying diverse opportunities of this kind in Latin America. Sectors such as energy, transformation industries and transportation offer healthy profit margins that allow companies to pay very attractive rates.[2]

- **Derivatives:** Derivatives contracts include local interest rate and foreign exchange futures and options, soft commodities in Brazil, and local debt and Peso futures in Mexico.

- **Real estate:** Alternative funds are increasingly seizing on opportunities to acquire, hold and improve real estate in the Latin American region, particularly in countries such as Argentina, Brazil, Chile, Colombia, Costa Rica and Mexico and Uruguay.

[1] Emerging Markets Private Equity Association. Re-emergence of Latin America Private Equity. EM PE Quarterly Review, Volume II, Issue 4, Q4 2006. Page 5

[2] Guerra, Javier. Asset-Based Lending Opportunities. Latin American Hedge Funds 2006. Hedgeweek Special Report. October 2006. Page 10.

II. Typical alternative fund structure

A. Overview

Alternative funds are organized as private investment pools that differ from other types of funds on the basis of market risks (the use of hedging techniques to reduce market risk[3]), number of investors, fee structure, portfolio diversification, degree of leverage and level of regulatory constraints. The sponsor of the fund generally serves as the general partner in partnership structures and as the principal shareholder in corporate structures. The general partner holds the "carried interest" in the fund, and like the fund itself is normally a pass-through entity for tax purposes, thereby allowing the character of fund-level gains to pass through to its partners.

The investment pool is managed by a management company, which is controlled by the sponsors. The fund manager receives two types of fees for the rendering of its managerial services: (1) an asset management fee, which is calculated based on a percentage of the fund's assets under management—typically 1 or 2 percentage points per year; and (2) an incentive fee, which represents a share of the fund's profit.

Alternative funds can assume many different organizational structures, including, for example: a single-entity fund, a master-feeder fund, a parallel fund, and a multi-manager fund. In selecting the appropriate structure, a number of issues must be considered, including the structure of manager compensation, the number of investors, the rights and responsibilities of investors, and the implications of tax, legal and regulatory issues. With respect to tax considerations, the type of investors, the location of the funds and the management entity, the location and asset class of the investment, and the degree of leverage needed all become key factors in determining how an alternative fund might be structured.

B. General tax considerations

At the fund level, many different types of structures may be implemented in order to minimize tax exposure in the cross-border arena. US alternative funds generally are structured as onshore pass-through vehicles (e.g., limited partnerships), which can be favorable to US taxable investors. This type of structure facilitates the preservation of the character of the underlying investment income earned at the fund level, and avoids additional layers of taxation.

Notwithstanding the benefits of a partnership structure for taxable investors, such a structure may not be desirable for non-US and US tax-exempt investors. In this regard, non-US investors may face US income tax withholding on the fund's US source fixed and determinable, annual or periodic ("FDAP") income (e.g., dividends, interest and interest equivalents), and to full net-basis taxation on their US effectively connected income ("ECI") to the extent that a US trade or business is triggered by the partnership. Tax-exempt investors, on the other hand, may need to report unrelated business taxable income ("UBTI"), which is subject to full corporate income tax rates. Thus, for these types of investors it is preferable to utilize an offshore platform, which may be a corporate entity located in a tax-favorable jurisdiction.[4]

[3] Although in practice, most hedge funds only use the tenancy of short and long-term positions in a certain investment in order to reduce risk.

[4] Teunissen, Taggart, Arora and Mugabi. Recent Trends in Cross-Border Investments in Distressed Debt by US Managed Hedge Fund. Taxation of Financial Products. Volume 6, Issue 1. 2006 CCH Incorporated. Page 19.

Investments by alternative funds should be carefully structured to mitigate any potential tax leakage, such as the imposition of high rates of cross-border income tax withholding in the jurisdictions in which investments are made. Certain countries may impose high local taxes on income derived from investments, as well as high withholding taxes on the repatriation of such income. For alternative funds that are organized as corporations, any tax liabilities that may arise from taxable presence exposure in any jurisdiction could significantly erode the returns on the investments, especially if those alternative funds are organized in countries that do not have an expansive network of income tax treaties, such as Bermuda and the Cayman Islands.

Fund managers often establish representative offices in the countries in which the investments are made in order to more closely monitor local market opportunities. Since the manager generally acts on behalf of the funds, there is a risk that if its activities are not carefully defined it may trigger a permanent establishment (“PE”) of the fund in the jurisdiction in which the relevant investments are made. In addition to increasing tax exposure in the country in which the PE is triggered, the fund in such a case would have tax filing/compliance obligations in such jurisdiction. And if the fund is structured as a limited partnership or similar pass-through entity, these filing obligations could extend to the fund’s investors in certain cases. Consequently, the management of PE risk is high on the list of tax structuring priorities for alternative funds.

It is important to note that several jurisdictions (e.g., the US, UK, Hong Kong and Singapore) have implemented favorable trading safe harbors that allow management entities to trade on behalf of nonresidents' funds without creating a PE. These countries allow management companies operating within their borders to provide discretionary advisory services to the funds. Management entities located in jurisdictions that do not have trading safe harbors generally limit the scope of their services through sub-advisory agreements in order to avoid the triggering of a local PE. In this regard, decisions regarding investments are typically made by an entity located in a country with a trading safe harbor, and the local sub-advisor plays a supporting, non decision-making role by, for example, researching local investment opportunities and providing recommendations to the principal management company/advisor. Again, it is crucial that the scope of the activities performed be carefully planned with the goal of mitigating PE exposure, which could prove to be very costly to the fund and its investors.

III. Tax issues affecting alternative funds investments in Latin America

A. Overview

Alternative fund investments in Latin America may be structured as onshore investments with a local legal entity, or offshore investments, depending on the class of assets in which the fund will ultimately invest. Typical classes of assets can be distinguished based upon their relative liquidity, with shares of public or privately held companies and debt securities representing greater liquidity than, say, non-performing loans ("NPLs") and real estate.

Alternative funds typically invest in Latin American shares and debt securities via offshore entities in order to mitigate any potential capital gains tax burden upon exit from the investments. However when investing in less liquid asset types (e.g., NPLs and real estate), the use of a local investment vehicle is more typical. In this regard, while the holding of real estate or NPLs by a nonresident entity does not, when viewed in isolation, necessarily trigger a PE, the holding of these types of assets may require some degree of "on the ground" activities, which may increase the PE risk profile in certain jurisdictions. Consequently, onshore entities are often set up for the purpose of investing in these asset classes.

When investments are made through onshore entities, local income tax and other tax liabilities must be considered in connection with returns generated. In addition to considering the local income tax rate applicable to such returns and, correspondingly, the "tax capacity" generated (i.e., the local income tax available for mitigation), it is also important to consider cross-border withholding tax rates and the availability of a broad tax treaty network. This is especially critical in Latin America as domestic law rates of withholding tax on interest (and, in some cases, dividends) can be quite high.

B. PE risk

For alternative funds which have significant sums of their investors' money deployed across numerous borders, it is crucial to have a solid plan for PE risk management. This is especially crucial in Latin American countries when investing in assets classes which require "on the ground" activities, for instance when dealing with real estate or NPLs. In the case of real estate, leasing activities might require some level of local negotiation and signing the agreements. As for NPLs at certain point it may be necessary to engage in negotiations with debtors or to conduct collection activities. Latin American countries, as a general rule, do not have trading safe harbor provisions permitting local investment decision-making activities to be performed onshore without triggering a taxable presence. Additionally, many countries have limited domestic law guidance as to what constitutes a PE, thus the risk is often difficult to estimate with any degree of reasonable precision.

When a tax treaty applies, its provisions would need to be considered in performing a PE risk assessment. Most newer treaties in the region follow the Organization for Economic Cooperation and Development ("OECD") model, which provides a fairly comprehensive view of which activities may trigger a PE. Nonetheless, the local interpretation of those provisions is not always consistent with internationally accepted views, and the lack of consistency among and/or precedent within countries can make the risk assessment exercise challenging.

When an alternative fund invests in immovable assets in a country through a foreign entity, the nonresident is likely to be deemed to have a PE in the local jurisdiction. Thus, local entities are generally recommended for real estate deals. PE risks similarly may exist if a nonresident entity conducts business through an agent located in a local jurisdiction. Typically, the local agent would need to have the ability to negotiate and/or conclude contracts on behalf of the nonresident, or to otherwise bind the nonresident locally. This might occur, for example, if the fund were to hold an NPL portfolio offshore and an employee from the local management company were to have the authority to bind the nonresident entity.

C. Choice of entity considerations

1. In general

Alternative fund structures normally rely on pass-through entities to minimize the overall tax burden facing investors. In addition to entities which are fiscally transparent under the domestic laws of a local jurisdiction (e.g., a general partnership such as a Sociedad Colectiva or a Sociedad en Comandita), there are companies which are considered to be eligible entities for US entity classification ("check-the-box") purposes. The local equivalents of US Limited Liability Companies (Sociedad de Responsabilidad Limitada or "SRLs," limitada in Brazil) are eligible entities for this purpose, while stock corporations (Sociedad Anonima or "SA") are not.

Limited liability companies are, relatively speaking, simpler to manage from a local commercial law standpoint than stock corporations. In this regard, there generally are flexible (if any) board/shareholder meeting requirements. While most countries require a minimum of two members/owners, some jurisdictions do not have a minimum capital contribution requirement applicable to the minority interest-holder.

As a general rule, limited liability companies are subject to the same tax rules as stock corporations. Thus, apart from any commercial law distinctions, the key differentiator tends to be the "checkable" nature of local limited liability companies for US tax purposes.

In this regard it is relevant to consider certain US. tax issues that might arise in connection to the type of entity used to invest. Some of the key US tax issues are:

- **Foreign tax credits.** The potential for double taxation exists because the US imposes income tax on its citizens and residents based on their income wherever it is earned in the world. Subject to many limitations, the US foreign tax credit (FTC) regime mitigates double taxation by allowing a US taxpayer to claims a credit against the taxpayer's US tax liability for any foreign taxes paid on foreign-source income. Alternative investments funds and management companies often structure their investments through entities that are treated as fiscally transparent (under the check-the-box rules) for US tax purposes. Therefore any taxes paid by fiscally transparent entities generally should be available as FTCs at the level of their ultimate US owners subject to the applicable limitations.

- **US anti-deferral rules.** This becomes relevant when investments are not structured through entities that are treated as fiscally transparent for US tax purposes. These rules are generally designed to prevent deferral of certain passive income (e.g., interest, dividends) earned by foreign corporations. The anti-deferral rules apply mainly to controlled foreign corporations (CFCs) and PFICs.

  – CFC. US shareholders that own directly, indirectly, or through attribution, more than 50 percent of the stock or value of a CFC, for at least 30 days in any particular year, may be required to include in their income for US. federal income tax purposes, their pro rata share of the Subpart F income of the CFC for every year that it qualifies as a CFC. These US shareholders are also required to include in their income the amounts determined under Section 956 for every year in which any of their companies are CFCs (but only to the extent not previously included).

  – The PFIC regime is designed to tax shareholders of certain companies that generate primarily passive income or own primarily passive assets, or both. Unlike the CFC regime, there is no threshold ownership requirement necessary to invoke the application of the PFIC rules. The test is whether the company meets either the income test (75 percent or more of gross income is passive) or the asset test (more tan 50 percent of assets are held for production of passive income).

2. The use of financial trusts and investment funds

With respect to investments in NPLs and similar asset classes (other than real estate investments), it may be beneficial to have a local financial trust or investment fund acquire the local portfolio. In addition to certain tax benefits that may be available as highlighted below, there may also be legal and regulatory advantages. The following is a brief summary of some of the more common trust-like vehicles that have been considered and/or utilized by alternative funds investing in the region.

a. Argentine financial trusts

In Argentina, the use of a Financial Trust (Fideicomiso Financiero) may be considered for investments in financial assets, such as NPLs. Private financial trusts are subject to regular Argentine corporate income tax, which is imposed at a 35% rate on net taxable income. Deductions are generally permitted for all ordinary and necessary expenses incurred at the trust level including, for example, management fees. Additionally, provincial gross revenues taxes apply to the trust's gross income.

Remittances on equity interests in the trust are not subject to Argentine income tax withholding to the extent that previously taxed profits are distributed. Excess distributions (attributable, for example, to excess distributable income resulting from book/tax differences) are subject to a 35% withholding tax, or lower tax treaty rate.

Debt participations are generally permitted in financial trusts. Interest accruing on such participations is generally deductible at the trust level, assuming Argentine transfer pricing requirements are satisfied (arm's length standard). Withholding tax generally applies on interest payments at domestic law rate of 35% (15.05% on payments made to certain financial institutions), or a lower treaty rate. Argentine thin capitalization rules should not apply to private financial trusts—however, an arm's length debt/equity ratio is generally advisable.

In certain limited cases it may be possible to utilize a public financial trust. This requires a bona fide public offering of the trust's participations, which is normally not feasible in a related-party context. The primary benefit of a public financial trust is that trust distributions to beneficiaries are deductible from the trust's taxable income.

b. Brazilian FIDCs

A Credit Rights Investment Fund (the Portuguese acronym is "FIDC") is a special investment fund vehicle that is highly regulated with regard to the profile of the investors, the investment portfolio, and certain other factors. Even though FIDCs are not formed as a distinct legal entity under Brazilian commercial law, they may enter into agreements and conduct business activities (including the ownership of assets) in their own name.

The earnings of a FIDC are not subject to Brazilian taxation at the fund level. Foreign investors that own FIDC quotas are subject to the following Brazilian tax treatment to the extent that (i) they are not residents of a tax haven jurisdiction, and (ii) their investments are made in accordance with Central Bank regulations (Resolution no. 2689):

- 15% income tax withholding on FIDC distributions.
- 15% capital gains tax on the sale or other transfer of FIDC quotas (note: under certain circumstances, there may be grounds to sustain that gains realized by "non-tax haven" investors on the sale of their FIDC quotas through the Brazilian Exchange may be tax exempt).

If a "master" FIDC were to decide to acquire the quotas of existing small FIDCs or to incorporate new FIDCs, the distribution of income from the lower-tier FIDCs to the master FIDC—and gains realized by Master FIDC on the sale of the quotas of the lower-tier FIDCs—should be tax exempt.

Assets acquired by a FIDC—including NPLs acquirer from certain Brazilian lenders—may be subject to Brazilian Central Bank restrictions and/or registration requirements. While this is a legal/regulatory and not a tax issue, it may ultimately impact the structuring of a local investment.

Brazil levies a CPMF tax, which is levied at a 0.38% rate on every withdrawal of funds from Brazilian bank accounts. This would apply, for example, when the FIDC withdraws funds from its local bank account to acquire assets.

c. Chilean FIPs

In Chile the use of a Private Investment Fund (Fondo de Inversion Privado or "FIP") may be considered. A FIP is a special type of non-publicly traded fund which can be used to make investments in Chilean financial assets. A FIP is created via private contract, but it must be managed by a Chilean stock corporation (SA).

While FIPs are not legal entities, they are not subject to Chilean Corporate Income Tax ("CIT"). Therefore, any income generated or received by the FIP is not subject to 17% CIT at the fund level. Nevertheless, FIPs must comply with tax formalities applicable to other Chilean taxpayers, such as registration with the tax authorities, application for a taxpayer ID, maintenance of full accounting records, etc.

Cross-border distributions from Chilean FIPs are subject to 35% nonresident withholding tax, thus the primary tax benefit of FIPs is the deferral of Chilean taxation until profits are distributed.

d. Uruguayan financial trust

Uruguay also has a financial trust structure that may be considered by hedge funds. These trusts are generally subject to a 25% income tax on net income. Ordinary and necessary expenses are generally deductible, including expenses related to portfolio management and the write-off of investment assets.

To the extent that the trust has debt participations held by Uruguayan residents, interest accrued is ordinarily fully deductible on local financing. If there are nonresident holders of the debt participations, the interest deduction is capped at 48% of the interest accrued. However, if the debt-holder were domiciled in a low-tax jurisdiction, interest would be nondeductible.

Financial trusts are also subject to an annual equity tax of 1.5% of the net book value of their assets (i.e., gross book value less debt financing to acquire those assets).

Payments made to the holders of equity participations in a Uruguayan financial trust are subject to 7% income tax withholding. Equity certificates holders are subject to a 1.5% equity tax upon the Trust equity. Since there is local financing which is deductible for equity tax at the level of the Trust, there is no double taxation.

The use of a financial trust to hold certain classes of assets—such as distressed debt—is generally recommended for Uruguayan commercial law purposes.

Assets acquired by a Uruguayan financial trust—including NPLs—may be subject to Central Bank registration requirements (although approvals are not required).

D. Financing

The characterization of an investment instrument as debt or equity can be crucial to an alternative fund investing in Latin America. In addition to legal, treasury and business-related issues, there are a number of tax drivers that may play a role in the debt versus equity decision-making process. While arm's length payments of interest on debt are generally deductible for local income tax purposes, payments of dividends generally are not. On the other hand, interest payments may be subject to income tax withholding at domestic law rates as high as 40 percent, while dividends are often exempt from withholding taxes. In addition, a company's capital may be reduced on a tax-free basis in most jurisdictions, assuming certain formalities are followed.

1. Dividends

Certain Latin American jurisdictions do not impose withholding taxes on any dividend payments, while others exempt amounts distributed out of previously taxed earnings from withholding taxes. These exemptions from withholding taxes are intended to promote integrated tax systems in accordance with which there is a single level of income taxation on company income. Such integrated tax systems tend to inject some degree of neutrality into the debt versus equity decision-making process by not subjecting dividends to withholding taxes, while at the same time permitting a deduction for interest payments.

2. Capital reductions

Capital reductions normally are not subject to local income tax because they are not viewed as distributions of earnings. Unlike the US federal income tax rule that deems distributions with respect to equity—whether or not formally declared as dividends—to come first out of current or accumulated earnings and profits and then out of capital/tax

basis, most Latin American jurisdictions respect the formal characterization of the payment type, such as dividends, capital reductions, etc. (note that Chile is an exception to this rule).

3. Returns on debt

Domestic law withholding tax rates on interest payments from Latin American companies can be quite high, with rates ranging between 30 to 35 percent being typical. Lower withholding tax rates—ranging between zero and 4.95 percent—may be available for payments of interest to qualified banks or financial institutions. In addition, tax treaties often reduce applicable withholding tax rates quite significantly, to rates generally ranging between 5 to 15 percent.

Back-to-back loans using banks or financial institutions may sometimes be used to obtain lower withholding tax rates. In addition to any withholding tax rate reduction, borrowings from a registered financial institution may also avoid exchange controls on repayments of loan principal in certain jurisdictions.

Interest is generally deductible by the Latin American borrowing entity, assuming it complies with applicable arm's length standards and thin capitalization rules. In this regard, it is important to mention that several Latin American countries currently have fully developed thin capitalization provisions (e.g., Argentina, Chile, Mexico, Venezuela). In addition, the domestic tax laws in certain jurisdictions provide specific categories of interest that are non-deductible (e.g., interest relating to back-to-back loans and interest that varies based on profits in Mexico).

4. Inflationary impact

In certain jurisdictions, annual inflationary adjustments are required to be made with respect to monetary assets and liabilities. When the balance of the monetary assets is lower than the balance of the monetary liabilities, the company may have an inflationary gain, which normally represents an addition to taxable income. When the balance of the monetary assets is higher than the balance of the monetary liabilities, the company may have an inflationary loss, which normally is deductible for income tax purposes.

In addition to the inflationary adjustment mechanism, debt instruments denominated in non-local currency may be subject to annual foreign exchange adjustments. The resulting exchange gains or losses may be recognized for local tax purposes on an accrual basis. A devaluing of the local currency would normally trigger the recognition of an annual foreign exchange loss, which should be deductible, while an appreciating local currency would trigger the recognition of an annual foreign exchange gain, which should be includable in taxable income.

The impact that inflationary adjustments and foreign exchange gains/losses may have on an interest deduction should be carefully considered in determining the appropriate debt versus equity capitalization of a Latin American affiliate. In this regard, it is possible in certain years to have an inflationary gain amount that is larger than the sum of the nominal interest deduction and the foreign exchange adjustment—creating so-called "phantom income."

5. Hybrid instruments

In certain jurisdictions it may be possible to finance local operations through the use of a hybrid instrument. If structured properly, these instruments may be treated as debt from a local country perspective and equity from a lending country perspective. As such, payments on the instrument may be treated as deductible interest in the borrowing Latin American jurisdiction (subject to applicable thin capitalization and withholding tax provisions), and as dividends in the recipient country—effectively creating a deductible dividend of sorts.

6. Mandatory deposit requirements (encaje)

In some jurisdictions there is a regulatory rule which requires that a certain percentage of funds advanced by a nonresident to a local resident in the form of a loan must be deposited with the Central Bank for a specified period. Argentina and Colombia currently have such mandatory deposit rules, and neither country offers interest on the mandatory deposits. While these are legal/regulatory rules, they can impact tax structuring exercises and, in certain cases, can be deal stoppers. Thus, it is crucial to consider the impact that encaje may have on leveraged deals.

IV. Concluding thoughts

The alternative fund industry most definitely has set its sights on Latin America. While the tax rules in many jurisdictions have become evermore complex, some countries still retain rules which are dissimilar to those in other regions. The trend is towards a maturing landscape from a tax and regulatory perspective, but on a path strewn with varying degrees of uncertainty. While Europe has been successful in regionalizing its approach to numerous tax matters, assessments must clearly be made on a country-by-country basis in Latin America. Nevertheless, there are numerous regional themes and take-aways that alternative fund managers can point to—and these become more relevant as a particular fund expands its footprint in the region.

In the meantime, the structuring of deals in Latin America can be quite complex—at least at the outset. There are numerous technical and practical considerations that may require input from multiple sources beyond the deal team, including tax, legal, and treasury/finance disciplines. From a local country tax perspective, the deductibility of payments, the application of withholding taxes, and the imposition of limitations on leveraging all must be addressed. Alternative funds which are considering financing their Latin American investments should be aware of the potentially high tax costs associated with cross-border financing transactions as well as the planning opportunities that exist to mitigate such costs.

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