MEMORANDO

TO: Yanire Martes

International Swaps and Derivatives Association, Inc.

FROM: Bruno Pineda Cordero

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The purpose of this memorandum is to provide general advice in respect to cross border OTC derivatives from an Ecuadorian law perspective, according to the questionnaire sent to us in April, 2016.

1. **Do OTC derivatives transactions face an enforceability problem (e.g. due to anti-wagering provisions etc. under local law)?**

   We have no precedents of enforcement of OTC derivatives transactions.

   Derivatives transactions are expressly permitted activities for financial entities according to article 194 of the Ecuadorian Monetary and Financing Code and the regulations issued by the Superintendency of Banks and the Monetary and Financing Board. Even if derivatives transactions are not expressly permitted activities for non- financial entities, these transactions should be allowed for hedging purposes and also as investment transactions which may be performed by all non-financial companies on a non-ordinary base according to article 3 of the Companies Law.

2. **Are there any issues with foreign law governed contracts (mainly English and New York law) when used for cross-border transactions into your jurisdiction? For example, some countries may restrict the use of foreign law and language documents when it comes to contracting with local public law or state entities.**

No, there are no issues with foreign law governed contracts (mainly English and New York law) when used for cross-border transactions into Ecuador.

Financial institutions, hedge funds and other private Ecuadorian counterparties do not need the authorization of third parties in order to submit to foreign law. On the other hand, it is possible for the State, State institutions and State instrumentalities, to submit themselves to foreign law and foreign jurisdiction or arbitration, as long as there is a prior authorization from the Attorney General from the main officer of the relevant entity.

3. **Are there provisions (of a statutory, customary, common law, etc nature) in local law that provide for the enforceability of close-out netting? Is close-out netting defined in addition to set- off under local law? Does local law allow netting in accordance with the terms of the underlying contract (e.g. the ISDA Master Agreement)?**

No, there are no legal or regulatory provisions in Ecuador that provide for the enforceability of close-out netting. Close-out netting is not expressly defined under Ecuadorian law, contrary to set- off which is regulated by the Civil Code.

By not being expressly defined, close-out netting is neither permitted nor prohibited, which means it could be convened based on the will of the parties, but subject to the restrictions mentioned in this answers to set-off. According

to articles 1671, 1672 and 1673 of the Ecuadorian Civil Code, set off is applicable only in the following cases:

1. Each obligation must consist on a monetary obligation or in an obligation involving fungible things or undetermined choses of the same gender and kind.

2. Both obligations must be due and determined.

3. Both obligations must be payable.

4. In any case, the parties shall be debtors of each other.

4. **In case there are netting provisions under local law, do they apply to all types of counterparties, e.g. financial institutions, corporates (commodity trading firms, utilities, manufacturers etc.), SPV, public law entities (municipalities, central bank, development banks etc.)?**

Not applicable, as we mentioned before, there are no netting provisions under local law.

5. **Is the scope of transactions eligible restricted in any way, e.g. to certain products (rates, currencies, equities, credit etc.). What about commodity products (gas, coal, oil, metals, agricultural etc.) and "new" products (emissions allowances, freight rates, weather variables etc.)? Is there a different treatment for financially settled transactions as opposed to physically settled ones (i.e. where the underlying product is delivered)?**

No, as there is no a legal or regulatory restriction in applicable laws (Finance and Monetary Code and regulations issued by the Superintendency of Banks

and the Ecuadorian Monetary and Financing Code), the scope of transactions eligible is not restricted (e.g. to certain products, commodity products against new products). Furthermore, there are no different treatment for financially settled transactions as opposed to physically settled ones.

6. **Are financial collateral arrangements governed by foreign law recognized under local law? In particular, would title transfer and security interest arrangements (under English and NY law) be enforceable (e.g. ISDA credit support documentation)?**

The answer depends on the location of the assets according to the Ecuadorian Civil Code.

According to the article 15 of the Ecuadorian Civil Code, the effects of the agreements related to assets located in Ecuador shall be according to Ecuadorian laws. Thus, title transfer and security interest arrangements regarding assets located in Ecuador should be governed by Ecuadorian laws or, if they are not subject to local law, the contracts must be conformed to local law in order for them to have effects in Ecuador.

In case the assets are located abroad, financial collateral arrangements governed by foreign law should be recognized under Ecuadorian law. Therefore, transfer and security interest arrangements (under English and NY law) should be enforceable (e.g. ISDA credit support documentation).

The same rules apply in case the counterparty is the Ecuadorian State, Ecuadorian State institutions and Ecuadorian State instrumentalities, as long as such entities have the required authorizations and they comply with public law requirements in order to contract under foreign law, it shall be recognized as the applicable law.

7. Any other issues under local law (e.g. conflict of law rules; jurisdiction issues (e.g. arbitration recommended)?

We foresee the following eventual problems in case of enforcement of foreign sentences or awards related to ISDA transactions:

a. Netting clauses / set-off: As we mentioned before, set-off is only possible in case:

1. Each obligation must consist on a monetary obligation or in an obligation involving fungible things or undetermined choses of the same gender and kind.

2. Both obligations must be due and determined.

3. Both obligations must be payable.

4. In any case, the parties shall be debtors of each other.

Thus, it is not possible set-off in case of (i) immature or contingent debt and (ii) debts with subsidiaries not parties of the agreement.

Also, please bear in mind that if the counterparty is a corporation and a limited liability company, it has submitted itself to a creditors' arrangement process and this process has been accepted by the Superintendency of Companies, Securities and Insurance, a suspicious period of 180 days will be applied to obligations terminated by means of close out netting.

This creditors' arrangement process (called "concurso preventivo de acreedores" or "*concordato*") applies to non-financial and non-insurance corporations and limited liability companies in an arrangement process looking for debtor's relief. This suspicious period applies because in a close out netting debts that are not due could be paid.

b. Compound interest: Compound interest are prohibited in our Constitution and in other laws. Thus, it will be against public policy and it will be difficult to enforce the provisions of a foreign sentence or foreign award contemplating compound interest.

For further information and advice on the application of the laws of Ecuador to OTC derivatives transactions as well as enforceability of ISDA Master Agreement, please contact:

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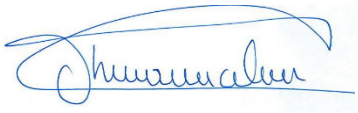
Yours sincerely,



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