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**UNIDROIT Committee of governmental experts
on the enforceability of close-out netting
provisions
First session
Rome, 1 – 5 October 2012**

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**Draft Principles regarding the
enforceability of close-out netting provisions**

COMMENTS

(submitted by Governments and Organisations)

INTRODUCTION

Subsequently to the comments (C.G.E./Netting/1/W.P. 3-6) on the text of the UNIDROIT Draft Principles regarding the enforceability of close-out netting provisions (C.G.E./Netting/1/W.P. 2 and Addendum) for consideration by the Committee of Governmental Experts on the enforceability of close-out netting provisions at its first session from 1 to 5 October 2012, the UNIDROIT Secretariat received comments from the Government of Brazil. These comments are reproduced hereunder.

COMMENTS SUBMITTED BY MEMBER STATES

Brazil

Introduction

We congratulate UNIDROIT for its initiative of developing the Draft Principles regarding the enforceability of close-out netting provisions. We do believe that the main issue that inspires this work is the effort to establish international harmonized rules to prevent systemic risks, which could lead to a financial system collapse.

In this sense, some aspects of the current version of the Draft Principles raised a few concerns about its scope and the compatibility of the Principles with the necessity to protect the financial system as a whole. These concerns are presented below, and we hope that they can be addressed in the First Session of the Committee of Governmental Experts.

Principle 2: Definition of 'eligible party'

The reference made in this Principle to 'persons' is not sufficient so as to consider collective investment vehicles who may not necessarily be entitled in this category. This problem can be addressed through a simple drafting change in subparagraph (c), that should read as follows:

c) any other person or legal entity designated as an eligible party under the law of the relevant State.

Principles 2 and 3: Definitions of 'eligible party' and 'eligible obligation'

In light of what we said previously, we believe that the scope and definitions expressed in Principles 2 and 3 should be set having in mind the perspective of preventing systemic risks in financial markets. Consequently, it makes no sense to leave the definition of eligible parties and eligible obligations as broad as possible, as seems to be the case of the Draft Principles.

A limitation/restriction of the content of such definitions appears to be more appropriate, as suggested by France in document C.G.E./Netting/1/W.P.4.

Principles 4-6 on formal requirements for close-out netting provisions

The same concern mentioned above should apply for Principles 4-6, especially in two topics.

First, we understand that the reference to "any formal act" in Principle 4 should demand further discussion in order to exclude specific regulatory requirements such as those existing for derivative contracts.

Second, we also believe that there should be an explicit exclusion from the scope of Principle 6 of any control, filing or registration requirements that may exist to prevent systemic risks or ensure full and fair disclosure in capital markets.