

# ISDA

International Swaps and Derivatives Association, Inc.

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[National authorities in OAS member states including:  
Argentina, Brazil, Chile, Colombia, Costa Rica, El Salvador,  
Ecuador, Mexico, Peru, Uruguay, Venezuela and CARICOM]

For the attention of: [\_\_\_\_\_]

## **Proposed Inter-American Treaty to Modernize Securities Ownership, Transfer and Pledging Legal Framework**

Dear [\_\_\_\_\_]:

I am writing on behalf of the International Swaps and Derivatives Association, Inc. (**ISDA**). ISDA is the global trade association representing leading participants in the privately negotiated derivatives industry, a business which includes, among other things, interest rate, currency, commodity, credit, and equity swaps, options and forwards. Privately negotiated derivatives play an important role in the management of cross-border flows of capital in the financial markets of the Americas.

ISDA was chartered in 1985, and today numbers over 600 member institutions from 46 countries on six continents, many of which are actively involved in the financial markets of your country. ISDA's members include most of the world's major institutions that deal in, and are leading end-users of, privately negotiated derivatives, as well as service providers and consultants. Additional information on ISDA, our mission and our activities in support of that mission is available on our website: <http://www.isda.org>.

One of ISDA's key objectives is to promote legal certainty for cross-border financial transactions. ISDA and its members devote considerable resources to acquiring and updating legal opinions from a wide range of countries on netting, set-off and financial collateral arrangements and to promoting modernization of laws to ensure the integrity of, and to reduce systemic risk in, the world's financial markets.

A worldwide movement is underway to harmonize and modernize commercial laws that govern the ownership, transfer and pledge of investment securities. Investment securities (known in Spanish as *títulos valores*, *valores bursátiles* or *valores mobiliarios* and as *títulos e valores mobiliários* in

Portuguese) transactions are now global and are conducted in a manner that local lawmakers could not have envisioned 15 years ago. A wide disparity exists among countries with respect to the law governing these transactions. To the extent that these laws and practices deviate from international standards and electronic methods of doing business, the country in question as well as its debtors, creditors, investors and underwriters will face increased costs and may even be denied access to international sources of liquidity.

Markets for financial services have grown enormously in recent years. This growth has brought great benefits to economies globally. The greater depth and variety of activities of market participants in global and regional financial markets has, in turn, focused the attention of participants on the need for effective management of credit risk. National bodies with responsibility for financial markets and securities settlement systems also have a strong interest in seeing that credit risk in these markets is efficiently managed. Some of these bodies, such as national central banks and national government debt agencies, are also themselves participants in the markets. There are various ways in which market participants may manage credit risk to reduce or eliminate it. One of the most important is the use of collateral. This applies to transactions in both privately negotiated and exchange traded markets. It also applies to payment systems and securities settlement systems.

The main legal impediments financial market participants, operating on a cross border basis, currently face with range from legal restrictions on the use of pledged collateral by a holder of that collateral to uncertainties regarding the enforceability of the title transfer-based collateral arrangements, including the possibility of the arrangement being recharacterised as a form of security interest. Furthermore, the uncertainty under existing conflict of law rules as to the substantive law that applies to a securities arrangement as well as the vulnerability of title transfer collateral arrangements to the rights of third parties, such as assignees and attaching creditors of the collateral giver, affect the markets. The project described in the following paragraph is aimed at addressing these and related issues.

We understand that a drafting effort is being undertaken by the National Law Center for Inter-American Free Trade (NLCIFT) as project manager. Interested parties at this stage include a number of participants from government entities, private sector companies and law firms throughout the hemisphere. The purpose of this effort is to prepare a draft Treaty for consideration by the Organization of American States (OAS) through its upcoming **CIDIP-VII** treaty enactment process. This Treaty would cover the creation, transfer, pledge and extinction of rights in investment securities in Latin America and the Caribbean. Of special interest would be the cross-border transfer of paperless securities, by way of sale or as collateral, through intermediaries and modern securities settlement systems. This work would complete the seminal adoption (at the recently concluded CIDIP-VI) of the Model Inter-American Law of Secured Transactions and its appendix on electronic documents and signatures. The topic of investment securities was intentionally left uncovered by the Model Law so that it could be addressed independently and take into consideration the special needs of these unique transactions.

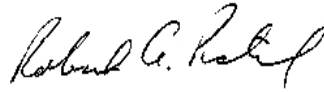
The OAS is currently in the process of considering and selecting topics for CIDIP-VII. Given the importance of modernizing the legal framework for investment securities to enable access by governments and private enterprises alike to the liquidity provided in international financial markets, we urge you to support the instruction of your mission to the OAS to support this important topic for the CIDIP-VII agenda.

If we can be of assistance to you in any way on this issue, for example, by providing information about international market practice or about law reform efforts in other parts of the world relating to the

legal framework for investment securities, we would be delighted to do so. In such a case, please do not hesitate to contact the undersigned (tel. +1 212 901 6000; [rpickel@isda.org](mailto:rpickel@isda.org)).

Thank you for your consideration of this important matter.

Yours truly,

A handwritten signature in black ink, appearing to read "Robert G. Pickel". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Robert G. Pickel  
Executive Director and Chief Executive Officer