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1 ANNEX ON FINANCIAL SERVICES

1.1 Text of Annex on Financial Services

Annex on Financial Services

1. Scope and Definition

(a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the Agreement.

(b) For the purposes of subparagraph 3(b) of Article I of the Agreement, 'services supplied in the exercise of governmental authority' means the following:

- (i) activities conducted by a central bank or monetary authority or by 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 this paragraph 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 commitments or obligations under the Agreement.

(b) Nothing in the Agreement shall be construed to require a Member to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

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.

Banking and other financial services (excluding insurance)

- (v) Acceptance of deposits and other repayable funds from the public;
- (vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;
- (vii) Financial leasing;
- (viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;
- (ix) Guarantees and commitments;
- (x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:
 - (A) money market instruments (including cheques, bills, certificates of deposits);
 - (B) foreign exchange;
 - (C) derivative products including, but not limited to, futures and options;
 - (D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;

- (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 the supply of financial services" in paragraph 1(a) of the Annex. With respect to the meaning of the word "affecting", the Panel referred to the Appellate Body's interpretation, in *EC – Bananas III*, of the phrase "measures by Members affecting trade in services" in Article I:1 of the GATS (see the Section on Article I:1 of the GATS), and found:

"[I]n determining whether the measure 'affects' the supply of financial services within the meaning of paragraph 1(a) of the Annex on Financial Services, the Panel can be guided by this jurisprudence of the Appellate Body. This leads us to the view that the word 'affecting' in paragraph 1(a) of the Annex on Financial Services has a broader scope than such terms as 'regulating' or 'governing' and therefore covers any measure that has 'an effect on' the supply of financial services.

We recall that we have already concluded that the eight measures at issue, and hence measures 5 and 6, are measures 'affecting trade in services' within the meaning of Article I:1 of the GATS. Likewise, we have concluded that both measure 5 and measure 6 are inconsistent with Article II:1 of the GATS. In our view, if a measure is covered by the GATS since it affects trade in services and has been found to be inconsistent with that Agreement, it must be considered to be a measure 'affecting' the supply of services."¹

2. The Panel also observed that the measure at issue "must 'affect' the supply of a particular type of services, namely, financial services".² In determining whether the services whose supply was affected by the measures at issue were "financial" in nature, the Panel noted that the services

¹ Panel Report, *Argentina – Financial Services*, paras. 7.855-7.856.

² Panel Report, *Argentina – Financial Services*, para. 7.853.

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."¹⁰

7. The Appellate Body also noted that the introductory clause "[n]otwithstanding any other provisions of the Agreement" in the first sentence of paragraph 2(a) is also relevant to the understanding of the scope of measures covered by this provision:

³ Panel Report, *Argentina – Financial Services*, para. 7.857.

⁴ Panel Report, *Argentina – Financial Services*, para. 7.814.

⁵ Panel Report, *Argentina – Financial Services*, para. 7.816.

⁶ Panel Report, *Argentina – Financial Services*, para. 7.851.

⁷ Appellate Body Report, *Argentina – Financial Services*, para. 6.242, referring to Panel Report, para. 7.847.

⁸ Appellate Body Report, *Argentina – Financial Services*, para. 6.247.

⁹ Appellate Body Report, *Argentina – Financial Services*, para. 6.253.

¹⁰ Appellate Body Report, *Argentina – Financial Services*, para. 6.253.

"The ordinary meaning of the term 'notwithstanding', on the basis of its relevant dictionary definition, is 'in spite of, without regard to or prevention by'. This means that, under paragraph 2(a), a Member shall not be prevented from taking measures for prudential reasons despite its obligations under 'any other provisions of the Agreement', provided that such measures fulfil all of the requirements of paragraph 2(a).¹¹ This understanding of the meaning of the introductory clause of paragraph 2(a) is confirmed by the second sentence of paragraph 2(a). Specifically, the second sentence states that '[w]here such measures do not conform with *the provisions of the Agreement*, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement.' The reference to 'the provisions of the Agreement' suggests that this sentence also relates to inconsistencies with *any other provision* of the GATS."¹²

8. For the Appellate Body, the fact that paragraph 2(a) covers violations of obligations under "*any other provisions* of the Agreement" means that this provision "could be invoked to justify inconsistencies with all of a Member's obligations under the GATS".¹³ The Appellate Body held:

"These include, for example, a Member's most-favoured-nation treatment obligation under Article II, market access commitments under Article XVI, or national treatment obligation under Article XVII. This indicates that, for example, measures which are of the types listed in Article XVI:2, and which impose market access restrictions for prudential reasons, could potentially fall within the scope of paragraph 2(a). The type of measure taken by a Member (such as market access restrictions) and the provision of the GATS contravened by such measure (such as Article XVI) are distinct, but related, concepts."¹⁴

9. Turning to the title of paragraph 2 of the Annex on Financial Services, "Domestic Regulation", the Appellate Body noted that "the title forms part of the text of paragraph 2" and found that:¹⁵

"[T]he meaning and function to be attributed to the title should be consistent with a proper interpretation of paragraph 2(a) itself. In this respect, we note that the Appellate Body has, in prior cases, referred to the title of a provision to reinforce its interpretation of the text of that provision.¹⁶ Neither the Annex on Financial Services nor the GATS itself contains a definition of the term 'domestic regulation'.

Nonetheless, the context provided by Article VI of the GATS, which is also entitled 'Domestic Regulation', may shed some light on the meaning and function of the title of paragraph 2(a). The provisions of Article VI refer to a variety of measures, ranging from 'measures of general application affecting trade in services' in Article VI:1, 'administrative decisions affecting trade in services' in Article VI:2, and 'authorization ... for the supply of a service' in Article VI:3, to licensing requirements, qualification requirements and procedures, and technical standards in Articles VI:4 and VI:5(a), and 'adequate procedures to verify the competence of professionals of any other

¹¹ (*footnote original*) We note that the Appellate Body interpreted a similar phrase in the same way in *EC – Tariff Preferences*, finding that the phrase '[n]otwithstanding the provisions of Article I of the General Agreement' 'permits Members to provide 'differential and more favourable treatment' to developing countries in spite of the [most-favoured-nation obligation] of Article I:1' of the GATT 1994. (Appellate Body Report, *EC – Tariff Preferences*, para. 90) The Appellate Body also noted that paragraph 1 of the Enabling Clause 'thus excepts Members from complying with the obligation contained in Article I:1 for the purpose of providing differential and more favourable treatment to developing countries, provided that such treatment is in accordance with the conditions set out in the Enabling Clause'. (Ibid.)

¹² Appellate Body Report, *Argentina – Financial Services*, para. 6.254.

¹³ Appellate Body Report, *Argentina – Financial Services*, para. 6.255.

¹⁴ Appellate Body Report, *Argentina – Financial Services*, para. 6.255.

¹⁵ Appellate Body Report, *Argentina – Financial Services*, para. 6.257.

¹⁶ (*footnote original*) E.g. in *US – Carbon Steel*, after reviewing the text of Articles 11.9 and 21.3 of the Agreement on Subsidies and Countervailing Measures and the context contained in the eleven paragraphs of Article 11 of that Agreement, the Appellate Body noted that the various paragraphs of Article 11 'set forth rules of a mainly procedural and evidentiary nature' and that '[a]ll of them relate to the authorities' initiation and conduct of a countervailing duty *investigation*.' The Appellate Body noted that this understanding is consistent with 'the overall title of Article 11 – '*Initiation and Subsequent Investigation*.' (Appellate Body Report, *US – Carbon Steel*, para. 67 (emphasis original))

Member' in Article VI:6. In our view, the broad scope of measures potentially covered by Article VI indicates that its title, 'Domestic Regulation', should also be construed in a broad sense and should not serve the function of restricting the types of measures falling under that provision. Similarly, the title of paragraph 2(a), like that of Article VI, in our view, does not serve such a function."¹⁷

10. The Appellate Body also considered that the definitions provided in Article XXVIII of the GATS provide useful context for interpreting the Annex on Financial Services, and found that "[t]he use of the word 'any' in the terms 'any measure' and 'any other form' suggests that Article XXVIII(a) contains no *a priori* exclusion of the type or form that a measure may take under the GATS, including under the Annex on Financial Services". The Appellate Body hence concluded that "the text of paragraph 2(a) of the Annex on Financial Services, read in the light of the scope and definition of the term 'measure' in both paragraph 1(a) of the Annex and Article XXVIII(a) of the GATS, indicates no restrictions on the type or form of a 'measure' falling under paragraph 2(a) of the Annex."¹⁸

11. Finally, turning to the object and purpose of the GATS, the Appellate Body noted that both the third and fourth recitals of the preamble of the GATS refer to Members' "national policy objectives". For the Appellate Body:

"The 'national policy objectives' referred to in the preamble could be pursued through various means, including through measures taken pursuant to paragraph 2(a) of the Annex on Financial Services, provided that the measures 'affect[] the supply of financial services', are taken 'for prudential reasons', and are not 'used as a means of avoiding' the Member's GATS commitments or obligations. An interpretation limiting the types of measures that could potentially fall under paragraph 2(a) would not be in consonance with the balance of rights and obligations that is expressly recognized in the preamble of the GATS."¹⁹

12. On the basis of the foregoing analysis, the Appellate Body concluded that "[a]n interpretation of paragraph 2(a) on the basis of its text, read in the light of its context and the object and purpose of the GATS, indicates that paragraph 2(a) does not impose specific restrictions on the types of 'measures affecting the supply of financial services' falling within its scope, provided that they also fulfil the other requirements of paragraph 2(a)."²⁰ The Appellate Body therefore considered that its interpretation of paragraph 2(a) of the Annex on Financial Services comported with the Panel's interpretation that this provision "covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a)" of the Annex.²¹

1.3.3 "measures for prudential reasons"

13. The Panel in *Argentina – Financial Services* considered that the terms "measures for prudential reasons" and "prudential measures" were not synonyms:

"The Panel is not convinced ... that the two concepts – 'measures for prudential reasons' and 'prudential measures' – signify the same thing or have the same effects. Firstly, we note that the prudential exception does not speak of 'prudential measures' but of 'measures for prudential reasons'. We therefore consider that it is the reason which must be 'prudential' and not the measure *per se*. The meaning of the two expressions cannot be the same and, in our opinion, this is an important aspect to be borne in mind when interpreting this provision. In other words, the GATS does not seek to identify measures that could be characterized as *specifically* prudential, such as those usually cited in the context of the standards defined by the Basel Committee on Banking Supervision.²² Nor does paragraph 2(a) of the Annex on Financial Services

¹⁷ Appellate Body Report, *Argentina – Financial Services*, para. 6.258.

¹⁸ Appellate Body Report, *Argentina – Financial Services*, para. 6.259.

¹⁹ Appellate Body Report, *Argentina – Financial Services*, para. 6.260.

²⁰ Appellate Body Report, *Argentina – Financial Services*, para. 6.261.

²¹ Appellate Body Report, *Argentina – Financial Services*, para. 6.262.

²² (*footnote original*) See the 'Core principles for effective banking supervision', established by the Basel Committee on Banking Supervision, in particular Principles 14 to 29 relating to 'prudential regulations and

refer to any international norm to be used as a guide when deciding on the nature of a measure in the light of the Agreement. Rather, instead of exempting a specific *type* of measures from the obligations and commitments under the GATS, the exception makes it possible to exempt or exonerate any measure affecting the supply of financial services that has been taken '*for prudential reasons*'.²³

14. The Panel also considered that, in order to answer the question of what is meant by a measure being taken "for prudential reasons" in paragraph 2(a) of the Annex on Financial Services, it should divide its analysis into two parts: it should examine, first, the meaning of the concept "prudential reasons" and, second, "what is meant by a measure having been taken 'for' prudential reasons".²⁴ See sections 1.3.4 and 1.3.5 below.

1.3.4 The meaning of the term "prudential reasons"

15. The Panel in *Argentina – Financial Services* examined the ordinary meaning of the term "prudential reasons" in Spanish, English and French, and found that "[a]ll these definitions, whatever the official language we examine, tend to characterize the expression 'prudential reasons' (*'motivos cautelares', 'raisons prudentielles'*) as 'causes' or 'reasons' of a 'preventive' or 'precautionary' nature".²⁵ The Panel considered that "this understanding of the concept 'prudential reasons' as referring to 'preventive or precautionary reasons' finds support in the list of prudential reasons set out in paragraph 2(a) of the Annex on Financial Services".²⁶ For the Panel, this list "throws light on the type of 'prudential reasons' envisaged in" paragraph 2(a) of the Annex and, as it follows the word "including", "the list of reasons should be regarded as indicative and not exhaustive".²⁷ The Panel further observed:

"The indicative list of prudential reasons in paragraph 2(a) of the Annex on Financial Services includes by way of example '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'. These examples are in themselves extremely broad and point to various aspects of prudential reasons – aspects that have to do, *inter alia*, with the protection of consumers of financial services broadly speaking or with the maintenance of the integrity and stability of the financial system. Being merely illustrative, the list contained in paragraph 2(a) could include other prudential reasons beyond those explicitly cited."²⁸

16. The Panel opined that "the meaning and importance that Members attach to these prudential reasons may vary over time, depending on different factors, including the perception of the risk prevailing at different points in time".²⁹ The Panel also recalled that:

"[O]n various occasions the Appellate Body has stated that Members, in applying concepts equally important for society, such as those covered by Article XX of the GATT 1994, are entitled to determine the level of protection they consider appropriate. This was also the conclusion of the panel in *US – Gambling*, with reference to other policy objectives under Article XIV of the GATS.

Although these statements were made in the context of Articles XX of the GATT 1994 and XIV of the GATS, we believe that they also apply to prudential reasons such as 'the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier' or 'the integrity and stability of the financial system' within the framework of paragraph 2(a) of the Annex on Financial Services. The nature and scope of financial regulation at different times reflect the knowledge, experience and scales of values of governments at the moment in

requirements' (September 2012 version, Spanish text can be viewed at: http://www.bis.org/publ/bcbs230_es.pdf).

²³ Panel Report, *Argentina – Financial Services*, para. 7.861.

²⁴ Panel Report, *Argentina – Financial Services*, para. 7.863.

²⁵ Panel Report, *Argentina – Financial Services*, para. 7.867.

²⁶ Panel Report, *Argentina – Financial Services*, para. 7.868.

²⁷ Panel Report, *Argentina – Financial Services*, para. 7.868.

²⁸ Panel Report, *Argentina – Financial Services*, paras. 7.868-7.869.

²⁹ Panel Report, *Argentina – Financial Services*, para. 7.870.

question. We therefore consider that WTO Members should have sufficient freedom to define the prudential reasons that underpin their measures, in accordance with their own scales of values."³⁰

17. The Panel concluded that its interpretation "corresponds to the object and purpose of the GATS, as set out in its own preamble, which recognizes 'the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives'".³¹

1.3.5 Measures taken "for" prudential reasons

18. In *Argentina – Financial Services*, the Panel examined the question of when a measure is taken "for" prudential reasons. The Panel started with the following observation:

"Carrying out an appropriate examination to determine whether a measure has been taken for prudential reasons is no easy task. If we compare paragraph 2(a) of the Annex on Financial Services with the general exceptions of Articles XIV of the GATS and XX of the GATT 1994, we note that, unlike some of the subparagraphs of these provisions, the prudential exception does not require the measures to be 'necessary'. Hence it does not seem obvious to us *a priori* that the text of paragraph 2(a) of the Annex on Financial Services justifies the imposition of a 'necessity' test requiring the measure to be the least trade-restrictive, as established within the context of the general exceptions of the GATT 1994 and the GATS. In this respect, we agree with the parties and various third parties. For Argentina, the prudential exception does not justify the use of a 'necessity' test or other more deferential standard, such as that stemming from the expression 'relating to'. Panama does not refer to a 'necessity' test, but considers that the measures must have been taken for a 'specific cause or reason'. According to Panama, it is the *prudential* nature of the measure taken by the respondent that should be the subject of the closest scrutiny by a panel in this phase of the examination. The European Union considers that, unlike many of the paragraphs in Article XX of the GATT 1994 and Article XIV of the GATS, which specify that the measure must be 'necessary' for achieving the legitimate objective, paragraph 2(a) does not require that the measure should be the least trade-restrictive means of achieving the stated objective. According to the United States, the expression 'for prudential reasons' neither requires nor permits an assessment of the extent to which the measure contributes to the realization of the end pursued."³²

19. The Panel similarly considered that it could not "simply transpose the previous rulings by the Appellate Body with respect to Article XX(g) of the GATT 1994, which allow the adoption of inconsistent measures 'relating to the conservation of ... resources ...'".³³

20. Looking at the ordinary meaning of the preposition "for" in Spanish, English and French, the Panel in *Argentina – Financial Services* found that "[a] measure taken 'for' prudential reasons would therefore be a measure with a prudential cause".³⁴ The Panel then noted:

"Argentina's interpretation – in proclaiming a 'rational relationship' between the measure and its prudential objective and that the measure must be fit for the purpose of preventing the event, or the effects resulting therefrom, which the measure is intended to avoid – seems to us to be in keeping with the idea derived from the meaning of the words 'for' and 'reasons' that in the measure's design, structure and architecture there must be a rational relationship of cause and effect between the measure and the prudential reason for it."³⁵

21. The Panel rejected the proposition that "prudential measures" should be transitional, provisional or short term in nature and that they should remain in place only for as long as the

³⁰ Panel Report, *Argentina – Financial Services*, paras. 7.870-7.871.

³¹ Panel Report, *Argentina – Financial Services*, para. 7.872.

³² Panel Report, *Argentina – Financial Services*, para. 7.884.

³³ Panel Report, *Argentina – Financial Services*, para. 7.885.

³⁴ Panel Report, *Argentina – Financial Services*, para. 7.888.

³⁵ Panel Report, *Argentina – Financial Services*, para. 7.889.

factual circumstances that justified their adoption continue to exist. The Panel explained in this regard:

"Firstly, we recall that, as indicated earlier, the expression 'prudential measures' does not appear as such in paragraph 2(a), since that paragraph refers to 'measures for prudential reasons'. Secondly, nothing in the ordinary meaning of the words 'prudential reasons' conveys the idea of a time-limit, either for the reasons or for the measures. Finally, even if we were to accept that precautions are limited to situations of imminent danger, we cannot agree with Panama's premise that the existence of 'imminent' danger necessarily and solely calls for measures of a 'transitional, provisional or short-term' nature. As a matter of principle, an 'imminent' danger may give rise to long-lasting measures to avoid the recurrence of similar situations in the future. Therefore, in our opinion, the measures for prudential reasons envisaged in paragraph 2(a) of the Annex on Financial Services may be urgent measures to confront an imminent risk, temporary or provisional measures, or even permanent (or long-lasting) measures, which might be taken even in the absence of an imminent risk that would prevent fulfilment of one of the motives or reasons mentioned in that paragraph. In our view, it is the nature of the situation that threatens a particular prudential objective that will dictate the nature of the measure."³⁶

22. In a finding not reviewed by the Appellate Body, the Panel in *Argentina – Financial Services* concluded that a measure is taken "for" prudential reasons when there is a "rational relationship of cause and effect" between the measure at issue and the prudential reason provided:

"Hence, it seems to us that the use of the word 'for' in the phrase 'measures for prudential reasons' denotes a rational relationship of cause and effect between the measure and the prudential reason. Thus, the Member taking the measure in question must demonstrate that in its design, structure or architecture there is a rational relationship of cause and effect between the measure it seeks to justify under paragraph 2(a) and the prudential reason provided. A central aspect of this rational relationship of cause and effect is the adequacy of the measure to the prudential reason, that is, whether the measure, through its design, structure and architecture, contributes to achieving the desired effect. Whether a measure has been taken 'for prudential reasons', that is, whether there is a rational relationship of cause and effect between the measure and the reason, can only be determined on a case-by-case basis, taking account of the particular characteristics of each situation and each dispute."³⁷

1.4 Relevance of the Annex on Financial Services for other parts of the GATS

23. The Panel in *Mexico – Telecoms* was reluctant to place too much weight on the wording of the Annex on Financial Services to interpret the scope of the Annex on Telecommunications:

"Mexico contrasts the scope provision of the Annex [on Telecommunications] with the provisions on 'Scope and Definition contained in Section 1 of the Annex on Financial Services, and argues that the former only applies to access to and use of public telecommunications transport networks and services, whereas the latter applies to 'supply'. Mexico is of the view that, where the negotiators of the GATS intended that an Annex was to apply to the 'supply' of a service, they stated this explicitly. According to Mexico, the Annex [on Telecommunications] distinguishes between *access to and use of* public telecommunications transport networks and services, which is relevant to telecommunications services as an underlying transport means for other economic activities, and the *supply* of such services, which is relevant to trade in telecommunications services as a distinct sector of economic activity.

We agree that the Annex [on Telecommunications] addresses measures affecting 'access to and use of' public telecommunications transport networks and services, and *not* the supply of services. However, 'access to and use of' public telecommunications

³⁶ Panel Report, *Argentina – Financial Services*, para. 7.890.

³⁷ Panel Report, *Argentina – Financial Services*, para. 7.891.

transport networks and services are to be granted in order to enable the supply of services. Section 5 explicitly seeks to ensure that access to and use of public telecommunications transport networks and services is granted 'for the supply of a service included in [a Member's] Schedule'. While the Annex is neutral as to the services that can be supplied through access to and use of public telecommunications transport networks and services, the Annex on Financial Services only 'applies to measures affecting the supply of financial services'. The fact that Members devoted an annex to measures affecting the supply of services in one specific services sector – financial services – does not provide a basis for interpreting the scope of another annex – on telecommunications networks and services – which differs significantly in structure and objective."³⁸

24. The Panel in *China – Electronic Payment Services* considered the relevance of the Annex on Financial Services for purposes of interpreting entries in a GATS Schedule. The Panel observed:

"Article XXIX of the GATS (*Annexes*) states that '[t]he Annexes to this Agreement are an integral part of this Agreement'. Pursuant to that provision, the GATS Annex on Financial Services is treaty text. Moreover, it constitutes context for purposes of interpreting China's Schedule, which is itself an integral part of the GATS. Paragraph 5 (*Definitions*) of the Annex contains several definitions and a classification of financial services that WTO Members may use – and many of them did use – when scheduling their commitments on financial services. We recall that China stated that it scheduled its financial services commitments by reference to the definition of financial services set forth in the Annex. We shall therefore turn to the Annex as relevant context for the interpretation of China's Schedule."³⁹

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³⁸ Panel Report, *Mexico – Telecoms*, paras. 7.282-7.283. Along the same lines, the Panel in *Korea – Commercial Vessels* questioned the relevance of the wording of the GATS Annex on Financial Services to the interpretation of a provision of the SCM Agreement. See Panel Report, *Korea – Commercial Vessels*, para. 7.47.

³⁹ Panel Report, *China – Electronic Payment Services*, para. 7.139.