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1 ANNEX ON FINANCIAL SERVICES

1.1 Text of Annex on Financial Services

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- (i) activities conducted by a central bank or monetary authority or any other public entity in pursuit of monetary or exchange rate policies;
- (ii) activities forming part of a statutory system of social security or public retirement plans; and
- (iii) other activities conducted by a public entity for the account or with the guarantee or using the financial resources of the Government.

(c) For the purposes of subparagraph 3(b) of Article I of the Agreement, if a Member allows any of the activities referred to in subparagraphs (b) (ii) or (b) (iii) of paragraph 3 to be conducted by its financial service suppliers in competition with a public entity or a financial service supplier, 'services' shall include such activities.

(d) Subparagraph 3(c) of Article I of the Agreement shall not apply to services covered by this Annex.

2. Domestic Regulation

(a) Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's obligations under the Agreement.

3. Recognition

(a) A Member may recognize prudential measures of any other country in determining how the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

(b) A Member that is a party to such an agreement or arrangement referred to in subparagraph (a), whether future or existing, shall afford adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that such circumstances exist.

(c) Where a Member is contemplating according recognition to prudential measures of any other country, paragraph 4(b) of Article VII shall not apply.

4. Dispute Settlement

Panels for disputes on prudential issues and other financial matters shall have the necessary expertise relevant to the specific financial service under dispute.

5. Definitions

For the purposes of this Annex:

(a) A financial service is any service of a financial nature offered by a financial service supplier of a Member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance). Financial services include the following activities:

Insurance and insurance-related services

(i) Direct insurance (including co-insurance) :

(A) life

(B) non-life

(ii) Reinsurance and retrocession;

(iii) Insurance intermediation, such as brokerage and agency;

(iv) Services auxiliary to insurance, such as consultancy, actuarial, risk

assessment and claim settlement services

- (E) transferable securities;
- (F) other negotiable instruments and financial assets, including bullion.
- (xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;
- (xii) Money broking;
- (xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;
- (xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;
- (xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;
- (xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

(b) A financial service supplier means any natural or juridical person of a Member wishing to supply or supplying financial services but the term 'financial service supplier' does not include a public entity.

- (c) 'Public entity' means:
 - (i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or
 - (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions.

1.2 Paragraph 1(a)

1.2.1 Measures "affecting the supply of financial services"

1. The Panel in Argentina – Financial Services examined the meaning of the phrase "affecting

identified by the parties were listed under paragraph 5(a) of the Annex on Financial Services. The Panel further noted:

"[B]efore listing the 'financial services' to which we have referred, paragraph 5 of the Annex on Financial Services defines the concept of 'financial services' as 'any service of a financial nature offered by a financial service supplier of a Member'. It is therefore our understanding that all the services subsequently listed in paragraph 5 of the Annex are services of 'a financial nature'."³

1.3 Paragraph 2(a)

1.3.1 Nature of paragraph 2(a) and burden of proof

3. In a finding not reviewed by the Appellate Body, the Panel in *Argentina – Financial Services* concluded that "paragraph 2(a) constitutes a justification for measures that are inconsistent with the GATS and is therefore in the nature of an 'exception'." ⁴ The Panel found, accordingly, that the burden of proof lies with the defendant. ⁵

4. In this same dispute, the Panel further considered that, to avail itself of the prudential exception in paragraph 2(a) of the Annex on Financial Services, the defendant, as the party invoking that exception, "needs to satisfy three requirements: (i) that [the measures at issue] are measures 'affecting the supply of financial services'; (ii) that [the measures at issue] were taken 'for prudential reasons'; and (iii) that [the measures at issue] have not been used 'as a means of avoiding [the defendant's] commitments or obligations' under the GATS." ⁶

1.3.2 Scope of paragraph 2(a)

5. In *Argentina – Financial Services*, Panama appealed the Panel's findings that paragraph 2(a) of the Annex on Financial Services "covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a)" of the Annex. ⁷ Panama alleged that the Panel had failed to give meaning to the term "Domestic Regulation" in the title of paragraph 2 of the Annex on Financial Services, and in doing so, had failed to interpret the prudential exception correctly. ⁸ The Appellate Body therefore examined the scope of paragraph 2(a) of the Annex on Financial Services.

6. The Appellate Body observed, first, that the word "measure" appears in both sentences of paragraph 2(a) and that "[o]n its face, neither sentence identifies a particular type of measure that may fall within the scope of paragraph 2(a)." ⁹ The Appellate Body then noted that:

"[P]aragraph 1(a) of the Annex on Financial Services establishes the scope of all provisions in this Annex, and, as a result, it assists in establishing the scope of the measures that are covered under paragraph 2(a). Paragraph 1(a) stipulates that the Annex 'applies to measures affecting the supply of financial services'. The use of the phrase 'measures affecting the supply of financial services' in paragraph 1(a) supports the view that paragraph 2(a) does not impose specific restrictions on the types of measures falling within its scope. ¶n13 Td [(m)-1.3 (e)- (ta)20.3 g7ody.64 0(i)] [(249in)0TJ 0.06 0 Td [5 (.)-21-1 (rc 0(th 0

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transport networks and services are to be granted in order to enable the supply of services. Section 5 explicitly seeks to enB2Tgt2epSSB2Tgt2 (k0a()0.7t(n)-1 (a2e)2Be21xTw 0.8 0 Td [(D)-2.3 (S