**WORLD TRADE ORGANIZATION**

**WT/DS413/R**
16 July 2012

(12-3729)

Original: English

# CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

***Report of the Panel***

**TABLE OF CONTENTS**

## LIST OF ANNEXES

### ANNEX A

EXECUTIVE SUMMARIES OF THE FIRST WRITTEN SUBMISSIONS OF THE PARTIES



### ANNEX B

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF, OF THE PARTIES AT THE FIRST SUBSTANTIVE MEETING



### ANNEX C

WRITTEN SUBMISSIONS AND ORAL STATEMENTS, OR INTERGRATED SUMMARIES THEREOF, OF THE THIRD PARTIES

## ANNEX D

EXECUTIVE SUMMARIES OF THE SECOND WRITTEN SUBMISSIONS OF THE PARTIES



## ANNEX E

ORAL STATEMENTS OR EXECUTIVE SUMMARIES THEREOF, OF THE PARTIES AT THE SECOND SUBSTANTIVE MEETING



## ANNEX F

REQUEST FOR A PRELIMINARY RULING



## ANNEX G

EXCERPT OF CHINA'S SCHEDULE



## ANNEX H

TABLE OF TRANSLATIONS OF LEGAL MEASURES AND OTHER INSTRUMENTS

## ABBREVIATIONS OF MEASURES, CERTAIN EVIDENCE, AND OTHER SELECTED INSTRUMENTS REFERRED TO IN THIS REPORT[1]

| Short Titles | Full Titles |
|---|---|
| American Express 2010 Annual Report | US SEC Form 10-K, American Express Company Annual Report, for the fiscal year ended November 30, 2010 (Exhibit US-7) |
| BIS Red Book 2003 | BIS Red Book 2003, Payment Systems in the United States (Exhibit US-11) |
| CUP's Articles of Association | The Articles of Association of China UnionPay Co., Ltd. (Exhibit US-20, No Chinese Exhibit) |
| Discover 2010 Annual Report | US SEC Form 10-K, Discover Financial Services Annual Report, for the fiscal year ended November 30, 2010 (Exhibit US-8) |
| Document No. 8 | Announcement of the People's Bank of China on Providing Clearing Arrangements for Banks That Handle Personal RMB Deposits, Exchanges, Bank Cards and Remittance in Macao (PBOC Announcement [2004] No. 8) (Exhibits US-46, CHN-62) |
| Document No. 16 | Announcement of the People's Bank of China on Providing Clearing Arrangements for Banks That Handle Personal RMB Deposit, Exchanges, Bank Cards and Remittance in Hong Kong (PBOC Announcement [2003] No. 16) (Exhibits US-44, CHN-60) |
| Document No. 17 | Measures for the Administration of Bank Card Business (Yin Fa [1999] No.17) (Exhibits US-52, CHN-53) |
| Document No. 37 | Circular of the People's Bank of China on Promulgation of the "Opinions on Implementation of the Work in Bank Card Interoperability in 2001" (Yin Fa [2001] No. 37) (Exhibits US-40, CHN-54) |
| Document No. 49 | Circular of China Banking Regulatory Commission concerning Conduction of the Bank Card Business by Wholly Foreign-invested Banks and Chinese-foreign equity joint venture banks (Yin Jian Fa [2007] No. 49) (Exhibits US-62, CHN-68) |
| Document No. 53 | Circular of the State Administration of Foreign Exchange on Standardizing the Administration of Foreign Currency Bank Cards (Hui Fa [2010] No. 53) (Exhibits US-51, CHN-71) |
| Document No. 57 | Circular of the People's Bank of China on Uniform Use of 'Yin Lian'[2] Logo and its Holographic Label for Anti-counterfeiting (Yin Fa [2001] No. 57) (Exhibits US-41, CHN-55) |
| Document No. 66 | Circular of the State Administration of Foreign Exchange on Regulating the Management of Foreign Currency Bank Cards (Hui Fa [2004] No. 66) (Exhibits US-45, CHN-61) |

[1] When the relevant exhibits were submitted by the United States and by China, this has been indicated.
[2] This is without prejudice to the parties' views on the correct translation of the long title of the instrument.

| Short Titles | Full Titles |
|---|---|
| Document No. 76<br>• Notice of Document No. 76<br>• Business Practices Appendix of Document No. 76 | Notice of the People's Bank of China in Relation to the Issuance of Business Practices for the Interoperable Service of Bank Cards and Appendix on Business Practices for the Interoperable Service of Bank Cards (Yin Fa [2001] No. 76) (Exhibits US-56/US-63, CHN-56) |
| Document No. 94 | Opinions on Bank Card Interoperability Related Work in 2002 by the People's Bank of China (Yin Fa [2002] No.94) (Exhibits US-42, CHN-57) |
| Document No. 103 | Certain Opinions of the People's Bank of China, the National Reform and Development Commission, the Ministry of Public Security, the Ministry of Finance, the Ministry of Information Industry, the Ministry of Commerce, the State Administration of Foreign Exchange, on Promoting the Development of Bank Card Industry (Yin Fa [2005] No. 103) (Exhibits US-1, CHN-65) |
| Document No. 129 | Circular of the People's Bank of China on Further Improving Bank Card Interoperability Related Work (Yin Fa [2003] No.129) (Exhibits US-53, CHN-59) |
| Document No. 142 | Notice of People's Bank of China, the China Banking Regulatory Commission, the Ministry of Public Security and the State Administration for Industry and Commerce on Strengthening the Security Management of Bank Cards and Preventing and Combating Bank Card Crimes (Yin Fa [2009] No. 142) (Exhibits US-55, CHN-69) |
| Document No. 149 | Opinions of the Standing Office of the People's Bank of China on the Circular on Strengthening the Safety Management of Bank Cards and Preventing and Fighting Crimes in Bank Cards by the People's Bank of China, the China Banking Regulatory Commission, the Ministry of Public Security and the State Administration for Industry and Commerce (Yin Ban Fa [2009] No. 149) (Exhibits US-50, CHN-70) |
| Document No. 153 | Guiding Opinions of the People's Bank of China on Regulating and Promoting the Development of Bank Card Acceptance Market (Yin Fa [2005] 153) (Exhibits US-49, CHN-66) |
| Document No. 219 | Notice of the People's Bank of China concerning Relevant Issues on Accepting and Using RMB Bank Cards in Border Areas (Yin Fa [2004] No. 219) (Exhibits US-47, CHN-63) |
| Document No. 254 | Circular on Relevant Issues Concerning the Operation of Individual RMB Business by Mainland Banks and Hong Kong/Macau Banks (Yin Fa [2004] No. 254) (Exhibits US-48, CHN-64) |
| Document No. 272 | Circular Regarding Issues Concerning Bank Card Interoperability Related Work by the People's Bank of China (Yin Fa [2002] No.272) (Exhibits US-43, CHN-58) |
| Document No. 273 | Notice of the People's Bank of China on the Relevant Issues concerning Strengthening the Administration of Overseas Business Acceptance of Bank Cards (Yin Fa [2007] No. 273) (Exhibits US-54, CHN-67) |

| Short Titles | Full Titles |
|---|---|
| FFIEC IT Examination Handbook | Federal Financial Institutions Examination Council (FFIEC), "Retail Payment Systems, IT Examination Handbook" (February 2010) (Exhibit US-12) |
| MasterCard 2010 Annual Report | US SEC Form 10-K, MasterCard Incorporated Annual Report, for fiscal year ended December 31, 2010 (Exhibit US-6) |
| MasterCard 2009 Annual Report | US SEC Form 10-K, MasterCard Incorporated Annual Report, for fiscal year ended December 31, 2009 (Exhibit US-5) |
| Notification of Approval of CUP's Business Licence | Shanghai Municipal Administration for Industry and Commerce, Notification of Business Licence Approval and Issuance for China UnionPay Co., Ltd (March 19, 2002) (Exhibit US-29, No Chinese Exhibit) |
| Visa 2010 Annual Report | US SEC Form 10-K, Visa 2010 Annual Report (as of September 30, 2010) (Exhibit US-4) |
| Visa IPO Prospectus | US SEC Amendment No. 4 to Form S-1 Registration Statement Under Securities Act of 1933, Visa Inc. IPO Prospectus, February 25, 2008, (Exhibit US-3) |

## TABLE OF CASES CITED IN THIS REPORT

| Short Title | Full Case Title and Citation |
|---|---|
| *Argentina – Textiles and Apparel* | Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by Appellate Body Report WT/DS56/AB/R, DSR 1998:III, 1033 |
| *Australia – Apples* | Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, adopted 17 December 2010, as modified by Appellate Body Report WT/DS367/AB/R |
| *China – Publications and Audiovisual Products* | Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010 |
| *China – Publications and Audiovisual Products* | Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R |
| *China – Raw Materials* | Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, circulated to WTO Members 30 January 2012 |
| *China – Raw Materials* | Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R / WT/DS395/R / WT/DS398/R / and Corr.1, circulated to WTO Members 5 July 2011 |
| *EC – Approval and Marketing of Biotech Products* | Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, Add.1 to Add.9, and Corr.1, adopted 21 November 2006, DSR 2006:III-VIII, 847 |
| *EC – Asbestos* | Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243 |
| *EC – Bananas III* | Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591 |
| *EC – Bananas III (Ecuador)* | Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas, Complaint by Ecuador*, WT/DS27/R/ECU, adopted 25 September 1997, as modified by Appellate Body Report WT/DS27/AB/R, DSR 1997:III, 1085 |
| *EC - Hormones* | Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135 |
| *EEC – Apples I (Chile)* | GATT Panel Report, *EEC – Restrictions on Imports of Apples from Chile*, L/5047, adopted 10 November 1980, BISD 27S/98 |
| *India – Patents (US)* | Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9 |
| *Japan - Alcoholic Beverages II* | Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 |

| Short Title | Full Case Title and Citation |
|---|---|
| *Mexico – Telecoms* | Panel Report, *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 1 June 2004, DSR 2004:IV, 1537 |
| *Philippines – Distilled Spirits* | Appellate Body Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/AB/R / WT/DS403/AB/R, adopted 20 January 2012 |
| *Philippines – Distilled Spirits* | Panel Reports, *Philippines – Taxes on Distilled Spirits*, WT/DS396/R / WT/DS403/R, adopted 20 January 2012, as modified by Appellate Body Reports WT/DS396/AB/R / WT/DS403/AB/R |
| *Thailand – Cigarettes (Philippines)* | Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011 |
| *Thailand – Cigarettes (Philippines)* | Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/R, adopted 15 July 2011, as modified by Appellate Body Report WT/DS371/AB/R |
| *Turkey - Rice* | Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, 2151 |
| *US – Carbon Steel* | Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, 3779 |
| *US – COOL* | Panel Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements*, WT/DS384/R / WT/DS386/R, circulated to WTO Members 18 November 2011 |
| *US – Countervailing Measures on Certain EC Products* | Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities*, WT/DS212/AB/R, adopted 8 January 2003, DSR 2003:I, 5 |
| *US – Export Restraints* | Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, 5767 |
| *US – Gambling* | Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475) |
| *US – Gambling* | Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, 5797 |
| *US – Gasoline* | Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3 |
| *US – Gasoline* | Panel Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/R, adopted 20 May 1996, as modified by Appellate Body Report WT/DS2/AB/R, DSR 1996:I, 29 |
| *US – Section 301 Trade Act* | Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815 |
| *US - Shrimp* | Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755 |
| *US – Tuna II (Mexico)* | Panel Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/R, circulated to WTO Members 15 September 2011 |

| Short Title | Full Case Title and Citation |
|---|---|
| *US – Upland Cotton* | Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3 |
| *US – Wool Shirts and Blouses* | Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, 323 |
| *U.S. – Zeroing (EC)* | Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, 417 |

## LIST OF ABBREVIATIONS USED IN THIS REPORT

| | |
|---|---|
| 1993 Scheduling Guidelines | 1993 Guidelines for the Scheduling of Specific Commitments under the GATS (Document MTN.GNS/W/164) |
| 2001 Scheduling Guidelines | Guidelines for the Scheduling of Specific Commitments under the GATS, S/L/92, March 28, 2001 |
| ATM | Automated Teller Machine |
| BIN | Bank Identification Number |
| BIS | Bank for International Settlements |
| CBRC | China Banking Regulatory Commission |
| CPC | 1991 United Nations Provisional Central Product Classification |
| CUP | China UnionPay Co., Ltd |
| DSU | Understanding on Rules and Procedures Governing the Settlement of Disputes |
| EPS | Electronic payment services |
| EPS supplier | Electronic payment services supplier |
| FFI | Foreign Financial Institutions |
| GATS | General Agreement on Trade in Services |
| GATT | General Agreement on Tariffs and Trade |
| PBOC | People's Bank of China |
| POS | Point-of-Sale |
| RCBFCC | Rural Credit Banks Funds Clearing Center |
| RMB | Renminbi |
| Scheduling Guidelines | 1993 Scheduling Guidelines and 2001 Scheduling Guidelines |
| UNOG | United Nations Office at Geneva |
| WTO | World Trade Organization |
| WTO Agreement | Marrakesh Agreement establishing the World Trade Organization |

# I. INTRODUCTION

## A. COMPLAINT OF THE UNITED STATES

1.1 On 15 September 2010, the United States requested consultations with China pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Article XXII of the General Agreement on Trade in Services (GATS) with respect to the measures and claims set out below.[3]

## B. ESTABLISHMENT AND COMPOSITION OF THE PANEL

1.2 On 11 February 2011, the United States requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.[4] At its meeting on 25 March 2011, the Dispute Settlement Body (DSB) established a panel pursuant to the request of the United States in document WT/DS413/2, in accordance with Article 6 of the DSU.[5] The Panel's terms of reference are the following:

> To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by the United States in document WT/DS413/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[6]

1.3 On 23 June 2011, the United States requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 4 July 2011, the Director-General accordingly composed the Panel as follows:

Chairperson: Mr Virachai Plasai

Members: Ms Elaine Feldman
Mr Martín Redrado

1.4 Australia, Ecuador, the European Union, Guatemala, India[7], Japan, and the Republic of Korea reserved their rights to participate in the Panel proceedings as third parties.

## C. PANEL PROCEEDINGS

### 1. General

1.5 On 5 July 2011, China submitted to the Panel a request for a preliminary ruling with respect to the consistency of certain aspects of the United States' panel request with Article 6.2 of the DSU. The Panel issued its preliminary ruling to the parties, with a copy to the third parties, on 7 September 2011. The Panel held a first substantive meeting with the parties on 26-27 October 2011. A session with the third parties took place on 27 October 2011. The Panel held a second substantive meeting with the parties on 13-14 December 2011. On 25 January 2012, the Panel issued the descriptive part of its Panel Report. The Panel issued its Interim Report to the parties on 11 April 2012. The Panel issued its Final Report to the parties on 25 May 2012.

---

[3] WT/DS413/1.
[4] WT/DS413/2.
[5] See WT/DSB/M/294.
[6] WT/DS413/3.
[7] India filed its notification of interest to participate in the Panel proceedings as a third party following the date of the Panel's composition. The Panel included India in the list of third parties after consultations with the parties.

## 2. Preliminary ruling on the consistency with Article 6.2 of the DSU of the United States' request for the establishment of a panel

1.6 China submitted its request for a preliminary ruling to the Panel on 5 July 2011 (see Annex F-1). After consultations with the parties, the Panel decided to issue a preliminary ruling before the date of receipt of the United States' first written submission. The Panel noted that this approach would avoid delay in the proceedings. The Panel provided the United States with an opportunity to submit written comments on China's request and also invited the third parties to submit any written comments they might have in response to the views expressed by the parties. The Panel also provided the parties with an opportunity to request a preliminary ruling hearing to discuss the matter. As neither party requested a hearing on the preliminary ruling issue, the parties were given an opportunity to submit further written comments on the other party's initial written submissions.

1.7 On 29 July 2011, the United States submitted a response to China's request for a preliminary ruling (see Annex F-2). China commented on the United States' submission on 25 August 2011. The United States filed further comments on 30 August 2011. None of the third parties submitted comments on the first set of submissions.

1.8 The Panel issued its ruling to the parties, with a copy to the third parties, on 7 September 2011. The Panel rejected China's preliminary objection of 5 July 2011.[8] After consulting the parties, the Panel requested the Chairperson of the DSB to circulate the ruling to the WTO membership. The ruling was circulated as document WT/DS413/4 on 30 September 2011. The ruling forms an integral part of the findings in Section VII of this report.

## 3. Translation issues

1.9 The United States submitted translations of certain measures at issue in this dispute in its response of 29 July 2011 to China's request for a preliminary ruling and also in its first written submission of 15 September 2011. In a communication to the Panel on 22 September 2011, China identified a number of issues with these translations, alleging that the United States had incorrectly translated certain words or phrases, thereby affecting the original meaning of the measures.

1.10 In a communication to the parties on 12 October 2011, the Panel indicated that it would discuss the translation issues raised by China during the first substantive meeting with the parties. At that meeting the Panel asked the parties if they would be able to agree on a translation from the outset, or otherwise specify those translation issues on which they could not agree. The Panel suggested that, if the parties were unable to agree, an independent translator could be selected in consultation with the parties to provide expert linguistic advice on the correct translation for outstanding issues. The parties agreed to the selection of an independent translator for any outstanding issues. On 9 December 2011, the parties informed the Panel of the translation issues on which agreement had been reached as well as those that could not be resolved.

1.11 At the second substantive meeting, the parties agreed in principle to the Panel's suggestion to appoint, as the independent translator, UN Geneva's (UNOG) Conference Services Division. At this time, the Panel further requested the parties to provide a brief rationale setting out their views on outstanding translation issues to facilitate the independent translator's work. On 4 January 2012, the parties each submitted a brief rationale setting out their views on outstanding translation issues.

1.12 The Panel appointed UNOG as the independent translator on 26 January 2012. This Report will hereinafter refer to the "independent translator" when discussing advice provided by UNOG. The independent translator provided advice to the Panel on the outstanding issues on 15 February 2012.

[8] See WT/DS/413/4, para. 58.

This advice was promptly forwarded to the parties who submitted written comments thereon on 24 February 2012.

## II. FACTUAL ASPECTS

2.1 These proceedings concern a series of legal requirements relating to electronic payment services that the United States alleges are maintained by China. According to the United States, these legal requirements, alone or in combination, "affect electronic payment services for payment card transactions and the suppliers of those services".[9]

2.2 According to the United States, "electronic payment services" involve the following:

> services through which transactions involving payment cards (as defined below) are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated. Suppliers of electronic payment services supply, directly or indirectly, a system that typically includes the following: the processing infrastructure, network, and rules and procedures that facilitate, manage, and enable transaction information and payment flows and which provide system integrity, stability and financial risk reduction; the process and coordination of approving or declining a transaction, with approval generally permitting a purchase to be finalized or cash to be disbursed or exchanged; the delivery of transaction information among participating entities; the calculation, determination, and reporting of the net financial position of relevant institutions for all transactions that have been authorized; and the facilitation, management and/or other participation in the transfer of net payments owed among participating institutions.[10]

2.3 The United States definition of the term "payment card" includes the following:

> a bank card, credit card, charge card, debit card, check card, automated teller machine (ATM) card, prepaid card, and other similar card or payment or money transmission product or access device, and the unique account number associated with that card or product or access device.[11]

2.4 The United States challenges what it alleges to be the following legal requirements:

- requirements that mandate the use of China UnionPay, Co. Ltd. (CUP) and/or establish CUP as the sole supplier of electronic payment services for all domestic transactions denominated and paid in China's domestic currency, renminbi (RMB);
- requirements that payment cards issued in China bear the CUP logo;
- requirements that all automated teller machines (ATM), merchant card processing equipment, and point-of-sale (POS) terminals in China accept CUP cards;
- requirements on acquiring institutions to post the CUP logo and be capable of accepting all bank cards bearing the CUP logo;
- broad prohibitions on the use of non-CUP cards for cross-region or inter-bank transactions; and

[9] WT/DS413/2, p. 1.
[10] See WT/DS413/2, fn 1.
[11] See WT/DS413/2, fn 2.

- requirements pertaining to card-based electronic transactions in Hong Kong, China and Macao, China.[12]

2.5 The United States considers that these requirements are maintained through a series of instruments that are identified in the request for establishment of a panel:[13]

- Document No. 17;
- Document No. 37;
- Document No. 57;
- Document No. 76;
- Document No. 94;
- Document No. 272;
- Document No. 129;
- Document No. 16;
- Document No. 66;
- Document No. 8;
- Document No. 219;
- Document No. 254;
- Document No. 103;
- Document No. 153;
- Document No. 273;
- Document No. 49;
- Document No. 142;
- Document No. 149;
- Document No. 53;
- The "'business specifications' and 'technical standards' that are identified in the instruments above, including in Document No. 17, Document No. 57, Document No. 129, and Document No. 49"; and
- any amendments to date or any related implementing measures "to date".[14]

## III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1 The United States requests that the Panel find that each of the legal requirements identified in the request for the establishment of a panel (and enumerated in paragraph 2.4 above) is inconsistent with China's obligations under Article XVI:1 and XVI:2(a) and Article XVII of the GATS. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with its WTO obligations.

3.2 China requests that the Panel reject the United States' claims in this dispute in their entirety.

[12] United.States' request for the establishment of a panel, pp. 1-4; United States' submission in response to China's request for a preliminary ruling, 29 July 2011 ("United States' response to China's request for a preliminary ruling"), para. 77; Panel's preliminary ruling, para. 15; and United States'. first written submission, paras. 29-31.

[13] See list "Abbreviations of measures, evidence, and other instruments referred to in this Report", p. viii.

[14] See WT/DS413/2, p. 4.

## IV. ARGUMENTS OF THE PARTIES

4.1 The arguments of the parties are reflected in their executive summaries provided to the Panel in accordance with paragraph 16 of the Working Procedures adopted by the Panel (see List of Annexes, pages vi and vii).

## V. ARGUMENTS OF THE THIRD PARTIES

5.1 The arguments of Australia, Ecuador, the European Union, Japan, and the Republic of Korea, are reflected in their executive summaries provided in accordance with paragraph 16 of the Working Procedures adopted by the Panel (see Annex C). Guatemala and India did not submit written or oral arguments to the Panel.

## VI. INTERIM REVIEW

6.1 On 11 April 2012, the Panel submitted its Interim Panel Report to the parties. On 25 April 2012, the United States and China each submitted written requests for the review of precise aspects of the Interim Report. On 9 May 2012, the United States submitted comments on China's requests for review. China did not submit any comments on the United States' requests for review. Neither party requested an interim review meeting.

6.2 In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage. The Panel modified aspects of its Report in the light of the parties' comments where it considered these appropriate, as explained below. References to sections, paragraph numbers and footnotes in this section relate to the Interim Panel Report, except as otherwise noted.

6.3 Turning to the parties' requests, both parties asked the Panel to make certain changes of an editorial nature to improve clarity and accuracy. Accordingly, the Panel made changes to paragraphs 7.35, 7.36, 7.58, 7.154, 7.208, 7.227, 7.311, 7.522 and 8.1; footnotes 1, 12, and 91; and the "Table of Abbreviations of Measures, Evidence and Other Instruments Referred to in this Ruling". The Panel made additional editorial corrections and revisions in response to the parties' comments.

6.4 Regarding footnote 30, the United States requests inclusion of a citation, as an example, to paragraphs 35-54 of its submission in response to China's request for a preliminary ruling, given the reference made in that footnote to submissions made by the United States.

6.5 The Panel notes that footnote 30 supports a section containing a description of technical and commercial aspects of payment card transactions based on information and evidence included in the parties' submissions. This section contains a number of references to the evidence presented by the parties. In the Panel's view, in the specific context of footnote 30, it is not necessary to add the citation requested by the United States.

6.6 Regarding paragraph 7.14, China notes that, in describing the steps in a payment card transaction, the Panel states that "[t]he issuer authorizes transactions at POS terminals, collects payment from the card holder, and transmits the funds *to the payment card company's settlement bank for settlement of payment obligations incurred by the card holder*" (emphasis added by China). The italicized portion of this sentence, China argues, is not accurate in all cases. According to China, there are many payment card systems in which the settlement of payment obligations takes place through a mechanism that is operated independently of a "payment card company". China notes that this could include, for example, an inter-bank funds transfer system operated by the central bank, or a

clearing and settlement mechanism operated by a different company.[15] On the basis of this argument, China requests that the Panel either (i) indicate that it is describing the operations of a particular "payment card company" (in this case, Visa); or (ii) modify the sentence to reflect more broadly the variety of means by which inter-bank payments are effected (e.g., "transmits the funds through the relevant inter-bank payment channel for settlement …").

6.7 The United States considers that identifying a particular payment card company is not necessary. Rather, China's alternative suggestion, as indicated in item (ii) of its comment on paragraph 7.14 (i.e., to "modify the sentence to reflect more broadly the variety of means by which inter-bank payments are effected"), may be an acceptable way to modify the sentence should the Panel consider it appropriate to do so.

6.8 The Panel agrees with the United States that identifying a particular payment card company is not necessary. We accept, however, that it is useful to reflect more broadly the variety of means by which inter-bank payments are effected. As a result, the Panel made appropriate changes to paragraph 7.14 along the lines of China's alternative suggestion.

6.9 Regarding paragraph 7.24, China notes that the second sentence states: "Merchants submit transaction information for clearing and payment to acquirers, *which forward their transaction claims to the relevant payment card company*."(emphasis added by China) China argues that, for the same reasons explained by China in relation to paragraph 7.14, the italicized portion of this sentence is not accurate in all cases. In many systems, China argues, the acquiring bank will place a cleared transaction item directly into an inter-bank settlement mechanism that has no connection to a "payment card company". More generally, according to China, the entirety of paragraph 7.24 is describing the particular type of multilateral deferred net settlement system operated by companies like Visa and MasterCard. This is not the only type of settlement system for payment card transactions, contrary to the impression created by this paragraph. China indicates that Australia's EFTPOS system is a case in point. China explains that within that system, issuing and acquiring financial institutions exchange transaction items directly with each other on a bilateral basis.[16] Once a day, financial institutions use these bilateral transaction items to calculate their credit and debit positions in relation to all other financial institutions, and report these positions to the "Collator", which is operated by the Reserve Bank of Australia.[17] The Collator then calculates the multilateral net positions of the financial institutions and transmits these positions to Australia's high-value inter-bank transfer system (known as RITS) for final settlement.[18] Within this system, acquiring financial institutions do not "forward their transaction claims to the relevant payment card company." In fact, according to the explanation provided by China in this specific request, there is no "payment card company" involved in the process at all.

6.10 For these reasons, China requests that the Panel (i) indicate that paragraph 7.24 is describing the typical model of operations for global network operators like Visa and MasterCard; or (ii) modify the paragraph to reflect more broadly the variety of back-end clearing and settlement mechanisms that are used in payment card systems.

6.11 The United States indicates that it would not object to the inclusion of clarifying language that confirms that there are variations of both the "four-party model" and the "three-party model". However, the United States observes that a company-specific reference is unnecessary. The United States submits that an accurate and acceptable reference would be to describe the process as a "typical

[15] China refers to Exhibits CHN-101 (Australia), CHN-102 (Canada) and CHI-103 (France).
[16] China refers to Exhibit CHN-101, p. 31.
[17] China refers to Exhibit CHN-101, pp. 31-33.
[18] China refers to Exhibit CHN-101, n. 23.

four-party model". The United States also acknowledges that there may be more than one way in which the settlement component of a payment card transaction can be conducted.

6.12 The Panel agrees with the United States that identifying a particular payment card company is not necessary. The Panel also notes that paragraph 7.24 describes the typical back-end processing of payment card transactions in four-party and three-party models. Therefore, we consider that the sentence in question in paragraph 7.24 could be modified along the lines proposed by the United States. As a result, we made relevant changes to the second sentence of paragraph 7.24.

6.13 Regarding paragraph 7.28, the United States requests, for greater accuracy, that the Panel's reference in the second sentence to the United States' definition of "payment cards" be modified to include the phrase "and the unique account number associated with that card or product or access device" as is set forth in the United States' panel request, and as is referred to in paragraph 7.25 of the Interim Report.

6.14 The Panel considers that the requested change would be more faithful to the definition presented by the United States, which is referred to in paragraph 7.28, and therefore the Panel modified paragraph 7.28 accordingly.

6.15 Regarding paragraphs 7.38 to 7.45, China requests that the Panel clarify what the relevant service transaction would be in the case of three-party models. In particular, China requests that the Panel indicate whether it considers that (i) the operators of three-party models supply the services at issue to themselves; (ii) the operators of three-party models supply the services at issue to card holders and/or merchants; or (iii) the Panel has some other understanding of the relevant service transaction in the case of three-party models.

6.16 The United States considers that the particular details China proposes to include regarding three-party models are not necessary to the Panel's analysis. Nor has China offered any explanation as to why these "clarifications" are necessary.

6.17 The Panel notes at the outset that, as pointed out by the United States, China did not offer any explanation as to why the requested clarifications are useful or necessary. It is unclear to us what are the rationale and purpose of those purported clarifications. We recall that paragraphs 7.38 to 7.45 address whether the services at issue cover the three-party model in addition to the four-party model. These paragraphs of the Report should be read in conjunction with the previous sections on payment card transactions and the services at issue. In particular, the main features of three-party models (in contrast with four-party models) are described in paragraphs 7.18 to 7.24 of the Report. In the Panel's view, it is clear from paragraphs 7.23 and 7.24 that operators of three-party models supply their services directly to card holders and merchants. For these reasons, the Panel does not find it necessary or appropriate to make the changes requested.

6.18 Regarding paragraph 7.39, the United States requests that the Panel include a new footnote at the end of the first sentence. The new footnote would refer to United States' responses to Panel question Nos. 25 and 74 and the United States' response to China's request for a preliminary ruling.

6.19 The Panel notes that the United States' responses to Panel question No. 25, paragraphs 81-83, and No. 74, paragraphs 26-28, are referred to in footnote 80, at the end of paragraph 7.39. As regards the requested reference to the United States' response to China's request for a preliminary ruling, in the Panel's view, the United States' arguments cited in paragraph 7.39 do not come from the paragraphs identified by the United States (paragraphs 40-41 and 54)". As a result, the Panel does not find it appropriate to add a new footnote to paragraph 7.39.

6.20 Regarding footnotes 94 and 97, the United States requests that, for completeness, a reference be included to paragraphs 11-14 of its second written submission.

6.21 In the Panel's view, paragraphs 11-14 of the United States' second written submission deal with whether EPS constitute a single integrated service, with a view to substantiating its claim that EPS should be classified in subsector (d) of China's schedule of specific commitments. Having said that, we added a reference to those paragraphs in footnote 94, which contains a summary of the United States' arguments on that issue. As regards footnote 97, we note that the point made in the fifth sentence of paragraph 7.59, to which footnote 97 relates, was not made in paragraphs 11-14 of the United States' second written submission, but in paragraph 17 of that submission. For that reason, we modified footnote 97 to refer to paragraph 17 of the United States' second written submission.

6.22 Regarding paragraph 7.61, the United States requests that the last sentence of this paragraph include a new footnote that refers to specified paragraphs of its submissions and responses to questions.

6.23 The Panel notes that paragraph 7.61 addresses whether the services at issue are integrated services, regardless of their classification in China's schedule of specific commitments. The Panel also notes that paragraphs 35-54 of the United States' response to China's request for a preliminary ruling, as well as paragraph 10 of the United States' first written submission, are not related to the precise issue addressed in paragraph 7.61 of the Report. We also note that the relevant paragraph of the United States' response to Panel question No. 26 is paragraph 84, which is quoted in footnotes 94 and 97 of that section, and that the relevant paragraph of the United States' second written submission is paragraph 17, which we added to footnote 97. For these reasons, the Panel does not find it appropriate or necessary to introduce a footnote to paragraph 7.61 of the Report.

6.24 Regarding paragraph 7.75 and footnote 110**,** the United States requests that the Report reflect that arguments put forward by the United States regarding the ordinary meaning of the service covered in China's subsector (d) also addresses the plain meaning of the phrase "including credit, charge and debit cards". The United States requests the Panel to add a sentence reflecting this argument in either paragraph 7.75 or footnote 110.

6.25 The Panel notes that the phrase "including credit, charge and debit cards" is discussed subsequently in the Report and therefore the Panel included an appropriate reference in footnote 142. The Panel also added an additional reference to United States' arguments in footnote 110.

6.26 Regarding footnotes 131, 152, 163, 181, 217 and 230, the United States requests the Panel to include references to additional paragraphs in United States' submissions that support the arguments cited by the Panel in the paragraphs concerned.

6.27 The Panel included additional relevant references in footnotes 131, 152, 163, 181, 217 and 230.

6.28 Regarding footnote 142, the United States requests that the citations include references to additional paragraphs in United States' submissions that support the argument cited by the Panel, and also indicate that the United States made arguments regarding the ordinary meaning of this phrase.

6.29 The Panel made appropriate additions to footnote 142.

6.30 Regarding footnote 160, the United States requests that the Panel refer to and cite the United States' rebuttal regarding China's letters of credit argument.

6.31 The Panel included in footnote 160 a reference to the United States' rebuttal argument on China's letters of credit argument.

6.32 Regarding footnote 176, the United States requests that for completeness the Panel include the United States' arguments made in its second written submission at paragraphs 103 to 115.

6.33 The Panel does not find it necessary to reflect the requested references to additional United States' arguments in this particular footnote, as these arguments are not specifically summarized in the paragraph to which footnote 176 is attached.

6.34 Regarding footnote 210, the United States requests that the Panel include a citation to relevant United States' arguments made in its second written submission.

6.35 The Panel does not find it necessary to refer to the United States' second written submission in relation to paragraph 7.157 as this paragraph summarizes the response given by the United States to question No. 39(a) by the Panel. However, the Panel modified footnote 210 so as to include a reference to the United States' complete response to Panel question No. 39(a).

6.36 Regarding paragraph 7.209 (and also paragraphs 7.238, 7.299, 7.334 and 7.360), the United States notes that paragraph 7.209 identifies the alleged requirements challenged by the United States. The United States requests that new footnotes be added for each requirement to reflect the United States' arguments as set forth in its submissions. The United States further requests that the Panel modify its description of the issuer, terminal equipment and acquirer requirements to reflect accurately the scope of the United States' claims concerning these requirements. Finally, the United States requests that the Panel make corresponding changes to the subheadings that appear directly under paragraphs 7.238, 7.299, 7.334 and 7.360.

6.37 The Panel added a new footnote at the beginning of paragraph 7.209 to include appropriate references to the United States' submissions and clarified in the first sub-paragraph that the short names for the requirements were chosen by the Panel. We note that the concise descriptions given in paragraph 7.209 of the issuer, terminal equipment and acquirer requirements are those used by the United States in its own submissions, as is clear from the references included in the new footnote. In the light of this, we decline the request to add further elements to these descriptions along the lines proposed by the United States. We recall in this regard that the precise scope of the United States' claims concerning the issuer, terminal equipment and acquirer requirements is discussed in Section VII.E.2(a)-(c) of the Interim Report. As we did not modify the relevant descriptions in paragraph 7.209, but for one editorial change, we also did not make the consequential changes sought by the United States to paragraphs 7.238, 7.299 and 7.334 (except for one corresponding editorial change). In the subheading following paragraph 7.360, we added a missing word, as requested by the United States.

6.38 Regarding paragraph 7.227, the United States requests that the Panel include the concluding sentence from footnote 282 as the new last sentence in paragraph 7.227, and include a new footnote that refers to the United States' response to Panel question No. 70.

6.39 The Panel modified paragraph 7.227 and included a new footnote to reflect the requested change.

6.40 Regarding paragraph 7.228, the United States requests that the Panel modify the eigth sentence to replace the reference to measures "that are currently in force", with a reference that the measures "were in force at the time of panel establishment". The United States submits that the Panel itself referred in paragraphs 7.227 and 7.228 to the time of the panel's establishment as the relevant point in time. It submits further that the Appellate Body in its recent Report on *China – Raw*

*Materials* (paragraphs 260-261) confirmed that the date of panel establishment is the relevant point in time for a panel's analysis.

6.41 The Panel incorporated the United States' suggested change.

6.42 Regarding paragraph 7.289, the United States requests that, at the end of the second sentence, the Panel add specified references to the United States' panel request and written submissions.

6.43 The Panel added a footnote to paragraph 7.289 to include appropriate references to the United States' panel request and written submissions.

6.44 Regarding paragraph 7.290, China comments that the Panel appears to engage in a substantive examination of Document No. 94. China points out that the Panel in paragraph 7.229 states that it declines to take Document No. 94 into account and will not consider it any further. China submits that it is unclear, therefore, why the Panel engaged in this analysis. China suggests that the Panel omit any discussion of Document No. 94.

6.45 The United States responds that the Panel's discussion of Document No. 94 provides useful and important context for the Panel's analysis of the United States' claims. The United States therefore requests that the Panel not omit this discussion.

6.46 In the light of the parties' comments, the Panel finds it appropriate to clarify the relationship of paragraph 7.290 with paragraph 7.229. We therefore made changes to paragraph 7.290 that take into account more clearly and explicitly the Panel's statements in paragraphs 7.221-7.229. We also made a consequential change to footnote 380 of the Interim Report.

6.47 Regarding paragraphs 7.367, 7.368, 7.371, 7.507(d) and 7.606, China requests that the Panel remove findings on the applicability of certain measures to the processing of RMB-denominated payment cards that are issued *and* used in Hong Kong, or issued *and* used in Macao. China considers that the United States, in its panel request, limited the scope of the relevant claims under Articles XVI and XVII of the GATS to (i) those RMB payment card transactions taking place in Macao or Hong Kong using payment cards issued in China, and (ii) those RMB payment card transactions taking place in China using payment cards issued in China, Hong Kong, or Macao. It considers that the panel request does not refer to those transactions where the payment card is both issued *and* used in either Hong Kong or Macao. China requests that the Panel modify the Report to find that this third category of transactions is not within the terms of reference, or, otherwise, to reflect in the Final Report China's position that these transactions are not within the Panel's terms of reference.

6.48 The United States requests the Panel to reject China's request. As an initial matter, the United States argues that China provides no legal basis under Article 6.2 of the DSU to support its request. In addition, the United States considers that there is no basis to read language in its panel request as excluding transactions where the payment card is both issued *and* used in either Hong Kong or Macao. In this respect, the United States notes that its panel request specifies that "China … requires the handling by CUP of all RMB transactions in Macao or Hong Kong using payment cards issued in Mainland China, as well as any RMB transactions in Mainland China using RMB payment cards issued in Hong Kong, China or Macao, China". In addition, the United States notes the statements in its panel request that "China also requires that all cross-bank or inter-bank transactions involving payment cards be handled through CUP. China prohibits the use of non-CUP payment cards for cross-region or cross bank or inter-bank transactions". The United States also submits that its panel request identifies the particular instruments through which China implements the measures.

6.49 The Panel recalls that the United States' panel request supplies a brief narrative description of the impugned measures. As noted by the parties, the panel request states in relevant part that "China

… requires the handling by CUP of all RMB transactions in Macao or Hong Kong using payment cards issued in Mainland China, as well as any RMB transactions in Mainland China using RMB payment cards issued in Hong Kong, China or Macao, China".[19]

6.50 Because the panel request refers only to RMB payment card transactions taking place in Macao or Hong Kong using payment cards issued in China, and to RMB payment card transactions taking place in China using payment cards issued in Hong Kong, or Macao, the Panel modified its findings to clarify that they do not refer to those transactions where the payment card is both issued *and* used in either Hong Kong or Macao. The panel request does not refer explicitly to the latter type of transactions, nor does it indicate, through the use of words such as "e.g.", "in particular", "inter alia", etc., that the types of transactions mentioned are but a subset of the relevant transactions. The United States further argues that its panel request specifies that China also requires that all cross-bank or inter-bank transactions be handled through CUP, and that China prohibits the use of non-CUP payment cards for cross-region or cross-bank or inter-bank transactions. Consistent with the fact that these alleged requirements are specified separately from the "Hong Kong/Macao requirements" in the panel request, the Panel considered allegations of the United States concerning cross-bank or inter-bank transactions and cross-bank or inter-bank prohibitions separately from the alleged Hong Kong/Macao requirements. Consequently, the Panel modified paragraphs 7.367 (including new footnote 469), 7.368, 7.371, 7.507(d), 7.578, 7.606, 7.621, 7.622 (including new footnote 804), 7.623, 7.624, 7.627, 7.636, and 8.1(d) (iv); and footnote 800. In doing so, we consider that our Report adequately reflects the United States' view that transactions where the payment card is both issued *and* used in either Hong Kong or Macao form part of its claims.[20]

6.51 Regarding paragraphs 7.716, 7.727 and 7.740, the United States requests that the Panel modify them so as to reflect that its claims and arguments concerning the issuer, terminal equipment and acquirer requirements explicitly cover three-party models. The United States notes that in the aforementioned paragraphs, the Panel states that the United States has not specifically addressed three-party networks in the context of issuer, terminal equipment and acquirer requirements. The United States further points out that the Panel in paragraphs 7.38-7.45 recognized that the United States argued that the three-party model was included in the services at issue. Finally, the United States refers the Panel to certain arguments it made in the course of the proceedings.

6.52 The Panel does not see any inconsistency between the statements in paragraphs 7.716, 7.727 and 7.740, on the one hand, and paragraphs 7.38-7.45, on the other. There is no suggestion in paragraphs 7.716, 7.727 or 7.740 that the United States' claims concerning the issuer, terminal equipment and acquirer requirements fail to cover three-party models. Having said this, for greater clarity and accuracy, we slightly modified paragraphs 7.727 and 7.740. In paragraph 7.716, we added one of the arguments to which the United States made reference and made appropriate consequential changes. Further consequential changes were made to paragraphs 7.613 and 7.620.

## VII. FINDINGS

### A. PRELIMINARY RULING UNDER ARTICLE 6.2 OF THE DSU

7.1 As noted in paragraphs 1.6-1.8 above, on 5 July 2011[21] China submitted a request for a preliminary ruling to the Panel with respect to the consistency of certain aspects of the United States' panel request with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"). China argued that the United States' panel request fails to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in

[19] WT/DS413/2, p. 2.
[20] See Interim Panel Report, paras. 7.364, 7.367, 7.369, 7.378, 7.396, 7.399 and 7.612.
[21] China's Letter of 5 July 2011.

two respects: first, by failing to explain how the definition of "electronic payment services" relates to China's specific commitments in any of the three subsectors identified in the panel request; and second, by failing to indicate which mode or modes of supply the United States considers to be at issue.[22] China argued that these deficiencies are central to all of the United States' claims and should be addressed at the earliest opportunity in the interest of due process before either party filed its first submission. The United States requested the Panel to decline China's request to make findings in advance of either party filing its first submission.[23] The United States further challenged the substance of China's request.[24]

7.2 After consulting with the parties, the Panel decided to issue a preliminary ruling to the parties on 7 September 2011, prior to receiving the United States' first written submission. The Panel observed that this would take into account China's concerns regarding the implications of the ruling on the substance of the case without causing additional delays in the proceedings. At the request of the Panel, the Chairperson of the DSB circulated the ruling to the World Trade Organization (WTO) membership on 30 September 2011[25].

7.3 As set out in further detail in its preliminary ruling, the Panel concluded that China had failed to establish that the United States' panel request is inconsistent with Article 6.2 of the DSU on the grounds that it does not provide a brief summary of the legal basis sufficient to present the problem clearly. The Panel found that the text of the panel request makes it clear that each of the requirements allegedly imposed by China is considered by the United States to be in breach of Articles XVI:1 and XVI:2 and Article XVII of the General Agreement on Trade in Services (GATS). The Panel also concluded that the United States' panel request considered as a whole does not need to explain further how the challenged measures are inconsistent with China's commitments under the relevant modes of supply. Accordingly, the Panel rejected China's preliminary objection of 5 July 2011 in its entirety and stated that it would continue its consideration of the case in accordance with the timetable that had been set for these proceedings.

7.4 The Panel's preliminary ruling circulated as document WT/DS413/4 dated 30 September 2011 forms an integral part of the present findings.

## B. GENERAL ISSUES

### 1. Burden of proof

7.5 The general rule on burden of proof in WTO dispute settlement is that a party claiming a violation of a provision of a covered agreement by another Member must assert and prove its claim.[26] Moreover, any party that asserts a fact, whether claimant or respondent, is responsible for providing proof thereof. This conforms to the generally accepted canon of evidence in civil law, common law, and, in fact, in most jurisdictions, that the burden of proof rests upon the party, whether complaining or responding, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.[27]

7.6 Similarly, in WTO dispute settlement, once a complaining party has made a *prima facie* case, the burden of proof moves to the responding party, which must in turn counter or refute the claimed

[22] China's request for a preliminary ruling.
[23] United States' Letter of 6 July 2011.
[24] United States' response to China's request for a preliminary ruling; United States' comments to China's reply.
[25] WT/DS413/4.
[26] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16, DSR 1997:I, 323 at p. 337.
[27] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323 at p. 335.

inconsistency.[28] The Appellate Body has stated that "a *prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[29] A *prima facie* case must be based on evidence and legal argument put forward by the complaining party in respect of each of the elements of the claim.[30] The amount and type of evidence that will be required will necessarily vary from case to case.[31]

7.7 Generally, the complainant in a given case initially bears the burden of proof to establish a *prima facie* case of inconsistency of a measure with a provision of a WTO covered agreement. In this dispute, therefore, the United States bears the initial burden to establish a *prima facie* case that China's measures are inconsistent with the cited provisions of Articles XVI and XVII of the GATS.

## 2. Treaty interpretation

7.8 Article 3.2 of the DSU directs panels to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is well settled that the rules codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention) are such customary rules.[32] These provisions read as follows:

> Article 31: General rule of interpretation
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

[28] Appellate Body Report, *EC – Hormones*, para. 98.
[29] Appellate Body Report, *EC – Hormones,* para. 104.
[30] Appellate Body Report, *US – Gambling*, para. 140.
[31] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:I, 323 at p. 335.
[32] Appellate Body Reports, *US – Gasoline*, p. 17, DSR 1996:I, 3 at pp. 15-16; *India – Patents (US)*, para. 45; and *US – Shrimp*, para. 114.

> 4. A special meaning shall be given to a term if it is established that the parties so intended.
>
> Article 32: Supplementary means of interpretation
>
> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning ambiguous or obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.[33]

7.9 Article XX:3 of the GATS provides that WTO Members' "Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof." Consistent with Article 3.2 of the DSU, GATS Schedules must be interpreted according to the "customary rules of interpretation of public international law". In *US – Gambling*, the Appellate Body confirmed that:

> [T]he task of identifying the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the *common intention* of Members. […] we consider that the meaning of the United States' GATS Schedule must be determined according to the rules codified in Article 31 and, to the extent appropriate, Article 32 of the Vienna Convention.[34] (emphasis original)

7.10 Accordingly, the Panel shall apply these principles in interpreting the relevant provisions of the covered agreements at issue in this dispute.

## C. THE SERVICES AT ISSUE

7.11 The Panel begins its analysis with an examination of the services at issue. We first consider the essential features of payment card transactions[35], based on the parties' submissions. Thereafter, we turn to the scope of the services at issue, addressing in particular areas of disagreement between the parties, namely (a) whether the services at issue cover the "three-party model" in addition to the "four-party model"; (b) whether the services at issue include the services supplied by third-party processors; and (c) whether the services at issue are single/integrated services.

[33] The Vienna Convention on the Law of Treaties (the "Vienna Convention"), done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

[34] Appellate Body Report, *US – Gambling*, para. 160.

[35] Both parties have used the expression "payment card transactions" when describing the transactions at issue in this dispute. See, e.g. United States' response to China's request for a preliminary ruling, para. 44 and China's first written submission, para. 15. The Panel will also use this term in its Report.

## 1. Payment card transactions[36]

7.12 A typical transaction involving the purchase of a good or a service entails a payment to the merchant by the consumer. Transactions often involve payment cards.[37] A "payment card" includes a bank card, credit card, charge card, debit card, check card, automated teller machine (ATM) card, prepaid card, and other similar card or payment or money transmission product or access device, and the unique account number associated with that card or product or access device.[38] Payment cards typically fall into one of three categories, depending on the timing of the payment: "pay later" cards (e.g. credit and charge cards); "pay now" cards (e.g. debit cards); and "pay before" cards (e.g. prepaid or stored-value cards). [39]

7.13 A "pay later" payment occurs after receiving the goods or services, and typically involves the use of a credit card. A credit card enables a consumer to access a credit line account at a financial institution. In general, credit cards have revolving credit arrangements that allow card holders to make purchases and be billed later. Most credit card accounts allow the card holder to carry a balance from one billing cycle to the next and make a minimum payment in each billing cycle, rather than requiring payment of the full balance. A charge card is a specific kind of credit card that has a short-term, fixed-period credit arrangement. The balance on a charge card account is payable in full when the statement is received and cannot be rolled over from one billing cycle to the next.[40] A "pay now" payment, which typically involves the use of a debit card, occurs at the time of purchase of goods or services. A debit card payment is linked to an existing transaction account at a financial institution. Debit cards are either online (i.e. PIN-based)[41] or off-line (i.e. signature-based). Debit card transactions are authorized in real time at the point-of-sale (POS) terminal using the same electronic funds transfer networks that handle ATM transactions.[42] The term "pay before" refers to payments for goods or services with prepaid or stored-value cards, loaded with funds before the purchase of goods or services occurs. The account associated with the prepaid debit card may be the liability of a financial institution. Prepaid cards are generally issued to persons who deposit funds into an account

[36] The information used to prepare this section comes from the parties' submissions. More information about the technical and commercial aspects of payment card transactions is found in the submissions made by the United States than in the submissions made by China, which explains the frequent reference to the sources provided by the former. We note in that regard that in paragraph 15 of its first written submission, China states that "China does not substantially disagree with those descriptions insofar as they go. China will therefore try to avoid repeating what the United States has already described, to the extent that China agrees with those accounts".

[37] The Panel considers that information regarding the different types of cards and their functioning is relevant notably for the discussion of classification of the services at issue (see Section VII.D of this report).

[38] United States' request for the establishment of a panel, fn. 2; response to China's request for a preliminary ruling, para. 35. The United States' response to China's request for a preliminary ruling was incorporated into the United States' first written submission (See United States' first written submission, para. 9). We note that China has used extensively the expression "payment card" in its submissions, and has not contested the definition provided by the United States in its request for the establishment of a panel.

[39] US SEC Amendment No. 4 to Form S-1 Registration Statement Under Securities Act of 1933, Visa Inc. IPO Prospectus, February 25, 2008, (Visa IPO Prospectus), Exhibit US-3, p. 128; US SEC Form 10-K, Visa 2010 Annual Report (as of September 30, 2010), (Visa 2010 Annual Report), Exhibit US-4, pp. 6-7; US SEC Form 10-K, MasterCard Incorporated Annual Report, for fiscal year ended December 31, 2010, (MasterCard 2010 Annual Report), Exhibit US-6, p. 6; and Federal Financial Institutions Examination Council (FFIEC), Retail Payment Systems, IT Examination Handbook (February 2010), (FFIEC IT Examination Handbook), Exhibit US-12, pp. 17, 20-21, and 24.

[40] FFIEC IT Examination Handbook, Exhibit US-12, p. 18; and BIS Red Book 2003, Payment Systems in the United States, (BIS Red Book 2003), Exhibit US-11, p. 440.

[41] PIN stands for Personal Identification Number.

[42] FFIEC IT Examination Handbook, Exhibit US-12, pp. 20-22; and BIS Red Book 2003, Exhibit US-11, p. 440.

of the issuer, while stored-value cards do not typically involve a deposit of funds as the value is prepaid and stored directly on the cards.[43]

7.14 Payment card transactions involve several entities: issuing institutions (or issuers), acquiring institutions (or acquirers), payment card companies[44], and settlement banks.[45] Issuers, usually banks, are the entities that make payment cards available to card holders. Issuers solicit card holders and establish applicable card holder terms, including individual credit limits, fees, interest rates and payment schedules. Payment cards commonly feature the logo or trademark of the issuer as well as the logo or trademark of the relevant payment card company or network. An institution seeking to issue cards must be capable of supplying card-based payment services or must use a payment card company to do so.[46] Issuers agree to adhere to rules specified by the payment card company that allow the payment card company to process transactions that use the cards issued by the bank. The issuer authorizes transactions at POS terminals, collects payment from the card holder, and transmits the funds through the relevant inter-bank payment channel for settlement of payment obligations incurred by the card holder.[47]

7.15 Acquirers sign up merchants to accept payment cards for a specific payment card company. In other words, they "acquire" transactions for a specific payment card company and network. Acquirers, often banks, maintain merchant accounts, handle relations with the merchant, receive all bank transactions from the merchant, ensure that payments are properly credited to the merchant, and provide the merchant with connectivity to the relevant payment network.[48] Like issuers, acquirers must be capable of supplying card-based payment services or must use a payment card company to do so.[49] Acquirers must adhere to specific standards, rules and procedures (typically set by the payment card company) governing the processing of transactions in the payment card network for which transactions have been acquired.

7.16 Issuers and acquirers may choose to partially or totally outsource the services they supply in connection with payment card transactions to so-called "third-party" processors.[50] Broadly speaking, these third-party processors can be categorized as merchant and issuer processors. Merchant and issuer processors provide payment-related services on behalf of acquirers and issuers, respectively. In so doing, they interconnect to, and interact with, the payment card company (or network). Third-party processors provide a potentially broad range of services.[51]

---

[43] FFIEC IT Examination Handbook, Exhibit US-12, p. 24.

[44] Throughout this section (paras. 7.13-7.25) on payment card transactions, and only for the sake of this section, the Panel refers to "payment card companies", defined by the Bank for International Settlement as "a company which owns trademarks of payment cards (credit, debit or prepaid cards) and may also provide a number of marketing, processing or other services to institutions issuing its cards." (BIS, Committee on Payments and Settlement Systems, A Glossary of Terms used in Payments and Settlement Systems, March 2003, (« BIS glossary »), Exhibit US-68, p. 16). We are using this term, rather than "EPS suppliers" and "network operators" as done by the United States and China, respectively, in order not to prejudge the discussion in subsequent sections. We are also using the term "payment card services" in this section to refer to the services supplied by these companies, and "payment card networks" to refer to the infrastructure and networks owned and operated by payment card companies.

[45] Visa IPO Prospectus, Exhibit US-3, pp. 129-130.

[46] United States response to China's request for a preliminary ruling, para. 43.

[47] Visa IPO Prospectus, Exhibit US-3, pp. 129-130.

[48] Visa IPO Prospectus, Exhibit US-3, pp. 129-130.

[49] United States response to China's request for a preliminary ruling. para. 43.

[50] Visa IPO Prospectus, Exhibit US-3, p. 130; and China's first written submission, para. 30.

[51] Visa IPO Prospectus, Exhibit US-3, p. 130 (under the title "Functions performed in connection with payment card transactions"); China's first written submission, paras. 31 and 32; and United States' response to Panel question No. 36(a), para. 93.

7.17 Payment card companies own, manage and promote payment brands, which they licence to their primary customers (i.e. issuers and acquirers). They approve card design, specifications and other requirements in connection with card issuance and acceptance.[52] Payment card companies establish rules and standards for their product platforms and payment networks, including eligibility for participation in the network, product platform features and functionality, merchant acceptance standards, and dispute and arbitration processes. They provide and operate the processing infrastructure and network necessary for the execution of payments via payment cards. They typically transfer authorization and clearing data and help settle funds between issuers and acquirers.[53] Payment card companies also provide issuers and acquirers with certain guarantees, including for example, indemnification for any settlement loss that issuers or acquirers may suffer due to the failure of another issuer or acquirer to fund its daily settlement obligations.[54]

7.18 There are two main business models used in card-based electronic payment transactions. These are often referred to as "open-loop", or "four-party" models, and "closed-loop", or "three-party" models.[55] In the four-party model, different entities handle the issuing of payment cards, the acquisition of transactions and the actual processing of transactions. Payment card companies in this model do not issue payment cards, nor do they acquire transactions with those payment cards. Payment card companies own and operate the networks that connect issuers and acquirers, and process transactions made in connection with payment cards. In the four-party model, the payment card company does not interact directly with either the card holder or the merchant.[56] It is the issuer and the acquirer that interact directly with, respectively, the card holder and the merchant.[57] Moreover, in four-party models, it is the issuer that extends credit to the card holder, not the payment card company.[58]

7.19 In the three-party model, the payment card company itself is responsible for issuing cards, handling the acquisition of transactions, and processing the transactions. In recent years, certain payment card companies that operate three-party models have also developed relationships with banks and other institutions, allowing them to issue these cards and acquire transactions for these cards' networks, thereby emulating certain aspects of the four-party model.[59]

7.20 The processing of transactions, whether in connection with four-party or three-party models, encompasses both (1) "front-end processing" (which serves to authenticate and authorize

[52] United States' response to China's request for a preliminary ruling, para. 44.

[53] Visa IPO Prospectus, Exhibit US-3, p. 131; Visa 2010 Annual Report, Exhibit US-4, pp. 5 and 7-13; *A Time of Change: A World of Opportunities,* MasterCard 2009 Annual Report, Exhibit US-5, pp. 4 and 7-9; UBS Securities LLC, *Visa 201: No Better Way to 'Play the Swipe*' (June 25, 2008), Exhibit US-10, pp. 28-30; and Bank for International Settlements (BIS) Committee on Payment and Settlement Systems (CPSS) *Clearing and Settlement Arrangements for Retail Payments in Selected Countries*, September 2000, Exhibit CHN-1, pages 2-6.

[54] Visa 2010 Annual Report, Exhibit US-4, pp. 30-31; and MasterCard 2010 Annual Report, Exhibit US-6, p. 38.

[55] Visa IPO Prospectus, Exhibit US-3, p. 128.

[56] Visa IPO Prospectus, Exhibit US-3, pp. 128-129; and MasterCard 2010 Annual Report, Exhibit US-6, pp. 4 and 7.

[57] Visa IPO Prospectus, Exhibit US-3, p. 129.

[58] Ibid. p. 128.

[59] Visa IPO Prospectus, Exhibit US-3, p. 128; US SEC Form 10-K, American Express Company Annual Report, for the fiscal year ended November 30, 2010, ("American Express 2010 Annual Report"), Exhibit US-7, pp. 4-11; and US SEC Form 10-K, Discover Financial Services Annual Report, for the fiscal year ended November 30, 2010, ("Discover 2010 Annual Report"), Exhibit US-8, pp. 1-4.

transactions), and (2) "back-end processing" (which serves, essentially, to clear and settle transactions).[60]

7.21 Front-end processing occurs at the time of the transaction. A card-based payment transaction can be initiated either at a terminal (e.g. a merchant's POS) or remotely via e-mail, telephone or internet. When a card holder presents a payment card to pay for a transaction, the merchant uses its POS terminal to transmit a request for authorization to its acquirer or a merchant (third-party) processor. The acquirer or its third-party processor determines the type of transaction (debit or credit), and the particular payment card network through which the transaction should be routed, and then forwards that request to the relevant payment card company.

7.22 After the payment card company receives the authorization request, it undertakes several tasks. Under a four-party model, it ascertains the type of transaction (e.g. credit or debit), determines various transaction parameters (e.g. location and type of merchant), identifies the issuer, and then routes the authorization request to the issuer. At that point, the issuer identifies the card holder's account and decides whether to authorize the transaction after confirming that the card is authentic, the account is in good standing, and the account limit is not exceeded (in the case of a credit transaction) or that sufficient funds are available (in the case of a debit transaction). The issuer then authorizes or rejects the transaction based on these validations as well as the card holder's record. The authorization (or rejection) information is sent back to the merchant via the payment card network. If the acquirer and the issuer are one and the same, a transaction is referred to as an "on-us" transaction. If the transaction has been authorized, the payment card company receives the approved transaction information. Then the payment card company returns the authorization information to the acquirer, or to the merchant processor or merchant, as the case may be. Finally, when the merchant receives the authorization, it completes the sale.

7.23 Under the three-party model, the payment card company, which is also the issuer and the acquirer, determines various transaction parameters, identifies the card holder's account and decides whether to authorize the transaction. The authorization (or rejection) information is sent by the payment card company directly to the merchant.

7.24 Back-end processing occurs at the time of the transaction or at a later point in time. Merchants submit transaction information for clearing and payment to acquirers, which forward this information to the appropriate entity (e.g. a payment card company in the case of a typical "four-party model" transaction) for purposes of establishing net settlement positions. The payment card company aggregates and processes all the information and produces a daily report of the net and debit positions of issuing and acquiring financial institutions. The settlement bank relies on the report generated by the payment card company but does not perform any data processing itself. The payment card company organizes this information by the respective card-issuing bank, and then forwards the transaction information to the participating entities specifying those transactions that were cleared and the net amounts to be paid (by issuers) and received (by acquirers). The transfer of money from the card holder to the issuer and from the acquirer to the merchant is carried out in accordance with the contractual agreements between those parties. Under the three-party model, there are no inter-bank transactions, because the payment card company acts as payment card network and processor, card issuer and merchant acquirer. In this case, it is the payment card company that debits the card holder's account and credits the merchant's account.[61]

[60] United States response to China's request for a preliminary ruling, paras. 49-53; and China's first written submission, para. 20. China also makes reference to "back-end processing" (China's first written submission, para. 31).

[61] American Express 2010 Annual Report, Exhibit US-7, pp. 4-11; Discover 2010 Annual Report, Exhibit US-8, pp. 1-4; and China's first written submission, fn. 7.

## 2. The services at issue

7.25 The United States' request for the establishment of a panel specifies that the present dispute concerns "certain restrictions and requirements maintained by China affecting electronic payment services for payment card transactions and the suppliers of those services (electronic payment services suppliers)" (footnotes omitted).[62] It describes "electronic payment services" and a "payment card" as follows:

> "Electronic payment services" involve the services through which transactions involving payment cards (as defined below) are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated. Suppliers of electronic payment services supply, directly or indirectly, a system that typically includes the following: the processing infrastructure, network, and rules and procedures that facilitate, manage, and enable transaction information and payment flows and which provide system integrity, stability and financial risk reduction; the process and coordination of approving or declining a transaction, with approval generally permitting a purchase to be finalized or cash to be disbursed or exchanged; the delivery of transaction information among participating entities; the calculation, determination, and reporting of the net financial position of relevant institutions for all transactions that have been authorized; and the facilitation, management and/or other participation in the transfer of net payments owed among participating institutions.[63]
>
> A "payment card" includes a bank card, credit card, charge card, debit card, check card, automated teller machine (ATM) card, prepaid card, and other similar card or payment or money transmission product or access device, and the unique account number associated with that card or product or access device.[64]

7.26 According to the United States, electronic payment services (EPS) are at the centre of all payment card transactions, and without these services the transactions could not occur.[65] EPS provide an efficient, timely and reliable means to facilitate the transmission of funds from the holders of payment cards who purchase goods or services to the individuals or businesses that supply them. EPS suppliers receive, check and transmit the information that the parties need to conduct the transactions, and manage, facilitate, and enable the transmission of funds between participating entities. According to the United States, the rules and procedures established by the EPS supplier give the payment system stability and integrity, and enable it to efficiently handle net flows of money among the institutions involved in card payments.[66] EPS suppliers also provide their customers with certain guarantees to ensure the integrity of the electronic payment services, including, for example, instances where customers fail to honour payment cards or where issuers or acquirers fail to fund obligations.[67] In the United States' view, the processing infrastructure, network, and rules and procedures, which facilitate, manage, and enable transaction information and payment flows, and which provide system integrity, stability and financial risk reduction, are key components of electronic payment services. [68]

7.27 China submits that the services at issue, as described in the United States' request for the establishment of a panel, relate to inter-bank payment card transactions, i.e. transactions where the

---

[62] United States' request for the establishment of a panel, para, 1.
[63] Ibid. fn. 1.
[64] United States' request for the establishment of a panel, fn. 2.
[65] United States' first written submission, para. 25.
[66] United States' response to China's request for a preliminary ruling, para. 40.
[67] Ibid. para. 42.
[68] Ibid. para. 45.

financial institution that issues the payment card to the card holder is unrelated to the financial institution that acquires the payment card transaction from the merchant.[69] These financial institutions (i.e. issuers and acquirers) authorize, clear, and settle inter-bank payment card transactions by obtaining these services from the operators of inter-bank payment card networks.[70] China considers that an inter-bank payment card network is a telecommunications and data-processing infrastructure through which a network operator provides certain authorization, clearing, and settlement services to participating financial institutions.[71] According to China, the operator of the network is not a party to the payment card transaction (which, it argues, is why it is a "four-party" model, not a "five-party" model),[72] but provides financial institutions with an external network for authorizing, clearing, and settling the payment card transactions to which they are parties.[73] The services at issue are what payment card companies describe as their "transaction processing services", consisting of the operation of a "processing infrastructure" that is used to provide certain "core processing services" relating to the "authorization, clearing, and settlement" of payment card transactions. These are, in China's view, "network services", i.e. the services that network operators provide to financial institutions for the purpose of authorizing, clearing, and settling inter-bank payment card transactions.[74]

7.28 The Panel notes first that the services at issue are "electronic payment services for payment card transactions" or, in other words, electronic payment services for transactions with payment cards. We also note that the definition of services at issue provided by the United States includes transactions with payment cards, which the United States defines as including bank cards, credit cards, charge cards, debit cards, check cards, ATM cards, prepaid cards, and other similar cards or payment or money transmission products or access devices, and the unique account number associated with those cards or products or access devices.[75]

7.29 We also observe that the descriptions provided by the parties of the services involved in the processing of payment card transactions do not differ fundamentally. We find confirmation of this observation in China's first written submission, where China states that "the United States has provided lengthy descriptions of the technical and commercial aspects of payment card transactions. China does not substantially disagree with those descriptions, insofar as they go".[76]

7.30 The Panel further notes that China acknowledged that the services at issue are determined by the United States' description in its request for the establishment of a panel and the scope of the challenged measures.[77] Indeed, China does not challenge the fact that the five "elements" described by the United States in its panel request correspond to what EPS suppliers − as the United States calls them − or "network operators" − as China prefers to call them − do. In analysing the five elements, China observes that:

[69] China's first written submission, para. 18.
[70] Ibid. para. 22.
[71] Ibid. para. 22.
[72] Ibid. para. 22.
[73] Ibid. para.22.
[74] Ibid. para. 73.
[75] United States' request for the establishment of a panel, fn. 2.
[76] China's first written submission, para. 15.
[77] "The services at issue in this dispute are determined by two factors. (1) the U.S. definition of the services at issue, as set forth in its panel request; and (2) the scope and effect of the challenged measures. It is the overlap of these two factors that determines the services at issue. The services at issue cannot be broader than the services that the United States has described in its panel request, and cannot be broader than the services that are actually affected by the challenged measures". (China's first written submission, para. 61).

> [T]he first element of the "system" - "the processing infrastructure, network, and rules and procedures" - appears to correspond, at least in part, to what payment card companies describe as their telecommunications and data-processing infrastructure;
>
> the second element of the "system" - "the process and coordination of approving or declining a transaction" - appears to correspond to what payment card companies describe as the authorization component of their core data processing services;
>
> the third and fourth elements of the "system" - "the delivery of transaction information among participating entities" and "the calculation, determination, and reporting of the net financial position of relevant institutions for all transactions that have been authorized" - appear to correspond to what payment card companies describe as the clearing component of their core data processing services; and
>
> the fifth element of the "system" - "the facilitation, management and/or other participation in the transfer of net payments owed among participating institutions" - appears to correspond to what payment card companies describe as the settlement component of their core data processing services.[78]

7.31 Moreover, both parties recognize that other institutions, such as issuers, acquirers and settlement banks, also participate in payment card transactions.[79]

7.32 We observe that China did not request that any element of the definitions of the services at issue provided by the United States be eliminated from the dispute. Indeed, while China emphasizes the clearing and settlement aspect of payment card transaction processing, it does not deny that the services at issue encompass other aspects of payment card transaction processing as well. In China's own words:

> However many other services might be at issue in this dispute, clearing and settlement services are plainly among them … Thus, while the United States makes heroic efforts to avoid using the terms "clearing" and "settlement" in the narrative of its submissions, China believes it should be undisputed that the services at issue include clearing and settlement services.[80]

7.33 We also note that the parties agree that the services at issue, as described in the United States' request for the establishment of a panel, do not include the services supplied by issuing and acquiring institutions.[81]

7.34 However, before proceeding further, the Panel would like to clarify two issues on which the parties differ, namely (i) whether the services at issue relate only to "inter-bank payment card transactions"; and (ii) whether the payment card company is a party to the payment card transaction.

7.35 Regarding the first question, we note China's argument that the services at issue relate to inter-bank payment card transactions, defined by China as transactions where the financial institution that issues the payment card to the card holder is unrelated to the financial institution that acquires the

---

[78]China's first written submission, para. 72.

[79] United States' response to China's request for a preliminary ruling, para. 43; and China's first written submission, para. 20.

[80] China's first written submission, para. 75.

[81] In its response to Panel question No. 43, the United States indicated that "[a]s a threshold matter, classification of issuing and acquiring services is not necessary for the panel's resolution of this dispute, as the U.S. claims do not pertain to this service".

payment card transaction from the merchant.[82] As will become clear in the subsequent sections dealing with the third-party model and third-party processors, we do not agree with this argument by China. In our view, the services at issue relate not only to inter-bank payment card transactions, as defined by China, but also to payment card transactions where the issuing financial institution is related to - or can indeed be the same as - the acquiring financial institution. This is the case, for example, of "on-us" payment card transactions, as well as transactions carried out under the three-party model.

7.36 Turning to the second question, China argues that the "operator of the network" (or the payment card company, as we have called it) is not a party to the payment card transaction (which is why it is a "four-party" model, not a "five-party" model); rather, the "operator of the network" provides financial institutions with an external network for authorizing, clearing, and settling the payment card transactions to which they are parties.[83] We do not agree with this argument by China. In our view, as evidenced by the description of payment card transactions provided in paragraphs 7.13 to 7.24 above, payment card companies or networks are indeed a party to the payment card transaction. This is not only the case with networks operating under the "three-party" model, but also with other networks generally operating under the "four-party" model. Among other things, these operators own the payment card brand; set rules, standards, and procedures by which issuers and acquirers must abide; and provide authorization, clearing and settlement services to issuers and acquirers. More importantly, they guarantee the transactions and get paid by issuers and acquirers for the services supplied.

7.37 In concluding, we recall that the services at issue in this dispute are determined by the description in the United States' panel request. In our view, the services at issue are therefore electronic payment services for all types of payment card transactions. These are the services the Panel must focus on, regardless of the labels used by the parties to refer to them. Hereinafter, we will use the expression "electronic payment services for transactions involving the use of various types of payment cards" (EPS) and "electronic payment service suppliers" (EPS suppliers) to refer to, respectively, the services at issue and the service suppliers supplying those services. We find support for this terminology in the fact that: (i) China does not deny that the dispute is about services related to "payment card transactions"; (ii) transactions with all types of payment cards are envisaged; (iii) these services are currently conducted exclusively through "electronic" means; and (iv) as will become clearer in the discussion on classification (Section E below), the services at issue are, in our view, "payment services".

### 3. Whether the services at issue cover the three-party model in addition to the four-party model

7.38 China argues that the definition of the services at issue proposed by the United States is premised on a four-party model.[84] The services at issue do not include the supply of services in three-party models and, therefore, the Panel should not reach findings on the supply of services under this model. Focusing on the five elements described by the United States, China argues that the definition of the services at issue proposed by the United States is based on the notion that there are "participating institutions" or "participating entities" involved in the "system". The essential feature of this "system", according to China, is to authorize, clear, and settle payment card transactions among "participating institutions". In a three-party model, China argues, there is no need to authorize, clear and settle payment card transactions among different financial institutions, because the issuer and the acquirer are the same entity. Because there are no inter-bank transactions in the three-party

[82] China's first written submission, para. 18.
[83] Ibid. para. 22.
[84] China's second written submission, para. 104.

model, there is no need for the operator of a three-party payment card system to obtain network services from a network operator.[85]

7.39 The United States argues that the services at issue cover services supplied in three-party models. For the United States, three-party model transactions include both those EPS systems that perform the functions of issuer and acquirer internally and "on-us" transactions occurring in a four-party system where the issuer and the acquirer are the same entity. In a three-party transaction, the role of the EPS supplier may vary by circumstance, but its activities would nevertheless fall within the definition of EPS provided in the panel request. The United States submits that, in some markets and systems, three-party model transactions are processed over the EPS provider's network in the same manner as transactions involving a different issuer and acquirer. Even if the transaction is processed internally and not over the EPS network, it is the EPS provider that developed the payment product (card program), it is the EPS provider's intellectual property that enables the switching of the transaction and supports the electronic payment process, the transaction is governed by the EPS provider's rules and procedures, and the transaction is secured by the EPS provider's risk management and fraud protections. According to the United States, the fact that certain payment card transactions may occur where the issuing institution and acquiring institution are the same does not change the definition or scope of the service being provided. Even in three-party models, the United States argues, the EPS supplier still must conduct an authorization of the transaction, which includes providing information such as the merchant code, POS terminal ID, country codes of the issuer, acquirer, and merchant, transaction currency, etc. The United States further submits that, in many instances, it "would be virtually impossible to distinguish "on-us" three-party transactions from four-party transactions".[86]

7.40 Replying to a Panel question, Australia, the European Union, Guatemala, and Korea submitted that the services at issue should be classified in the same subsector irrespective of whether they are supplied under the three-party or the four-party model.[87] According to the European Union, China's commitments refer to the services, not to the participants in the transaction; Guatemala is of the view that the participants in the supply of the service do not change the nature of the service.[88]

7.41 The Panel recalls that the services at issue, as defined in the panel request, consist of a "system" that "typically includes" five elements, namely (i) the processing infrastructure, network, and rules and procedures that facilitate, manage, and enable transaction information and payment flows and which provide system integrity, stability and financial risk reduction; (ii) the process and coordination of approving or declining a transaction, with approval generally permitting a purchase to be finalized or cash to be disbursed or exchanged; (iii) the delivery of transaction information among participating entities; (iv) the calculation, determination, and reporting of the net financial position of relevant institutions for all transactions that have been authorized; and (v) the facilitation, management and/or other participation in the transfer of net payments owed among participating institutions.[89] As noted above, China has not challenged this description. Moreover, China agrees that the definition of the services at issue proposed by the United States includes EPS suppliers operating four-party models.[90]

---

[85] China's second written submission, paras. 104-107.

[86] United States' response to Panel questions No. 25, paras. 81-83; and 74, paras. 26-28.

[87] Australia's response to Panel question No. 5; European Union's response to Panel question No. 5, para. 14; Guatemala's response to Panel question No. 5, para. 23; and Korea's response to Panel question No. 5.

[88] European Union's response to Panel question No. 5, para. 14, and Guatemala's response to Panel question No. 5, para. 23.

[89] United States' request for the establishment of a panel, fn. 1.

[90] China's second written submission, para. 104.

7.42 We consider important the use of the words "typically includes" in the panel request. By describing the "system" being supplied as "typically" including a number of specified elements, the panel request provides certain general parameters of the system under consideration, rather than seeking to confine the Panel's examination to a "system" that necessarily contains each and every element listed, and only those elements.[91] We note that EPS suppliers operating three-party models provide essentially all the elements of the "system" referred to above, as well as other services, such as card issuing and transaction acquiring, which are not within this system and are thus outside the scope of the services at issue. In particular, three-party model EPS suppliers provide the processing infrastructure, network, and rules and procedures that facilitate, manage, and enable transaction information and payment flows and which provide system integrity, stability and financial risk reduction; the process and coordination of approving or declining a transaction, with approval generally permitting a purchase to be finalized or cash to be disbursed or exchanged; the delivery of transaction information among participants in the transaction; the calculation, determination, and reporting of the net financial position of relevant participants in the transactions (e.g. total debit position of a card holder); and the facilitation, management and/or other participation in the transfer of payments among participants in the transaction. We are aware that in a three-party model, the supply of the fourth and fifth elements of the system[92] would usually involve individuals (e.g. card holders and merchants) rather than "institutions". However, in our view, that aspect does not change the nature of the EPS supplied. Nor does this difference mean that the three-party model falls outside the broadly defined "system" under consideration. In our view, EPS suppliers operating under three- and four-party models provide *in essence* the same services, as argued by the United States and some of the third parties.

7.43 China also argues that the three-party model does not make it necessary to authorize, clear and settle payment card transactions among different financial institutions, because the issuer and the acquirer are the same entity. Therefore, in China's view, there is no need for the operator of a three-party payment card system to obtain network services from a network operator. We agree with the United States that the fact that a payment card transaction is processed by a supplier that is also the issuer and the acquirer (meaning that there is therefore no inter-bank transaction) does not change the fact that such supplier provides the services at issue.

7.44 The Panel also notes the United States' argument that three-party model transactions include both those EPS systems that perform the functions of issuer and acquirer internally and "on-us" transactions occurring in a four-party system where the issuer and the acquirer are the same entity. The Panel observes that, depending on the identity of the issuer and acquirer, payment card transactions processed within − in principle − four-party models may resemble the processing of transactions within three-party models. This is the case of the "on-us" transactions within four-party models, in which the same bank is both the acquirer for the merchant and the issuer to the card holder. In such a case, the transaction is not processed over the network of the EPS supplier, but is handled solely by the bank concerned. In such a case, balances are shifted on the books of that bank, and there are no inter-bank transactions. This is very similar to the processing of payment card transactions by service suppliers operating under three-party models. It would be virtually impossible, in the Panel's view, to distinguish between the processing of a three-party transaction and the processing of an "on-us" four-party transaction, which, China agrees, are undoubtedly within the scope of the services at issue.

[91] We note that, according to the *Shorter Oxford English Dictionary*, typically means symbolically, representatively, characteristically. See *Shorter Oxford English Dictionary*, 6th ed., A. Stevenson (ed.) (Oxford University Press, 2007) (*Shorter Oxford English Dictionary*), Vol. 2, page 3393.

[92] Respectively, the calculation, determination, and reporting of the net financial position of relevant institutions for all transactions that have been authorized; and the facilitation, management and/or other participation in the transfer of net payments owed among participating institutions.

7.45 For the above-mentioned reasons, the Panel finds that the services at issue include the services supplied under three-party models, in addition to the services supplied under four-party models.

### 4. Whether the services at issue include the services supplied by issuer and merchant processors

7.46 The parties disagree on whether services supplied by issuer and merchant processors fall within the issues to be decided in this dispute.

7.47 China argues that issuer and merchant processors are providers of outsourced technology services to the issuing and acquiring institutions, respectively. Among other services, merchant processors provide the equipment necessary for the merchant to accept payment cards, route payment card transactions to the correct network, handle transaction authorizations, and undertake the back-end processing necessary for the merchant to obtain payment. Among other services, issuer processors manage and provide the information technology necessary for the card issuer to interact with network operators for the purpose of authorizing, clearing, and settling transactions that are made with the payment cards that it issues. China submits that the description of the services at issue by the United States makes no reference to these types of outsourced services. China further argues that the panel request refers to a "system" provided by "EPS suppliers", that allows for the authorization, clearing and settlement of inter-bank payment card transactions. In China's view, issuer and merchant processors do not supply a "system".[93]

7.48 The United States argues that issuers and acquirers may choose to perform services related to the processing of transactions in-house or may choose to outsource these services to issuer and acquirer processors, that will then handle or transmit electronic payment information to or from an EPS supplier. Issuer and acquirer processors are optional entities for card-based electronic payment transactions. According to the United States, this is in contrast to an EPS supplier that provides necessary infrastructure and services for card-based electronic payment transactions.[94]

7.49 The Panel recalls that the parties agree that the services at issue do not encompass the issuance of payment cards and the acquisition of payment card transactions, activities which are typically handled by banks. Thus, we address only the question of whether or not the services supplied by issuer and merchant processors are included in the services at issue.

7.50 We note that third-party processors have a very broad reach in terms of the services supplied. One global EPS supplier acknowledges that it faces "competition from transaction processors throughout the world, such as FirstData Corporation and Total Systems Services, Inc., some of which seek to enhance their networks that link issuers directly with point-of-sale devices for payment card transaction authorization and processing services. Certain of these transaction processors could potentially displace MasterCard as the provider of these payment processing services".[95]

7.51 The Panel recalls that the definition of the services at issue involves two particular elements relevant to third-party processors, i.e. "services through which transactions involving payment cards are processed", and "services through which the transmission of funds between institutions participating in the transactions are managed and facilitated". Once they are accredited by payment card companies, as noted above, these third-party processors participate in the processing of payment card transactions. As such, they provide "services through which transactions involving payment cards are processed", including, for example, terminal operation, authorization routing, and electronic

[93] China's second written submission, paras. 110-114.
[94] United States' response to Panel question No. 36(a), para. 93.
[95] MasterCard 2010 Annual Report, Exhibit US-6, p. 22.

data capture. They also provide "services through which the transmission of funds between institutions participating in the transactions are managed and facilitated", including the preparation and submission of clearing files, settlement processing, card holder and merchant statement preparation, and charge-back processing.[96]

7.52 We are therefore of the view that, due to their substantial involvement in the process, and considering the overlap between, on the one hand, the services supplied by third-party processors, and, on the other hand, those supplied by electronic payment services suppliers (see discussion regarding the role of EPS suppliers, in paragraphs 7.12 to 7.24 above)[97], third-party processors are part of the payment services loop.

7.53 We turn now to the statement in the United States' request for the establishment of a panel those [s] uppliers of electronic payment services supply, directly or indirectly, a system that typically includes five elements[98]. A textual analysis of this phrase supports our conclusion that the services at issue include the services supplied by third-party processors. We observe first that the definition refers to "suppliers" in the plural (not "a supplier", singular), and makes reference to "a system" in the singular (not "systems", plural). This suggests, in our view, that the services can be supplied by one or several suppliers, who, together, provide "a system". Secondly, the definition indicates that the suppliers supply "directly or indirectly" a system, which suggests that the supplier may supply the system "directly", meaning on its own, or "indirectly", meaning with the participation of other service suppliers. Thirdly, as noted above, many of the services "typically" included in the system are supplied by third-party processors, some of which are seen by global EPS suppliers as competitors.[99] Therefore, we do not consider that there is a need for a service supplier to supply all five elements of the "system" described by the United States to be considered, in terms of the United States' request for the establishment of a panel, as a "supplier of electronic payment services".

7.54 In the light of the foregoing analysis, the Panel concludes that the services at issue include the services supplied by third-party processors.

### 5. Whether the services at issue are integrated services

7.55 The United States argues that electronic payment services for payment card transactions are one integral service – one that is supplied and consumed as such. Moreover, the service is supplied as a coherent whole. According to the United States, each component of the "system" is "critical to effectuate the payment card transaction and EPS suppliers provide the entire package of services to their customers, the institutions that are participating in the payment card transactions." For the United States, each of the elements of the system is integrated and necessary to facilitate a payment card transaction and, as such, constitutes a single service. Indeed, without the entire system supplied by the EPS supplier, no issuer would be able individually to offer a card that is as widely accepted by merchants, and no acquirer could offer merchants a service that can deliver such a large number of card holders. It is necessary for each component element to work collectively for EPS to function properly.[100]

---

[96] A "charge back" is a reversal of a payment card transaction, typically initiated by the card issuer at the card holder's request. Charge backs can occur for a number of reasons, including fraud and processing errors.

[97] We recall that for the sake of neutrality at that stage of the report, paragraphs 7.12 to 7.24 made reference to "payment card companies" instead of "EPS suppliers".

[98] United States' request for the establishment of a panel, fn.1 (emphasis added).

[99] MasterCard 2010 Annual Report, Exhibit US-6, p. 22; and Visa IPO Prospectus, Exhibit US-3, table in p. 130.

[100] United States' response to Panel question No. 26, para. 84; United States' second written submission, paras. 11-14.

7.56 China argues that the services at issue do not have the nature of a single, integrated service. For China, the argument by the United States is a necessary consequence of its position that all services that "manage", "facilitate", or relate to the "processing" of a payment card transaction (or that are "essential", "integral", or "necessary") must be classified as "payment services". This interpretation, according to China, does not allow for "dividing" the services at issue. While the United States identified five elements of a "system" that "[s]uppliers of electronic payment services supply", it is clear – China argues – that the United States perceives no distinction among these elements for the purpose of classifying the services at issue in this dispute, or in relation to the case that it has decided to present.[101]

7.57 The Panel notes that two different – albeit closely related – issues arise. One is whether the services at issue can be considered an integrated service, which is supplied as such; the other is whether the services at issue should be classified under a single subsector or under more than one subsector in the classification system. We shall examine here the first issue; the discussion related to the classification of the services at issue is found in Section E below.

7.58 The Panel observes that the definition of the services at issue refers to a "system" composed of several elements. Those elements could be considered, individually, as services in their own right, e.g. "the process and coordination of approving or declining a transaction", "the delivery of transaction information among participating entities", "the calculation, determination, and reporting of the net financial position of relevant institutions for all transactions that have been authorized", and "the facilitation, management and/or other participation in the transfer of net payments owed among participating institutions." In the Panel's view, all these elements show that "electronic payment services for payment card transactions" are made up of different services that may be individually identified.

7.59 The United States argues, however, that the various elements of the system are integrated and necessary to facilitate a payment card transaction and, as such, constitute a single service. In our view, all elements of the system, together, are necessary for the payment card transaction to materialize. None of the elements of the "system", individually, would be sufficient to process a payment card transaction. Each of them must be integrated into a whole.[102] Indeed, we agree with the United States' argument that without the entire system supplied by the EPS supplier, no issuer would be able individually to offer a card that is as widely accepted by merchants, and no acquirer could offer merchants a service that can deliver such a large number of card holders.[103] From that perspective, considering the transaction from beginning to end, electronic payment services for payment card transactions constitute an integrated service.

7.60 A related question is whether "electronic payment services for payment card transactions", despite being made up of several services, are nevertheless supplied as an "integrated" service, or whether those different service components can be supplied – and are in fact supplied – as separate services by different service suppliers. China argues that different "elements" or "components" of "electronic payment services" are routinely supplied as different services by different service suppliers in several countries. One of the examples put forward by China to support this assertion is France, where, according to China, the authorization process for payment card transactions is carried out by the network of "*Groupement des Cartes Bancaires*" (or CB), while the clearing and settlement of

[101] China's response to Panel question No. 29, paras. 22-24.

[102] The *Shorter Oxford English Dictionary*, Vol. 1, p. 1402, defines "integrated" as: "1 Combined into a whole; united; individual, … c Uniting several components previously regarded as separate".

[103] United States' response to Panel question No. 26, para. 84, United States' second written submission, para. 17.

transactions is handled by "CompensationREtail" (or CORE).[104] The United States argues that the fact that two separate entities may provide different elements of "electronic payment services" is not inconsistent with the fact that each of the elements is integrated and necessary to facilitate payment card transactions, and as such constitutes a single service. In the United States' view, "electronic payment services" could not be effectuated through the provision of the service provided by STET only, or the service provided by CB only. It is, in the United States' view, the combination that enables the payment card transaction to occur.

7.61 We agree with the United States' view on this matter. How the supply of "electronic payment services" is organized depends on different parameters (e.g. the business models adopted by the entities participating in the payment card transaction). On the one hand, global electronic payment services suppliers provide all the components of the "system" identified by the United States, thus supplying a final product that looks like a "single" service for the direct user (the issuing and acquiring institutions) and for the ultimate beneficiaries of these services (the card holder and the merchant), and that in many countries that is the case. On the other hand, there are jurisdictions where the different components of the "system" are supplied by different service suppliers. Further, as we saw previously, third-party processors may also intervene in the processing of payment card transactions. In the Panel's view, therefore, the services at issue may as a factual matter be supplied by a single service supplier or by more than one service supplier acting in concert.

7.62 We conclude therefore that the services at issue include both the instances in which these services are supplied as a single service by a single service supplier, and those instances in which different elements of the "system" described by the United States are supplied by different service suppliers.

## D. CHINA'S SPECIFIC COMMITMENTS CONCERNING THE SERVICES AT ISSUE

7.63 The United States claims that, in sector 7.B, under the heading "Banking and Other Financial Services" of its GATS Schedule, China undertook market access and national treatment commitments with respect to subsector (d), which reads "[a]ll payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers draft (including import and export settlement)" (subsector (d)). According to the United States, subsector (d) includes the electronic payment services supplied in connection with "credit, charge and debit cards", and other payment card transactions.[105]

7.64 China argues that the United States has failed to prove that any of the services at issue, much less all of them, fall within subsector (d) of its Schedule. In China's view, the clearing and settlement services at issue fall under paragraph 5(a), subsector (xiv), of the GATS Annex on Financial Services (subsector (xiv)), which covers "[s]ettlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments", a subsector for which no commitments have been made in China's Schedule. China maintains that the fact that those clearing and settlement services do not fall within the scope of subsector (d) defeats the United States' assertion that all of the services at issue fall within subsector (d). According to China, the "payment services" referred to in subsector (d) encompass the issuance and acceptance by banks and other types

[104] CORE is a payment processing network developed and operated by the STET company (Systèmes Technologiques d'Echange et de Traitement). Examples of European countries in which the national authorization network is independent of the clearing and settlement mechanism for payment card transactions, Exhibit CHN-103, pp. 2 and 5.

[105] United States' first written submission, para. 13.

of financial institutions of payment instruments other than cash. However, issuing and acquiring services are not part of this dispute.[106]

7.65 Australia, the European Union and Korea submit that the services at issue fall under subsector (d) of China's Schedule.[107] According to Ecuador, an excessively broad interpretation of specific commitments in GATS schedules would constitute an unacceptable impairment of WTO Members' rights to define the scope and content of such commitments.[108]

7.66 The Panel must determine whether, as claimed by the United States, China has undertaken specific commitments on the services at issue under subsector (d) of its Schedule of Specific Commitments (China's Schedule).[109] To do so, it will need to interpret China's Schedule as well as relevant provisions of the GATS.

7.67 Article XX:1 of the GATS provides that each Member "shall set out in a schedule the specific commitments it undertakes", notably on market access and national treatment. This schedule, according to Article XX:3, "shall form an integral part" of the GATS[110], and is thus legally part of the WTO Agreement.[111] For that reason, GATS schedules must be interpreted according to the "customary rules of interpretation of public international law", as codified in Articles 31 and 32 of the Vienna Convention.[112]

7.68 As a result, we will interpret China's Schedule and other relevant treaty text in accordance with the ordinary meaning to be given to the terms of the Schedule in their context, and in the light of the object and purpose of the GATS and the WTO Agreement. The Panel will turn to supplementary means of interpretation pursuant to Article 32 of the Vienna Convention as appropriate.

### 1. Order of analysis of the subsectors identified by the parties

7.69 As a preliminary matter, the Panel must decide whether to start its interpretative analysis with subsector (d) of China's Schedule, or with subsector (xiv) of the GATS Annex on Financial Services (Annex).

7.70 China submits that, because clearing and settlement services for payment card transactions are encompassed by subsector (xiv) of the Annex, it is unnecessary for the Panel to examine the United States' assertion that those services are encompassed by subsector (d). According to China, the Panel should begin with an analysis of subsector (xiv) of the Annex – a subsector not listed in China's Schedule – because this subsector offers the more specific description of the clearing and settlement services at issue. Referring to the rules of interpretation contained in the United Nations' Provisional Central Product Classification[113] (CPC), China claims that the category that provides the most specific

---

[106] China's first written submission, paras. 78 and 96.

[107] Australia's third-party submission, para. 7; European Union's third-party submission, para. 23; and Korea's third-party submission, para. 11.

[108] Ecuador's third-party statement, para. 5.

[109] Schedule of Specific Commitments of the People's Republic of China, GATS/SC/135 (14 February 2002). The relevant part of China's Schedule is contained in Annex G to this Report.

[110] Article XX:3 of the GATS provides: "Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof."

[111] Pursuant to Article II:2 (Scope of the WTO) of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement), the GATS, which is included in Annex 1B of the WTO Agreement, is an integral part of that Agreement.

[112] DSU Art. 3.2. See also Appellate Body Report, *US – Gambling*, para. 160. For the text of Articles 31 and 32 of the Vienna Convention, see above, para. 7.8.

[113] Provisional Central Product Classification, Statistical Papers, Series M No.77, United Nations (1991).

description is to be preferred to categories providing a more general description.[114] The United States did not offer specific arguments on this issue.

7.71 The Panel notes, first, that this dispute concerns the scope of China's GATS commitments. The issue before us is whether the United States can properly base its claims in respect of the services at issue on China's commitments under subsector (d). For this reason, we believe that it would be incongruous for the Panel to begin its analysis by interpreting a subsector *not* relied on by the United States and *not* contained in China's Schedule. Furthermore, under the approach proposed by China, the Panel would need to determine at the outset of its examination which of subsectors (d) and (xiv) is "more specific". In our view, the matter is not so obvious that we could confidently determine, without undertaking a detailed examination, that subsector (xiv) is "more specific" in relation to the services at issue.

7.72 For these reasons, we are not persuaded that we must, from the outset, follow the CPC rule of interpretation referred to by China and thus direct our initial analysis away from the provisions of China's Schedule, in particular subsector (d). Naturally, this neither prevents nor dispenses us from subsequently examining subsector (xiv) of the Annex as relevant context for the interpretation of China's Schedule. The Panel will thus start its analysis by examining subsector (d) of China's Schedule.

## 2. Interpretation of subsector (d) in China's Schedule

7.73 The parties have different views on the scope of subsector (d). The United States argues that subsector (d) encompasses the services at issue. China disagrees and submits that this subsector covers issuing and acquiring services, which are not among the services at issue.

7.74 As explained above, we will interpret subsector (d) as described in China's Schedule in accordance with customary rules of interpretation. Therefore, we will first determine the ordinary meaning of relevant terms used to describe the services contained in subsector (d). We shall then turn to the context, which includes, *inter alia*, other elements of China's Schedule, the GATS itself, the GATS Annex on Financial Services, and the schedules of other WTO Members.[115] Finally, we shall consider the object and purpose of the GATS and the WTO Agreement. As indicated above, we may turn to supplementary means of interpretation pursuant to Article 32 of the Vienna Convention as appropriate.

### (a) Ordinary meaning

7.75 The United States argues that the services at issue fall within the ordinary meaning of "payment and money transmission services" as one type of "all" such services within subsector (d) of China's Schedule. According to the United States, the ordinary meaning of "payment" and "money transmission", as reflected in definitions from the *Shorter Oxford English Dictionary* and specialized financial sources, demonstrates that subsector (d) covers the action of transferring money from one person to another.[116]

7.76 China argues that subsector (d) is listed in China's Schedule under the heading of "banking services". Consistent with the ordinary meaning of "banking services", all of the services listed under

[114] China's first written submission, para. 89.

[115] In *US – Gambling*, a dispute about commitments included in the GATS Schedule of the United States, the Appellate Body found that the context included: (i) the remainder of the Member's Schedule; (ii) the substantive provisions of the GATS; (iii) the provisions of covered agreements other than the GATS; and (iv) the GATS Schedules of other Members. See Appellate Body Report, *US – Gambling*, para. 178.

[116] United States' response to China's request for a preliminary ruling, paras. 150-155; first written submission, para. 26; and second written submission, paras. 19-32.

that heading are services that are typically provided by banks, finance companies, and other types of financial institutions. The banks are making a "payment" within the ordinary meaning of that term, i.e. they are engaging in "[a]n act, or the action or process, of paying …". Hence, according to China, the payment services referred to in subsector (d) encompass the issuance and acceptance by financial institutions of payment instruments other than cash, but do not cover the services at issue.[117]

7.77 Australia submits that the ordinary meaning of the terms "all payment and money transmission services" encompasses services which manage and facilitate the transfer of funds, whether for the purpose of payment for a good, service or debt, or for purposes unrelated to payment, from one person or place to another.[118]

7.78 The Panel recalls that subsector (d) in China's Schedule reads as follows:

> All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers draft (including import and export settlement)

7.79 We begin our textual analysis of the phrase "all payment and money transmission services" by examining the terms "payment", "money" and "transmission". We shall then turn to the terms "all" and "services".

*(i) Ordinary meaning of "payment", "money" and "transmission"*

Dictionaries and glossaries

7.80 The Panel observes at the outset that, for the purpose of determining the ordinary meaning of the terms of subsector (d), dictionary definitions of those terms are a useful starting point. However, such definitions are not always sufficient. As the Appellate Body has explained:

> [I]n order to identify the ordinary meaning, a Panel may start with the dictionary definitions of the terms to be interpreted. But dictionaries alone are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words – be those meanings common or rare, universal or specialized.[119]

7.81 We first consider the term "payment" in subsector (d). The *Shorter Oxford English Dictionary* defines "payment" as "an act, or the action or process, of paying".[120] In turn, the verb "pay" is defined as "give (a person) money etc. that is due for goods received, a service done, or a debt incurred; remunerate. Also, hand over or transfer (money etc.) in return for something."[121] This general definition of "payment" is consistent with definitions in certain glossaries and specialized dictionaries submitted by the United States: (i) a "transfer of funds in any form between two parties";[122] or (ii) the "transfer of money from one party to another with the assent of both parties".[123] We glean from these definitions that the three main elements in a payment are (i) there is a transfer, (ii) what is transferred is money, and (iii) the transferred money is due for goods, services or a debt incurred. The Panel next considers the term "money". The *Shorter Oxford English Dictionary* provides the following general definition:

---

[117] China's first submission, paras. 95-97.
[118] Australia's third-party submission, para. 10.
[119] Appellate Body Report, *US – Gambling*, para. 164 (footnotes omitted, emphasis original).
[120] *Shorter Oxford English Dictionary*, Vol. 2, p. 2130.
[121] Ibid., p. 2129.
[122] *Banking Terminology*, 3rd ed., (American Bankers Association, 1989) (*Banking Terminology*), Exhibit US-59, p. 262.
[123] John V. Terry, *Dictionary for Business & Finance*, 1990, Exhibit US-60, p. 240.

> … A current medium of exchange in the form of coins and (in mod. use) banknotes; coins and banknotes collectively. … Any object or material serving the same purposes as coins. … Property, wealth, possessions, resources, etc., viewed as convertible into coin or banknotes or having value expressible in terms of these.[124]

7.82 In glossaries and specialized dictionaries, the term "money" is defined as the following: (i) "[a]nything which is immediately and generally acceptable for the discharge of a debt or in exchange for a good or service"[125]; (ii) "the means of facilitating the exchange of goods and services and the accumulation of financial wealth, commonly recognizable as banknotes, coins and bank deposits"[126]; (iii) "[a]nything that is generally acceptable as a means of settling debt. Money is said to have three main functions, being: a store of value; a means of exchange; and a means of debt settlement (cf. fiat money)".[127]

7.83 As one might expect, the definitions found in specialized dictionaries and glossaries are more technical than the general definition found in the *Shorter Oxford English Dictionary;* however, they are consistent with this definition. The definitions suggest that "money" can be characterized as (i) a generally acceptable means of exchange, (ii) that represents wealth, and (iii) is generally acceptable as payment.

7.84 Finally, the Panel considers the term "transmission". The *Shorter Oxford English Dictionary* defines this term as "[c]onveyance or transfer from one person or place to another; the action or process of passing from one person, organism, generation, etc., to another, as by personal contact, stored information, genetic inheritance, etc."[128] This definition suggests that the two main elements characterizing "transmission" are (i) a transfer, (ii) from one person or place to another.

7.85 In sum, our analysis of definitions contained in dictionaries and glossaries suggests that the terms "payment", "money" and "transmission", when used in combination, refer to the transfer of a generally acceptable means of exchange from one person or place to another. The money transferred may be due for goods or services received, or for settling a debt. We continue our consideration of the ordinary meaning of the terms used in subsector (d) with an examination of industry sources.

Industry sources

7.86 The United States argues that the description of the sector at issue drawn from industry sources is relevant to determining the ordinary meaning under Article 31 of the Vienna Convention. According to the United States, industry sources confirm the ordinary meaning of the service and demonstrate that EPS is a payment service that is one type of "all" "payment and money transmission service" falling within subsector (d). The United States contends that, in many instances, the common meaning of a term corresponds to its usage within a particular industry or sector and provides the basis for dictionary definitions. Consequently, the United States suggests, it is appropriate and may be helpful to look at how those involved in the service at issue understand the terms found in a GATS schedule. The United States further submits that sector sources describe the suppliers of the services at issue in this dispute as supplying "electronic payment services" for "payment card" transactions and

[124] *Shorter Oxford English Dictionary*, Vol. 1, p. 1821.
[125] D. Rutherford, *Dictionary of Economics,* Routledge*,* 1992, p. 305.
[126] G. Bannock & W. Manser, *The Penguin International Dictionary of Finance*, Penguin Books, 3rd ed., 1999, p. 181.
[127] Peter Moles & Nicholas Terry, *The Handbook of International Financial Terms,* Oxford University Press, 1997.
[128] *Shorter Oxford English Dictionary*, Vol. 2, p. 3325.

as operating within the "global payments industry." This confirms, according to the United States, that the services at issue are payment services falling under subsector (d) of China's Schedule.[129]

7.87 China argues that the United States provides no support for the proposition that the manner in which certain service suppliers characterize their services is relevant, as a matter of treaty interpretation, to how those services should be classified in relation to a Member's schedule. Thus, industry sources like company brochures, annual reports, or company websites are not relevant for the purpose of establishing the ordinary meaning of the terms at issue in this dispute, one reason being that they might be biased and self-serving. Moreover, China observes that the United States has not pointed to a single panel or Appellate Body report that uses industry sources as a means of treaty interpretation. China further argues that, even if the industry sources cited by the United were legally relevant to the classification of the services at issue, they would support China's position that these services include clearing and settlement, among other possible services. There are only a handful of references in these sources to the "payment industry" or "payment systems", compared to far more numerous references to the telecommunications, data processing, and clearing and settlement services that these companies describe themselves as providing.[130]

7.88 Ecuador submits that the industry's characterization of a service does not determine the nature of that service and the fact that one or several suppliers describe the services they supply as "payment services" does not necessarily confer that character upon them. The legal value of industry sources is therefore questionable.[131]

7.89 The Panel begins by assessing whether it is appropriate to examine industry sources in addition to dictionaries for the purpose of determining the ordinary meaning of a term appearing in a GATS schedule.[132] We acknowledge that, sometimes, industry sources may define a term in a way that might reflect self-interest and, thus, might be "biased and self-serving", as argued by China. To that extent, we see some merit in China's concerns about relying on such sources, without more. Nevertheless, we see no basis to completely disregard industry sources as potential relevant evidence of an ordinary meaning of a specific term in a particular industry. Indeed, we see no reason why a panel's search for the ordinary meaning of any term should always be confined to regular dictionaries. A panel's initial task in interpreting treaty provisions is to determine the ordinary meaning of the words used. If industry sources can be shown to assist with this task in a particular dispute, we see no reason why a panel should not refer to them. As with a panel's consideration of dictionary definitions, however, panels must be mindful of the limitations, such as self-interest, that industry sources may present and should govern their interpretive task accordingly.

7.90 With these preliminary observations in mind, we now examine the relevance of the terms that appear in the industry sources referred to by the parties for purposes of the interpretation of the terms used in subsector (d). We note that both parties refer to industry sources – sometimes the very same ones[133] – but draw different conclusions from them.[134] The United States argues that the way industry

[129] United States' first written submission, para. 26; and response to Panel question No. 82, para. 52.

[130] China's first written submission, paras. 117 and 118; and response to Panel question No. 82, paras. 1 and 2.

[131] Ecuador's third-party statement, paras. 12, 13 and 15.

[132] We observe that, pursuant to Article 31(4) of the Vienna Convention, "[a] special meaning shall be given to a term if it is established that the parties so intended". In the present dispute, no party is relying on this provision. Hence, we shall not consider it.

[133] China submits in this regard that "[i]ronically, many of the materials that the United States references and includes as exhibits are materials that China was already planning to cite – and, in fact, has cited above – for the proposition that the services at issue in this dispute include clearing and settlement services." China's first written submission, fn. 69.

[134] For example, both parties refer to MasterCard's 2010 annual report. Our examination of this report indicates that, as argued by the United States, it describes the company as providing "a global payment network"

sources describe their own services confirms that EPS is a payment service that is one type of "all" "payment and money transmission service" falling within subsector (d). China has not relied on industry sources to shed light on the meaning of "all payment …". In China's view, "[r]eading through the various corporate materials and other 'industry sources' that the United States cites as evidence, one is struck not by the handful of references to the 'payment industry' or 'payment systems', but rather by the far more numerous references to the telecommunications, data processing, and clearing and settlement services that these companies describe themselves as providing".[135]

7.91 The Panel notes that industry sources cited in this dispute refer to payment transactions, electronic payments and the various types of cards specifically identified in subsector (d) of China's Schedule.[136] We also note that the usage of these terms in industry sources is consistent with the definitions found in general dictionaries and more specialized glossaries that we examined in the preceding section. We find, however, that industry sources do little to shed further light on the scope of subsector (d).

The expression "payment and money transmission *services*"

7.92 Having considered the ordinary meaning of "payment", "money" and "transmission", the Panel notes that these three elements must be examined in conjunction with the term "services", which they qualify. Our understanding is that the phrase "payment and money transmission services" refers to, respectively, "payment services" and "money transmission services". The parties and third parties in this dispute have the same reading. What is thus at stake in this dispute is the scope of the expressions "payment *services*" and "money transmission *services"*.

7.93 The United States argues that EPS is the service through which transactions involving payment cards are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated. It considers that EPS clearly fall within the ordinary meaning of "payment and money transmission services" as one type of "all" such services.[137]

7.94 China submits that a service supplier that is merely "managing" or "facilitating" the supply of this type of payment service, or "processing" payment transactions, is not itself a party to the payment transaction. In China's view, the supplier is neither issuing nor accepting the payment instrument and is never in possession of the funds to be paid. It is not "paying" anyone, and is not providing a "payment service" within the ordinary meaning of that term. China also submits that the United

---

and operating in the "global payment industry". The report also refers to various means of payment, including "credit cards, charge cards, debit cards (including … [ATM] cards), prepaid cards, …" and indicates that the company provides "payment services and solutions". We observe however that, as submitted by China, the same report also refers to MasterCard as providing "transaction switching", which includes "authorization, clearing and settlement". MasterCard 2010 Annual Report, Exhibits US-6, pp. 4-10.

[135] China's first written submission, para. 118.

[136] Visa IPO Prospectus, Exhibit US-3, p. 128; MasterCard 2009 Annual Report, Exhibit US-5; MasterCard 2010 Annual Report, Exhibit US-6, p. 6; American Express 2010 Annual Report, Exhibit US-7, pp. 4-11; Discover 2010 Annual Report, Exhibit US-8, pp. 1-4; First Data Corp 10-K Annual Report (March 10, 2011), Exhibit US-9; UBS Investment Research, "Visa 201: No Better Way to 'Play the Swipe', June 25, 2008, Exhibit US-10, pp. 28-30; JCB Corporate Overview: JCB – A Leader in the Payments Industry (as of July 2011), Exhibit US-16; JCB Smart Card Press Release: JCB International and Vital Processing Services Team Up to Introduce JCB Smart Card Capability in the United States (November 2002), Exhibit US-17; JCB History (2001-2009, JCB International Co., LTD), Exhibit US-18; JCB System network: Most Advanced Payment System Network, Exhibit US-19; and CUP's Articles of Association, Articles 11-12, Exhibit US-20. See United States' response to China's request for a preliminary ruling, paras. 55-61 and 164-178; and first written submission, para. 27.

[137] United States' response to China's request for a preliminary ruling, para. 147-155; first written submission, paras. 25-26; and second written submission, paras. 19-32.

States has not given a proper interpretation to subsector (d) because the United States has failed to acknowledge that network operators are not "paying" or "transmitting money" to anyone.[138]

7.95 The Panel observes that the GATS provides no definition of the word "service", although it defines related concepts, such as the *supply* of a service and a service *supplier*.[139] Paragraph 5(a) of the GATS Annex on Financial Services defines a "financial service" as "any service of a financial nature offered by a financial service supplier of a Member", and contains a list of financial services that comprises "all payment and money transmission services, including …" under subsector (viii).

7.96 It is clear to the Panel that the *supply* of a "payment service" is not the same thing as the act of paying for goods or services. Purchasers who, on their own account, pay merchants for goods or services received are not thereby providing a "payment service" to these merchants. The payment in such case is what a purchaser gives in return for the good or service received, and not a separate service received by the merchant. Thus, "payment services" in our view are supplied, if at all, by a person or entity other than the payer or payee. Typically, when payment instruments other than cash are used, a third party intervenes between the payer and the payee, in order to facilitate or make possible the "act of paying". The same can be said about "money transmission services", since transmitting money normally involves the participation of an intermediary to ensure that the money is transferred from one party to another.

7.97 We consider, therefore, that whoever supplies a "payment service" does not "pay", but makes the payment between payer and payee, for example by processing payment transactions involving the use of credit cards, debit cards, or other such instruments. Similarly, when it comes to "money transmission services", the supplier of the service intervenes between the sender and the recipient (payer and payee) to ensure that the money is transmitted. In our view, a "money transmission service" encompasses, among other situations, those where the supplier either transmits the funds from the payer's account to the payee's account (as in the three-party model) or connects the parties involved in a payment transaction, and ensures that payment instructions are executed and funds are transferred pursuant to the transaction (as in a four-party model). Hence, suppliers of "payment and money transmission services" are providing a "service" that facilitates and enables payments and money transmissions. For that reason, we agree with the United States that "payment and money transmission services" include those services that "manage", "facilitate" or "enable" the act, of paying, or transmitting money.

Ordinary meaning of "all"

7.98 As noted, subsector (d) begins with the word "all". It is the only subsector in the financial services section of China's Schedule that does so. Subsector (viii) of the GATS Annex on Financial Services, on which, according to China, subsector (d) of China's Schedule is based,[140] also starts with the word "all".[141]

7.99 Consistent with the principle of effective treaty interpretation, we consider that the word "all" before "payment and money transmission services" must be given meaning and effect. In our view, the use of the term "all" manifests an intention to cover comprehensively the entire spectrum of "payment and money transmission services". More particularly, this term indicates to us an intention to include all services essential to payment and money transmission, all means of payment and money

[138] China's second written submission, para. 40.

[139] Article XXVIII(b) of the GATS defines the "supply of a service" as including "the production, distribution, marketing, sale and delivery of a service" and, pursuant to Article XXVIII(g) of the GATS, a service supplier means "any person that supplies a service".

[140] China's first written submission, para. 80.

[141] The *Shorter Oxford English Dictionary*, Vol. 1, p. 55 defines "all" as "the entire number of; the individual constituents of, without exception".

transmission (i.e. paper-based, card-based and others), and all associated business models (e.g. four-party model, three-party model and any variations thereof).[142]

Summary of findings on the ordinary meaning of "all payment and money transmission services"

7.100 Our analysis of the ordinary meaning of the relevant text indicates that "payment and money transmission services" include those services that "manage", "facilitate" or "enable" the act of paying or transmitting money. Finally, we concluded that the use of the term "all" manifests an intention to cover comprehensively the entire spectrum of payment and money transmission services.

7.101 Having determined the ordinary meaning of these terms, we shall turn now to the contextual elements of the phrase "all payment and money transmission services".

(b) Context

7.102 Pursuant to the rule codified in Article 31(2) of the Vienna Convention, the "context" within which a treaty provision shall be interpreted notably comprises the text of the treaty, including its preamble and annexes. For the purpose of interpreting a Member's GATS schedule, the Appellate Body found in *US – Gambling* that the context includes (i) the remainder of the Member's schedule; (ii) the substantive provisions of the GATS; (iii) the provisions of covered agreements other than the GATS; and (iv) the GATS schedules of other WTO Members.[143]

7.103 When looking at the remainder of a Member's schedule as part of a contextual analysis, panels and the Appellate Body have considered several aspects. For instance, in *US – Gambling*, the Appellate Body examined the structure of the schedule.[144] In *China – Publications and Audiovisual Products*, the Appellate Body considered such aspects as the contextual relevance of the sectoral heading at stake; market access, national treatment and additional commitments under the subsector at stake; subsectors adjacent to the services at stake; and commitments scheduled under another related sector.[145]

7.104 In the present dispute, we therefore consider that our examination of the context should, as also reflected in the parties' arguments, cover the following elements: (i) the rest of subsector (d); (ii) the headings in the sector at stake; (iii) market access, national treatment and additional commitments in the sector at stake; (iv) the structure of the GATS; (v) the GATS Annex on Financial Services; and (vi) the schedules of other WTO Members. We shall examine these different contextual elements in turn.

*(i) The rest of subsector (d)*

7.105 We recall that subsector (d) of China's Schedule reads as follows:

> [A]ll payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement)

7.106 The phrase "[A]ll payment and money transmission services" in subsector (d) of China's Schedule is immediately followed by the phrase: "including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement)". We observe that this phrase is

[142] The Panel uses the term "essential" to refer to all component services which are needed to complete a payment transaction or money transmission.
[143] Appellate Body Report, *US – Gambling*, para. 178.
[144] Appellate Body Report, *US – Gambling*, para. 179.
[145] Appellate Body Report, *China – Publications and Audiovisual Products*, paras. 361-372.

similar to that found in subsector (viii) of the Annex on Financial Services[146], on which, according to China, subsector (d) is based.[147] The only difference is the parenthetical addition "(including import and export settlement)" in subsector (d). We shall examine first the phrase "including credit, charge and debit cards, travellers cheques and bankers drafts" and shall then turn to the parenthetical addition.

The phrase "including credit, charge and debit cards, travellers cheques and bankers drafts"

7.107 The United States argues that the explicit reference to credit, charge and debit cards accords with the recognition that EPS is integral to the processing of these types of cards and other payment card-based electronic payment transactions. The United States observes that without EPS, payment card transactions could not occur.[148]

7.108 China submits that, properly interpreted in its context, the "payment services" referred to in subsector (d) encompass the issuance and acceptance by financial institutions of payment instruments other than cash. All of the specific types of payment instruments referenced in subsector (d) are methods of payment that allow the buyers and sellers of goods and services to complete transactions without a direct transfer of cash.[149]

7.109 The Panel first observes that the phrase "including credit, charge and debit cards, travellers cheques and bankers drafts" refers to payment and money transmission instruments, not to services. In our view, this phrase sets out various types of instruments that require payment and money transmission services for them to work effectively. We also note that the instruments listed are preceded by the word "including". As explained by the panel in *China – Publications and Audiovisual Products*, "the word 'including' in ordinary usage indicates that what follows is not an exhaustive, but a partial, list of all covered items".[150] In a similar vein, we consider that the phrase "including credit, charge and debit cards, travellers cheques and bankers drafts" in subsector (d) provides a non-exhaustive list of instruments used in connection with payment and money transmission services.[151] In the Panel's view, the explicit reference to "credit, charge and debit cards" in subsector (d) of China's Schedule sheds light on the type of services covered by the phrase "all payment and money transmission services" as it appears in China's Schedule. It notably suggests that the phrase covers payment and money transmission services that are essential for the use of the enumerated instruments.

7.110 Turning to dictionary definitions, a "credit card" is "a card issued by a bank, business, etc., authorizing the acquisition of goods and services on credit".[152] A "charge card" is "a credit card, esp. for use at a particular store or chain of stores or for an account which must be cleared in full on receipt of a statement".[153] A "debit card" is defined as "giving the holder access (through a computer terminal) to an account in order to transfer funds to another's account when making a purchase, etc."[154] These general definitions are confirmed by definitions found in more specialized glossaries,

[146] In paragraph 5(a) of the Annex, subsector (viii) is defined as "[a]ll payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts".

[147] China's first written submission, para. 80.

[148] The United States also argues that the ordinary meaning of the phrase "including credit, charge and debit cards" supports the position that EPS for payment card transactions fall within subsector (d) in China's Schedule. United States' response to China's request for a preliminary ruling, para. 149 and 156-163; first written submission, paras. 25-26; and second written submission, paras. 19-23 and 33-37.

[149] China's first written submission, para. 96.

[150] Panel Report, *China – Publications and Audiovisual Products*, para. 7.294.

[151] In our view, these instruments also include other types of cards, such as ATM cards.

[152] *Shorter Oxford English Dictionary*, Vol. 1, p. 555.

[153] Ibid. p. 385.

[154] Ibid. p. 615.

such as the *BIS Glossary of terms used in payment and settlement systems*.[155] Moreover, "credit, charge and debit cards" are commonly associated with EPS suppliers, which own and licence card brands. Finally, we note that definitions of "travellers cheques" and "bankers drafts" also identify them as payment and money transmission instruments involving transmission of money.[156]

7.111 Accordingly, we find that the phrase "including credit, charge and debit cards, travellers cheques and bankers drafts", which sheds light on the types of services covered by the phrase "all payment and money transmission services", refers to an illustrative list of payment and money transmission instruments. Dictionary definitions identify these instruments as instruments enabling the holder to make payments without cash and to transfer money from one person or place to another. Consequently, the list confirms that "[a]ll payment and money transmission services" refers to those services that are essential to the processing and completion of transactions using payment cards. The Panel considers that such transactions include not only those involving, for instance, the use of a credit card at a POS terminal for the purpose of a good or service, but also those involving the use of a credit, debit or ATM card for the purpose of withdrawing cash from an ATM. In the Panel's view, the latter constitutes a form of money transmission service.[157]

The reference to "(including import and export settlement)"

7.112 The United States submits that the parenthetical phrase "(including import and export settlement)" does not appear in subsector (viii) of the GATS Annex on Financial Services, but was added by China to the description of the services covered by subsector (d). According to the United States, the explicit use of "settlement" suggests that there is an element of settlement and clearing that occurs as part of the payment service.[158]

7.113 China submits that the term "import and export settlement" refers to the services that banks provide as payment intermediaries for import and export transactions through letters of credit. Unlike

[155] The BIS defines a "credit card" as "a card indicating that the holder has been granted a line of credit. It enables the holder to make purchases and/or withdraw cash up to a prearranged ceiling; the credit granted can be settled in full by the end of a specified period or can be settled in part, with the balance taken as extended credit. Interest is charged on the amount of any extended credit and the holder is sometimes charged an annual fee." The same glossary defines a "debit card" as "card enabling the holder to have his purchases directly charged to funds on his account at a deposit-taking institution (may sometimes be combined with another function, e.g. that of a cash card or cheque guarantee card)." Finally, the glossary defines a "travel and entertainment card" as "card issued by non-banks indicating that the holder has been granted a line of credit. It enables him to make purchases but does not offer extended credit, the full amount of the debt incurred having to be settled at the end of a specified period. The holder is usually charged an annual fee. Also called charge card." BIS Glossary, Exhibit US-68, pp. 16, 19 and 50.

[156] A travellers cheque is "a cheque for a fixed amount of money which may be cashed or used in payment abroad, on the holder's signature", *Shorter Oxford English Dictionary*, Vo. 2, p. 3331. A "bank draft" is defined as (i) "a check that a bank draws on itself, used when the payee does not wish to accept the credit of the customer as drawer. The customer purchases the bank draft with good funds, which gives the payee confidence that the check will be honoured. Also known as banker's check." *The Palgrave Macmillan Dictionary of Finance, Investment and Banking* (Palgrave MacMillan, New York, 2010) (*The Palgrave Macmillan Dictionary of Finance, Investment and Banking*), p. 44; or as (ii) "a cheque drawn by a bank on itself or its agent. A person who owes money to another buys the draft from a bank for cash and hands it to the creditor who need have no fear that it might be dishonoured. A bank draft is used if the creditor is unwilling to accept an ordinary cheque." *A Dictionary of Finance and Banking*, Oxford Paperback Reference, Exhibit CHN-80, p. 34.

[157] In our view, the use of a credit, debit or ATM card to withdraw cash from an ATM constitutes a form of money transmission service, insofar as, for example, the card issuing institution or card holder's bank authorizes the transmission of money from the card holder's bank account to the location of the ATM or, in the case of a credit card, a cash advance to the location of the ATM.

[158] United States' response to Panel question No. 83, paras. 54-58.

the case of payment cards, there is no third party that provides clearing and settlement services to the financial institutions that are involved in an import/export transaction. The financial institutions deal with each other directly, and use the international inter-bank payment system to complete the necessary transfer of funds. According to China, the reference to "settlement" in subsector (d) in no way suggests that clearing and settlement services are within the scope of this subsector, as there are no clearing and settlement services involved in an import/export transaction. China also submits that it is significant that subsector (d) does not use the word "clearing".[159]

7.114 The Panel notes that, as pointed out above in paragraph 7.106, the words in parenthesis – "including import and export settlement" – do not appear in subsector (viii) of the Annex; they were added by China to its Schedule. Consistent with the principle of effective treaty interpretation, these words must be given meaning.

7.115 In our view, the terms "import and export" suggest that the parenthetical phrase refers to payment services supplied in connection with international trade transactions. China appears to hold a similar view as it considers that the phrase refers to the services that banks provide as payment intermediaries for import and export transactions.[160] We observe that the parenthetical phrase qualifies *inter alia* the expression "bankers drafts", which generally refers to a draft drawn by a bank on itself.[161] Bankers' drafts are payment instruments used in international trade transactions between importers and exporters. Like other payment instruments listed in subsector (d), bankers' drafts must be settled in order to complete the transaction.[162] In our view, the word "settlement" at the end of the phrase refers to the completed transaction. Therefore, the parenthetical phrase serves to confirm that payment services for transactions between importers and exporters where payment occurs by means of bankers' drafts are covered by subsector (d) of China's Schedule.

7.116 We note China's argument that the fact that subsector (d) does not use the word "clearing" should be given interpretative significance.[163] In the Panel's view, the fact that the word "clearing" is not mentioned in the bracketed language does not mean that no clearing is involved in situations where bankers' drafts are used. Bankers' drafts, like any other type of cheque, are normally cleared before they are settled. We also note that various sources suggest that clearing is usually a prior step to settlement: the term "clearing" is defined as "[t]he system of settling payments due from one bank to another"[164] or "[t]he exchange of mutual claims by financial institutions with settlement of the net balance".[165] Settlement marks the final stage in an import/export transaction completed through bankers' drafts. Hence, in our view, "clearing" of a bankers' draft is implied in the parenthetical phrase.

---

[159] China's response to Panel question No. 83, paras. 1-3; and comments on United States' response to Panel question No. 83, para. 53.

[160] In response to Panel question No. 83, China submits that "[t]he term 'import and export settlement' refers to the services that banks provide as payment intermediaries for import and export transactions. … They involve banks acting as trusted payment intermediaries to allow the parties to an import/export transaction to avoid the use of cash." China's response to Panel question No. 83, para. 1.

[161] See above fn. 156 for definitions of "bank draft".

[162] We note in this regard that the BIS definition cited above in fn. 156 likens bankers' drafts to cheques.

[163] China's comments on United States' response to Panel question No. 83, para. 53.

[164] *Oxford Dictionary of Economics,* 3rd ed., Oxford University Press, 2009, Exhibit CHN-4, p. 64.

[165] *Banking Terminology*, Exhibit CHN-3, p. 64-65, definition 2. Another source defines "clearing" as "the process of transmitting, reconciling and, in some cases, confirming payment orders or security transfer instructions prior to settlement, possibly including the netting of instructions and the establishment of final positions for settlement." BIS Glossary, Exhibits US-68; CHN-2, p. 13.

7.117 We understand China's arguments to suggest that the language in parentheses applies primarily to letters of credit.[166] We agree that letters of credit are payment instruments used in international trade transactions and that payment services to complete transactions through letters of credit arguably can fall under subsector (d). Thus the words "including import and export settlement" might also relate to letters of credit. We observe, however, that letters of credit are not mentioned in the illustrative list under subsector (d). Moreover, a parenthetical phrase is a grammatical device often used to link the words in parenthesis to language that precedes them.[167] Here, the parenthetical phrase follows a list of instruments that does not include letters of credit. In our view, it is implausible that the parenthetical phrase relates primarily to letters of credit, i.e. a payment instrument that has not even been included in the list that precedes the parenthetical phrase.

7.118 The Panel therefore concludes that the parenthetical addition "(including import and export settlement)" in China's Schedule confirms that subsector (d) includes settlement, and by implication clearing, e.g. when bankers' drafts are used as payment instruments for transactions between importers and exporters. We perceive no sound basis for assuming that subsector (d) includes settlement, and where appropriate clearing, of transactions involving the use of bankers' drafts, but that it would exclude settlement and clearing of transactions involving the use of the *other* payment instruments listed in subsector (d). In our view, the parenthetical phrase merely seeks to make explicit – in relation to one particular type of transaction – something that the broad phrase "[a]ll payment and money transmission services …" already contains implicitly.

Summary of findings on the phrase "including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement)"

7.119 Our examination of the phrase "including credit, charge and debit cards, travellers cheques and bankers drafts" in subsector (d) as immediate context for interpreting the preceding words "[a]ll payment and money transmission services", led us to conclude that this phrase is an illustrative list which provides confirmation that the phrase "[a]ll payment and money transmission services" includes those services that are essential to the processing and completion of transactions using payment cards. Moreover, the parenthetical addition "(including import and export settlement)" confirms that subsector (d) includes settlement, and by implication clearing, when bankers' drafts are used as payment instruments for transactions between importers and exporters. The parenthetical addition also suggests to us that settlement and clearing of transactions involving the use of other payment instruments listed in subsector (d) would likewise be classifiable under this subsector.

7.120 We now proceed to examine whether other contextual elements confirm or undermine these conclusions.

*(ii) Other elements of China's Schedule*

The subheading "Banking services as listed below" in the sectoral column of China's Schedule

7.121 China argues that subsector (d) is one of six subsectors listed in China's Schedule under the heading "Banking services …". According to China, the ordinary meaning of "banking services" is services provided by banks. Consistent with this ordinary meaning, all of the services listed under the heading of "Banking services …" are services that are typically provided by banks, finance

[166] China's response to Panel question No. 83, para. 2. United States' rebuttal arguments regarding China's letter of credit arguments are set out in United States' response to Panel question No. 83, paras. 54-58.

[167] The *Shorter Oxford English Dictionary*, Vol. 2, p. 2102 defines "parenthesis" as "a word, clause, sentence, etc., inserted (as an explanation, qualification, aside, or afterthought) into a passage which is already grammatically complete, and usu. marked off by brackets, dashes, or commas."

companies, and other types of financial institutions. China also submits that China's market access and national treatment inscriptions for mode 3 confirm that the services encompassed by subsectors (a) through (f) are services supplied by banks and other financial institutions, which confirms that subsector (d) does not encompass services that are supplied to banks by non-bank service suppliers. According to China, when interpreted in this context, the "payment services" referred to in subsector (d) encompass the issuance and acceptance by financial institutions of payment instruments other than cash. China also submits that there is no indication in any Member's commitments for subsector (viii) of the Annex that these services are provided by suppliers other than banks or other financial institutions.[168]

7.122 The United States submits that the heading "Banking services…" does not have the effect of limiting the scope of the commitments to "banks" and other "regulated financial institutions". According to the United States, the definition of "financial institution" offered by China is far too narrow. The United States also observes that, in addition to the explicit reference to "non-bank financial institutions" in China's Schedule, there are other references to "foreign finance companies" in the market access column and to "foreign financial leasing corporations" in the additional commitments column. The United States further argues that, even if China's approach were correct, suppliers of payment card services would qualify because they were formerly operated as associations of banks and, according to the United States, the nature of the service that an entity supplies does not change merely because that entity assumes a new corporate form. The United States also submits that the characteristics and nature of the service control the classification of that service, and where the identity of the supplier is relevant, the sectoral description must clearly indicate that to be the case.[169]

7.123 Australia, the European Union, Guatemala and Korea are of the view that the subheading "Banking services …" does not affect the scope of China's commitments under subsector (d).[170]

7.124 The Panel notes that the heading "B. Banking and Other Financial Services …" in China's Schedule encompasses four categories, namely "Banking services as listed below", "Motor vehicle financing by non-bank financial institutions", "Other financial services as listed below", and "Securities".[171] Subsector (d) is listed under the subheading "Banking services as listed below". The four categories are specific to China's Schedule: they are not present in the GATS Annex on Financial Services and do not appear in other WTO Members' GATS schedules.

7.125 Turning first to the ordinary meaning of "banking", this term is defined as (i) "the provision of payments facilities, credit, and capital to individuals, firms, and the government. …";[172] (ii) "the business of banks";[173] and (iii) "the area of finance related to taking of deposits, granting of loans, and provision of other financial services, which may include investment, trading, and advisory".[174]

---

[168] China's first written submission, paras. 95-98; and China's response to Panel question No. 60, paras. 108 and 109. The Panel recalls that subsector (viii) of the Annex corresponds to subsector (d) of China's Schedule.

[169] United States' second written submission, paras. 118-124; and response to Panel questions No. 60, paras. 151-153 and No. 61, paras. 154 and 155.

[170] Australia's third-party response to Panel question No. 9 (no paragraph numbering provided); European Union's third-party response to Panel question No. 9, para. 29; Guatemala's third-party's response to Panel question No. 9, para. 34; and Korea's third-party's response to Panel question No. 9 (no paragraph numbering provided).

[171] See excerpt of China's Schedule in Annex G to this Report. We note that the last three subheadings are preceded by a hyphen. We view the lack of a hyphen before "Banking services as listed below" as a typographical error.

[172] *Oxford Dictionary of Economics*, 3rd ed., Oxford University Press, 2009, Exhibit CHN-41, p. 26.

[173] *Dictionary of Banking and Finance,* 4th ed., A & C Black, 2010, Exhibit CHN-42, p. 30.

[174] *The Palgrave Macmillan Dictionary of Finance, Investment and Banking*, Exhibit CHN-47, p. 46.

We observe that these definitions do not indicate that "banks" are necessarily the exclusive providers of "banking" services.

7.126 We also observe that all of the services listed in subsectors (a) to (f) under the subheading at issue are commonly supplied by banks, but non-bank financial services suppliers can also supply them. For example, deposits (subsector (a)) can be taken by post offices; loans (subsector (b)) can be granted by post offices and finance companies; leasing services (subsector (c)) can be supplied by leasing companies; money can be transferred (subsector (d)) by post offices or other specialized suppliers; guarantees (subsector (e)) can be granted by finance companies; and foreign exchange (subsector (f)) can be traded by specialised foreign exchange dealers and brokers. Hence, in practice, different types of entities can supply the services listed in subsectors (a) to (f).

7.127 Moreover, the commitments contained in the market access column, which are relevant context for interpreting the subheading at issue, make reference to "finance companies", which are non-bank entities.[175] Finally, the additional commitments column under the subheading "Banking services …" contains a reference to "financial leasing corporations" which are also non-bank entities. With these considerations in mind, it is clear to us that "banking services" as that term appears under the subheading at issue includes services supplied by banks and *non*-banks.

7.128 China argues that "[c]onsistent with this ordinary meaning [i.e. the ordinary meaning of banking services, which, according to China, refers to "services provided by banks"], all of the services listed under the heading of 'banking services' are services that are typically provided *by banks, finance companies, and other types of financial institutions*."[176] In other words, China's argument amounts to saying that "services provided by banks" are "services provided by banks *and non*-banks".

7.129 Moreover, as pointed out by the United States, when China wished to undertake a commitment with respect to a certain category of supplier only, it did so explicitly, such as in the subsector "[m]otor vehicle financing by non-bank financial institutions".[177]

7.130 Furthermore, the Panel observes that, as evidenced by the arguments presented by both the United States and China, there is a close historical association between banks and EPS suppliers. Both parties have made reference to the fact that certain United States' EPS suppliers were operated as associations of banks until 2006, i.e. until well after China's accession to the WTO in 2001.[178] If, as argued by China, the identity of the supplier is relevant for purposes of classifying services, then those EPS suppliers were arguably providing "banking services" as China defines that term (i.e. services supplied by banks) until they changed their corporate form in 2006. The Panel has already indicated that it does not share China's narrow interpretation of the term "banking services". Having said that, the Panel agrees with the United States that the classification of a service should not change solely because the suppliers of that service modify their ownership structure or legal form. Such an interpretative approach to classification would undermine the predictability, security and clarity of GATS specific commitments.

7.131 We also find relevant in this respect evidence submitted by China (to which we referred in connection with determining whether the services in question are supplied as integrated services)[179]

---

[175] A "finance company" is defined as "a non-bank financial institution …" See *The Palgrave Macmillan Dictionary of Finance, Investment and Banking*, Exhibit CHN-88, p. 206.

[176] China's first written submission, para. 95 (emphasis added).

[177] United States' response to Panel question No. 60, para. 152.

[178] China's first written submission, para. 50 ("Prior to their initial public offerings in 2006, Visa and MasterCard were operated as associations of banks … that issued and acquired payment cards under a common brand."); and United States' response to Panel question No. 60, para. 152.

[179] See para. 7.60 above.

demonstrating that, in France, for example, the authorization system for payment card transactions is operated by CB, an association of banks. Moreover, clearing and settlement of retail payments transactions, including payment card transactions, is operated by STET Inter-bank Payment Services, an institution created and still owned by five banks in France. In our view, this is further evidence of the continuing link between banks and EPS.[180]

7.132 Finally, as noted above, the heading "B. Banking and Other Financial Services …" encompasses four subheadings, namely, "Banking services as listed below", "Motor vehicle financing by non-bank financial institutions", "Other financial services as listed below", and "Securities". The subheadings "Banking services as listed below" and "Other financial services as listed below" group together, respectively, six and two subsectors. We note that the pattern of market access and national treatment commitments under each of these four subheadings is different. Hence, in our view, the heading "Banking services as listed below" may also serve a practical purpose, which is to separate China's commitments that apply in the same way to subsectors (a) to (f) from its commitments that apply only to certain categories of services (motor vehicle financing by non-bank financial institutions) or to other services listed further down in China's Schedule (namely, other financial services … and securities). As indicated, China has undertaken different market access and national treatment commitments under the four subheadings in question.

7.133 In sum, our analysis of the subheading "Banking services as listed below" leads us to conclude that this subheading is not indicative of an intention to circumscribe the commitments under subsectors (a) to (f) to a certain category of services suppliers, namely banks. Rather, this subheading indicates that the services concerned are typically supplied by banks, or were typically provided by banks in the past. This does not detract from the fact, however, that some of these services can be, and are, also provided by other types of financial entities. Additionally, and from a more practical point of view, this subheading may also serve to separate commitments undertaken in respect of subsectors (a) to (f) from different commitments undertaken in respect of other subsectors listed further down in China's Schedule.

7.134 We conclude therefore that the placement of subsector (d) under the heading "Banking services as listed below" does not contradict our view explained above that subsector (d) encompasses services that are essential to the processing and completion of transactions using payment cards.

The market access commitment under mode 1

7.135 In its arguments concerning the scope of the market access commitment undertaken by China under mode 1[181], the United States submits that the word "Unbound" in China's market access commitment under mode 1 is followed by the qualifying phrase "except for the following," which in turn is further elaborated by two sentences that describe elements of the services within subsector (d) for which China has undertaken mode 1 commitments, namely:

> - Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;
>
> - Advisory, intermediation and other auxiliary financial services on all activities listed in subparagraphs (a) through (k), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

[180] See China's response to Panel question No. 75, para. 2 and *Cartes Bancaires* 2010 Annual Report, Exhibit CHN-106, p. 13.

[181] The Panel will use the term "mode 1" to refer to the supply of a service that is "from the territory of one Member into the territory of any other Member", as provided for in Article I:2(a) of the GATS.

7.136 For the United States, China's mode 1 commitment must be understood as recognizing that elements of "payment and money transmission" services include "provision and transfer of financial information" and "advisory, intermediation and other auxiliary services", to the extent that such elements are integral to the core service, and that the service of which they form a part is properly classified within "payment and money transmission" services and not in subsector (k) or (l) of China's Schedule.[182]

7.137 China replies that, in an effort to "jam" all of the services at issue into the exception to China's unbound mode 1 inscription for subsector (d), the United States takes the position that all five of the "components" of the services at issue match the descriptions of subsectors (k) and (l). By doing so, the United States removes everything from the basket of subsector (d) and, as a result, has nothing left in this subsector.[183]

7.138 The Panel is of the view that the market access entry under mode 1 constitutes relevant context for the purpose of interpreting the scope of subsector (d). The Panel refers to its detailed discussion of China's market access commitment under mode 1 in Section VII.F.1(a) below. There, the Panel finds that this entry is properly understood as referencing China's mode 1 market access commitment for subsectors (k) and (l). Hence, the context provided by the market access entry under mode 1 does not suggest an interpretation that is different from that suggested by the other contextual elements examined so far. In other words, the mode 1 market access commitment does not contradict our conclusion that subsector (d) encompasses services that are essential to the processing and completion of transactions using payment cards.

*(iii) The GATS Annex on Financial Services*

The scope of subsector (xiv) in the Annex

7.139 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.[184] We shall therefore turn to the Annex as relevant context for the interpretation of China's Schedule.

7.140 Subsector (xiv) in paragraph 5(a) of the Annex, which falls under the heading "Banking and other financial services (excluding insurance)", states as follows:

> Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments[185]

7.141 China argues that the clearing and settlement services at issue in this dispute are classifiable under subsector (xiv) of the Annex, a subsector for which China undertook no commitments. China

[182] United States' response to Panel question No. 45, para. 118; and second written submission, paras. 103-108.

[183] China's second written submission, paras. 37 and 38.

[184] China's first written submission, para. 80.

[185] We note China's comment that "[b]ecause the process of 'clearing' comes before the process of 'settlement', China will refer to 'clearing and settlement services' even though item (xiv) refers to these two processes in the opposite order" (China's first written submission, fn. 49). Like China and for the same reason, we shall refer to "clearing and settlement services".

maintains that every definition of the term "financial assets" points to the conclusion that it refers to "money and claims", including cash and any right to receive cash. Furthermore, the reference to "negotiable instruments" in subsector (xiv) unambiguously includes retail payment instruments, such as cheques and travellers' cheques. It is China's view that, as context, the illustrative list of examples confirms that the drafters of subsector (xiv) intended to use the term "financial assets" according to its common and ordinary meaning.[186]

7.142 The United States replies that China's position is inconsistent with the ordinary meaning of "settlement and clearing services for financial assets" and fails to recognize that subsector (xiv) constitutes a substantially different financial service than the services at issue. It argues that China's position also fails to interpret the term "financial asset" within its immediate context, which is the full sentence in subsector (xiv).[187]

7.143 Australia argues that subsector (xiv) covers settlement and clearing services for financial assets, other than card based transactions. Settlement and clearing services for financial assets are clearly distinct from the settlement and clearing activity that is part of payment and money transmissions, such as credit card transactions.[188] The European Union submits that the clearing and settlement services involved in the trading (buying and selling) of "securities, derivative products and other negotiable instruments" are separate and distinct from the "payment and money transmission services" which take place when there is a transfer of funds between different persons or entities, in order to settle "credit, charge or debit card" transactions".[189] According to Korea, subsector (xiv) of the Annex addresses mainly paper-based financial asset transactions which, in and of themselves, represent or carry designated monetary value. The term "financial assets" refers to an object or instrument that contains or represents some sort of monetary value to its owner, which can subsequently be sold or negotiated; this is not the case for credit card or credit card transactions.[190]

7.144 The Panel observes that the parties do not dispute that payment card transactions must be cleared and settled. They disagree, however, where the clearing and settlement of payment card transactions should be classified. We recall that our interpretation of subsector (d) thus far has led us to the view that this subsector includes those services that are essential to the processing and completion of transactions using payment cards. We also concluded, in paragraph 7.118 above, that the parenthetical addition "(including import and export settlement)" confirms that subsector (d) includes settlement, and by implication clearing. Consistent with this view, clearing and settlement of payment card transactions should *a priori* be classified under subsector (d), because they are essential services to complete a payment card transaction. We also recall that, although we decided to begin our analysis with subsector (d) of China's Schedule, we also said that we would turn to subsector (xiv) of the Annex before reaching a final conclusion on the scope of subsector (d).[191]

7.145 Starting with an examination of the ordinary meaning of the terms "clearing", "settlement" and "financial assets", the Panel notes the following definitions:

> Clearing: "process of transmitting, reconciling and, in some cases, confirming payment orders or security transfer instructions prior to settlement, possibly including

[186] China's first written submission, paras. 79-89; response to Panel question No. 39(a), para. 47; and second written submission, paras. 2-33.
[187] United States' response to Panel question No. 24, paras. 68-80; and second written submission, paras. 42-74.
[188] Australia's third-party submission, para. 17; and third-party response to Panel question No. 1 (no paragraph numbering provided).
[189] European Union's third-party submission, para. 27.
[190] Korea's third-party submission, para. 1; and third-party response to Panel question No. 15(a) (no paragraph numbering provided).
[191] See para. 7.72 above.

> the netting of instructions and the establishment of final positions for settlement"[192] or "(a) the exchange of the payment instrument or of relevant payment information between the payer's and the payee's financial institutions, and (b) the calculation of claims for settlement".[193]
>
> Settlement: "an act that discharges obligations in respect of funds or securities transfers between two or more parties"[194] or "a transfer of funds to complete one or more prior transactions that were made subject to final settlement. Settlement is the point at which underlying claims and obligations are satisfied".[195]
>
> Financial assets: "[m]oney and claims, as distinct from physical assets such as land, buildings, or equipment. Financial assets include money, securities constituting a claim to receive money, such as bills or bonds, and shares giving indirect ownership of the physical assets of companies. The claims held as financial assets include the obligations of individuals, companies, and governments, domestic and foreign. Financial assets include shares in financial institutions, and derivatives such as options."[196] Other definitions describe a "financial asset" as "[a]n asset that is either cash, a contractual right to receive cash, or the right to exchange a financial instrument with another entity under potentially favourable terms or an equity instrument of another entity";[197] or "assets in the form of stocks, bonds, rights, certificates, bank balances, etc., as distinguished from tangible, physical assets …".[198]
>
> Financial: "of or pertaining to revenue or money matters".[199]

7.146 An examination of dictionary definitions and other specialized glossaries suggests that the ordinary meaning of the words "clearing" and "settlement" refers to activities that are relevant for both retail payment instruments and securities. The ordinary meaning of the term "financial assets" encompasses virtually all financial instruments. We also observe that definitions of the terms used in subsector (xiv) may overlap with definitions of terms in subsector (d) – for instance, "settlement" and "payment" are almost synonymous.[200] It is difficult, therefore, to ascertain the scope of subsector (d) of China's Schedule and that of subsector (xiv) of the Annex based solely on the ordinary meaning of the terms used in these sector descriptions. We also recall that the Appellate Body has cautioned against using dictionary definitions in a mechanical manner.[201]

7.147 Thus, while we agree with China that an interpretation of the term "financial assets" must begin with the ordinary meaning of the terms, our interpretation cannot end there. We recall that, pursuant to Article 31(1) of the Vienna Convention, the ordinary meaning of "financial assets" must be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty *in their context* and in the light of its object and purpose" (emphasis added). With this in mind,

---

[192] BIS Glossary, Exhibits US-68 and CHN-2, p. 13.

[193] BIS (CPSS), Clearing and Settlement Arrangements for Retail Payments in Selected Countries, 2000, Exhibit CHN-1, pp. 2-6.

[194] BIS Glossary, Exhibits CHN-2 and US-68, p. 45.

[195] *Banking Terminology*, Exhibit CHN-5, p. 323, definition 3.

[196] *A Dictionary of Economics,* 3rd ed., Oxford University Press, 2009, Exhibit CHN-32, p. 167.

[197] *A Dictionary of Accounting*, Oxford University Press, 1999, Exhibit CHN-38, p. 161.

[198] *Dictionary of Finance and Investment Terms*, 8th ed., Barron's, New York, 2010, Exhibit CHN-34, p. 257.

[199] *Shorter Oxford English Dictionary*, Vol. 1, p. 964. The *Shorter Oxford English Dictionary* does not contain a definition for financial asset or for clearing.

[200] See, above in section VII.D.2(a) our analysis of the ordinary meaning of the terms used in subsector (d) of China's Schedule.

[201] Appellate Body Report, *US – Gambling*, para. 164.

we now turn to the phrase "including securities, derivative products, and other negotiable instruments", which follows immediately after the words "settlement and clearing for financial assets" in subsector (xiv) and hence constitutes immediate context.

7.148 The United States argues that illustrative lists may be more than merely non-exhaustive lists of examples. They may also inform the overall scope of a provision and the meaning of a term that they illustrate. An examination of each of the items in the illustrative list in subsector (xiv) demonstrates that retail receipts, such as a claim on a payment card, are not the same type of financial asset as the items included in the illustrative list ("securities", "derivative products" and "other negotiable instruments"). According to the United States, the illustrative list of financial assets in subsector (xiv) indicates that the scope of those assets is limited to tradable investment instruments, which supports the conclusion that the term "financial assets" as used in subsector (xiv) is intended to be limited to these types of instruments.[202]

7.149 China submits that the three examples in the illustrative list do not constitute an exhaustive list of what constitutes a "financial asset" under subsector (xiv). Moreover, according to China, the United States tries to work backwards from these examples to limit the ordinary meaning of the term "financial assets" to what it calls "tradeable financial instruments" or, alternatively, "tradeable investment instruments". For China, the reference to "negotiable instruments" in subsector (xiv) unambiguously includes retail payment instruments such as cheques and traveller's cheques. Like securities and derivatives, these are "financial assets" within the ordinary meaning of that term because they give rise to claims for payment. Moreover, China contends that because subsector (viii) of the Annex provides examples of negotiable instruments as types of "payment services", the drafters understood that the clearing and settlement of these instruments under subsector (xiv) is distinct from the issuance and acceptance of these instruments under subsector (viii).[203]

7.150 The Panel is of the view that the list contained in subsector (xiv) sheds light on the type of clearing and settlement services covered under that subsector. In this respect, we recall the view of the panel in *China – Publications and Audiovisual Products* that "the word 'including' in ordinary usage indicates that what follows is not an exhaustive, but a partial, list of all covered items".[204] We find this statement to be correct in the specific context of subsector (xiv), and so, like the parties, we regard the list as illustrative. Accordingly, we conclude that this illustrative list is a non-exhaustive enumeration of the kinds of "financial assets", the clearing and settlement of which are classified under subsector (xiv).

7.151 We observe that although the parties appear to concur that the illustrative list in item (xiv) informs the understanding of the term "financial assets", they reach different conclusions on the meaning and scope of that term. For the United States**,** illustrative lists "may help to inform the overall scope of a provision and the meaning of a term that they illustrate".[205] For China, the reference to "negotiable instruments" in the illustrative list of subsector (xiv) "necessarily informs the understanding of the term 'financial assets'".[206]

---

[202] United States' response to Panel question No. 42, para. 107; and second written submission, paras. 75-93.

[203] China's response to Panel question No. 39(c), paras. 54-62; and second written submission, paras. 15-26. It will be recalled that subsector (viii) states as follows: "[a]ll payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts" and that China states that subsector (d) was based on subsector (viii). See, para. 7.106 above.

[204] Panel Report, *China – Publications and Audiovisual Products*, para. 7.294.

[205] United States' second written submission, para. 75.

[206] China's response to Panel question No. 39(a), para. 49.

7.152 We now turn to the specific financial instruments listed in the illustrative list of subsector (xiv), i.e. securities, derivative products, and other negotiable instruments, and start with an examination of their ordinary meaning:

> Security: "A document held by a credit as guarantee of his or her right to payment; a certificate attesting ownership of stock, shares, etc.; the financial asset represented by such a document. Also (US), such a document issued to investors to finance a business venture";[207] or "A pledge of financial or physical property to be surrendered in the event of failure to repay a loan. Any medium of investment in the money market or capital market, e.g. a money-market instrument, a bond, a share. A term used to refer only to bonds, and shares, as distinct from money-market assets."[208]
>
> Derivative product: "An arrangement or instrument (such as a future, option, or warrant) whose value derives from and is dependent on the value of an underlying asset.";[209] or "a financial contract the value of which depends on the value of one or more underlying reference assets, rates or indices. For analytical purposes, all derivatives contracts can be divided into basic building blocks of forward contracts, options or combinations thereof."[210]

7.153 Definitions found in general and specialized dictionaries suggest that "securities" (i) are a medium of investment, (ii) attest ownership rights and (iii) grant financial returns. Derivative products essentially share these same characteristics.

7.154 We consider now the ordinary meaning of the term "negotiable instruments". The word "negotiable" is defined as follows: "[o]f a bill, draft, cheques, etc.: transferable or assignable in the course of business from one person to another simply by delivery."[211] A "negotiable instrument" is "a document of title that can be freely negotiated …"[212] or "unconditional order or promise to pay an amount of money, easily transferable from one person to another".[213] The characteristics of "negotiable instruments", as identified in specialized dictionaries, are that they (i) are easily transferable from one person to another, and (ii) can be freely negotiated.

7.155 In our view, the reference to "securities, derivative products and other negotiable instruments" indicates that this subsector deals with financial assets which have in common the characteristic of being "negotiable". Many types of financial instruments are negotiable and some retail payment instruments listed under subsector (d) of China's Schedule, such as traveller's cheques and banker's drafts, may be negotiable. In contrast, we observe, and the parties seem to agree,[214] that plastic

---

[207] *Shorter Oxford English Dictionary*, Vol. 2, p. 2733.

[208] The Economist, *Dictionary of Business*, by Graham, Davis, Trott, Uncles, Bloomberg Press, 2003, Exhibit US-69, p. 334.

[209] *Shorter Oxford English Dictionary*, Vol. 1, p. 653.

[210] BIS Glossary, Exhibit US-68, p. 20.

[211] *Shorter Oxford English Dictionary*, Vol. 2, p. 1905.

[212] *A Dictionary of Finance and Banking*, Oxford Paperback Reference, Oxford, 2008, Exhibit CHN-39, p. 303.

[213] *Dictionary of Finance and Investment Terms*, 8th ed., Barron's, New York, 2010, Exhibit CHN-40, p. 469.

[214] The United States submits that "[p]ayment cards and the sales slips generated from payment card transactions do not meet the internationally accepted criteria for a negotiable instrument." United States' second written submission, para. 81. China states that "[c]redit, charge, and debit cards are more modern payment instruments, and their relationship to the concept of negotiability is more complicated. It is clear that the cards themselves – the pieces of plastic – are not negotiable instruments. … The slip is a promise to pay, but, in many cases, that promise will be subject to the terms and conditions of a contractual agreement (e.g. the cardholder agreement between the issuer and the cardholder). In these circumstances, the promise to pay may not be

payment cards and sales slips signed in connection with payment card transactions are not negotiable instruments because they are neither transferable nor can they be traded on a market. Hence, on this basis we consider that payment cards and sales slips do not fall within the category of "other negotiable instruments" referred to in the illustrative list of subsector (xiv).

7.156 China argues, however, that payment cards have "common features" with bankers' drafts and traveller's cheques in the sense that each of these instruments gives rise to inter-bank claims for payment between acquiring banks and issuing banks, and that such claims need to be cleared and settled. China concludes that, "since it is beyond any reasonable dispute that the clearing and settlement of negotiable instruments is encompassed by item (xiv), it would be arbitrary and illogical to conclude that clearing and settlement services for certain types of retail payment instruments are covered by item (xiv), while clearing and settlement services for other types of retail payment instruments are covered by item (viii) ".[215]

7.157 The United States submits that there are many types of negotiable instruments and, while some are used for payments (for example, cheques), others are used as investment vehicles (for example, commercial paper). The reference to "negotiable instruments" in subsector (xiv) does not include all such instruments. In the United States' view, subsector (xiv) only indicates that there are negotiable instruments that settle and clear like securities and derivative products. However, subsector (xiv) cannot be read properly to mean that all negotiable instruments are settled and cleared like securities and derivative products. Thus, the United States considers that to the extent a negotiable instrument appears in subsector (viii), it is not a negotiable instrument referred to in subsector (xiv).[216]

7.158 The Panel observes that, according to China, the clearing and settling of payment card transactions should be covered under subsector (xiv) because payment cards have "common features" with other payment instruments listed in subsector (d) (for example, bankers' drafts and travellers' cheques), these "common features" being, in China's view, that "(1) each is a type of payment instrument that is issued by banks; and (2) that each of these instruments gives rise to inter-bank claims for payment between acquiring banks and issuing banks, which such [*sic*] claims need to be cleared and settled."[217] In other words, China's interpretation brings the clearing and settlement of *non*-negotiable payment instruments, such as payment cards, within the scope of subsector (xiv). What appears to matter most, in China's view, is that clearing and settlement services for all financial instruments, whether negotiable or not, be classified in the same subsector.

7.159 It is not clear to us, however, how this interpretative approach can be reconciled with the terms used in subsector (xiv). First, we note that subsector (xiv) does not refer to "all settlement and clearing services", in contrast to the "[a]ll payment and money transmission services" found in subsector (d). Furthermore, we observe that the illustrative list includes two specific terms – "securities and derivative products" – and a broader, residual category – "other negotiable instruments". The adjective "other"[218] ties "negotiable instruments" back to "securities" and "derivative products", thereby establishing a nexus between these three categories of instruments. Reading the term "other negotiable instruments" with reference to the terms "securities" and "derivative products" that precede it supports the conclusion that the term "negotiable instruments" does not include any and all instruments that are "negotiable". We note in this respect that the

---

"unconditional", which is usually a formal requirement of negotiability." China's response to Panel's question No. 39(a), para. 48.

[215] China's response to Panel question No. 39(a), paras. 49 and 50.

[216] United States' response to Panel question No. 39(a), paras. 99-100.

[217] China's response to Panel question No. 39(a), para. 49.

[218] "Other" (adj.) is defined as "4 Existing besides or distinct from that or those already specified or implied; further, additional. …". *Shorter Oxford English Dictionary*, Vol. 2, p. 2035.

illustrative list does not say "*any* other negotiable instruments" or "other negotiable instruments *of any kind*". Thus, we consider that the term "other negotiable instruments", read in its context, covers only those instruments that share essentially the same characteristics as securities and derivative products.

7.160 Turning to the term "securities", we noted above that this term is defined as a means of investment attesting ownership rights and granting financial returns. We also noted that derivative products essentially share these same characteristics. In our view, payment cards and other payment instruments listed in subsector (d) do not share these characteristics. In particular, payment instruments are not a means of investment, do not grant ownership rights and do not yield financial returns. Hence, we agree with the United States that instruments listed in subsector (d), such as travellers' cheques, although potentially negotiable, are not among the negotiable instruments falling within subsector (xiv).

7.161 Furthermore, we find convincing the arguments and factual evidence submitted by the United States that there are many practical differences between the systems used to clear and settle investment instruments of the kind referenced in subsector (xiv) and the systems used to clear and settle payment instruments, such as those mentioned in subsector (d).[219] These differences relate to the following: (i) the financial instruments involved and the value of typical transactions; (ii) the market participants involved in the transaction and related processing; (iii) the infrastructure needs for such processes to occur safely and efficiently; and (iv) regulatory oversight and systemic risk to the financial system. The distinction between payment systems and securities infrastructure as distinct components of the market infrastructure is common in many countries, including in China.[220]

7.162 China does not contest the differences between clearing and settlement of payment instruments, on the one hand, and securities and derivatives, on the other hand. China argues, however, that these differences are not relevant to the interpretation of the term "financial assets" and do not change the ordinary meaning of the term "negotiable instruments". We disagree. In our view, classification of services is not an abstract exercise; due regard should be had to market and regulatory realities. A classification approach reflecting, and in accord with, those realities contributes to the clarity and, therefore, security and predictability, of GATS specific commitments. Our reading of the scope of subsector (xiv) in the Annex and that of subsector (d) in China's Schedule is consistent with these considerations, because it takes due account of (i) the way payment systems are generally organized and regulated, as well as (ii) the essential differences between the settling and clearing of payment instruments and of securities and other negotiable instruments.

7.163 In sum, we find that subsector (xiv) encompasses the clearing and settlement of financial instruments sharing essentially the same characteristics as securities, derivative products and other negotiable instruments. More particularly, we consider that subsector (xiv) covers the clearing and settlement of financial instruments which have investment attributes, grant ownership rights and yield financial returns. Our conclusion is also based on the important practical differences between, on the one hand, the clearing and settlement of financial assets like securities and, on the other hand, the clearing and settlement of payment transactions. Hence, it is our view that retail payment instruments listed in subsector (d) of China's Schedule are not "financial assets" within the meaning that term has in subsector (xiv) of the Annex and, therefore, transactions based on the payment instruments listed in subsector (d), including payment cards, are not cleared and settled under subsector (xiv).

[219] United States' second written submission, paras. 55 to 74 and Exhibits cited in those paragraphs.
[220] The Panel asked China whether China UnionPay was involved in any stage of the clearing and settlement of securities in China. China replied "[n]o". China's response to Panel question No. 34, para. 35.

Subsector (x) of the Annex

7.164 Subsector (x) in paragraph 5(a) of the Annex on Financial Services reads as follows:

> (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.

7.165 The United States argues that China's interpretation of "financial asset" and "negotiable instruments" as they appear in subsector (xiv) does not accord with how these terms are used elsewhere in the Annex. The United States notes that these terms also appear in paragraph 5(a), subsector (x) of the Annex. The illustrative list of tradable assets under subsector (x) includes "other negotiable instruments and financial assets, including bullion". Thus, according to the United States, "negotiable instruments" and "financial assets" as used in subsector (x) refer to tradable investment assets, rather than "[m]oney and claims." This indicates that "negotiable instruments" and "financial assets" are not retail payment vehicles like credit and debit cards.[221]

7.166 China submits that the United States overlooks the fact that subsector (x)(A) of the Annex explicitly refers to "cheques" as among the "negotiable instruments" and "financial assets" included within this category. According to China, "this fatally undermines the United States' insistence that the drafters of the Annex meant to exclude cheques from the ordinary meaning of the terms 'financial assets' and 'negotiable instruments'".[222]

7.167 The Panel observes that subsector (x) of the Annex contains a list of instruments that can be "traded for own account or for account of customers, …". The Panel has already observed that cheques are among those retail payment instruments that are potentially negotiable. In our view, the list in subsector (x) confirms this point. Yet we do not consider that the fact that "cheques" are listed in subsector (x) as tradable instruments would support the view that clearing and settlement of cheques and other payment instruments should fall under subsector (xiv) of the Annex. It is only if one assumes that the clearing and settlement of potentially negotiable instruments of any kind falls under subsector (xiv) that this would be so, and we have already explained that we are unable to accept this assumption. Finally, we note that subsector (x) does not refer to payment cards, which also supports our earlier conclusion that payment cards are not negotiable instruments.

7.168 To conclude, we consider that the fact that subsector (x) in the Annex refers to cheques as a kind of tradable instrument does not invalidate our conclusion with respect to the scope of subsector (d) in China's Schedule.

---

[221] United States' second written submission, paras. 94 and 95.
[222] China's opening statement at the second substantive meeting, para. 15.

Summary of findings on the GATS Annex on Financial Services

7.169 In our examination of subsector (xiv) of the Annex, we found that payment instruments listed in subsector (d) of China's Schedule, such as payment cards, are not "financial assets" within the meaning of that term as it is used in subsector (xiv) of the Annex. Therefore, in our view, the clearing and settlement of transactions involving the use of the payment instruments listed in subsectors (d) of China's Schedule are not covered under subsector (xiv) of the Annex. In our view, having regard to the broad phrase "[a]ll payment and money transmission services", clearing and settlement services concerning transactions using payment cards are properly classified under subsector (d). As concerns subsector (x) in the Annex, we found that the fact that it refers to cheques as tradable instruments does not invalidate our conclusion with respect to the scope of subsector (d) in China's Schedule.

7.170 Hence, our analysis of the context provided by the GATS Annex on Financial Services does not contradict our finding that subsector (d) of China's Schedule encompasses the services that are essential to the processing and completion of transactions using payment cards.

*(iv) The structure of the GATS*

7.171 We turn now to a consideration of the structure of the GATS. The United States submits that EPS fall within the ordinary meaning of "payment and money transmission services" as one type of "all" such services. EPS are at the centre of all payment card transactions and without these services the transactions could not occur. According to the United States, EPS involve the services through which transactions involving payment cards are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated. Moreover, EPS are integral to the processing of credit, charge, debit and other payment card-based electronic payment transactions, and without these services, payment card transactions could not occur.[223]

7.172 China submits that the assertion by the United States that subsector (d) encompasses all of the services at issue is based on an interpretation of this subsector that is "vastly overbroad." This interpretation would lead to the conclusion that this subsector encompasses not only services supplied by banks, but also services supplied to banks. Moreover, in China's view, services that "manage" or "facilitate" the supply of a service, or that relate to the "processing" of another service transaction, are not necessarily classifiable as that other service, but must be classified separately to the extent that they are distinct and separately identifiable services. China points out that, pursuant to the 2001 Scheduling Guidelines, "input" services must be classified and evaluated as distinct services. China further submits that a schedule of specific commitments is based on taxonomy of distinct and mutually exclusive services. Many of those services could be said to "manage" or "facilitate" the provision of other services within the taxonomy, or relate to the "processing" of a distinct service transaction. In China's view, this system of classifying services would collapse if distinct and separately identifiable services could be classified under another sector or subsector merely because they "manage", "facilitate", or relate to the "processing" of that service.[224]

7.173 The United States replies that it has described the entire package provided by an EPS supplier as "managing," "facilitating," or "enabling" the processing of payment card transactions in an effort to capture the "intrinsic linkage" between EPS and payment card transactions. EPS do not "manage," "facilitate," or relate to the "processing" of a payment and money transmission service. EPS are the service at issue. EPS "manage," "facilitate," and relate to the "processing" of payment card transactions – which is one type of payment service falling within "all payment and money

[223] United States' response to China's request for a preliminary ruling, para. 149; first written submission, paras. 25-26; response to Panel question No. 26, paras. 84-86; and second written submission, paras. 13-18.

[224] China's first written submission, paras. 102-108.

transmission services" in subsector (d). According to the United States, EPS for payment card transactions constitute one integral, indivisible service. They are sold in a bundle and the service is a coherent whole, and the service supplier and service consumer are the same for the various component services. Without this integrated service, a payment card transaction could not happen. EPS for payment card transactions is a single service that is "intrinsically linked" to payment card transactions and that, for purposes of classification, should be analysed as a whole. The United States also submits that, if China's position were accepted – that a service must first be disaggregated into subcomponents and each subcomponent separately classified – it would render WTO Members' concessions meaningless for a wide range of services.[225]

7.174 China further submits that network services are at most "inputs" to card issuance and acceptance services, and are better seen as altogether different services. The services supplied by network operators relate to how financial institutions interact with each other, not to how card holders and merchants interact with each other. For China, the United States is trying to imply in subsector (d) a right of market access for a different set of service suppliers who provide input services (at most) at an entirely different level of trade. This is not only inconsistent with the principle of mutual exclusivity, but with WTO Members' express recognition that input services must be classified and evaluated as distinct services. China also takes issue with the argument that EPS is "one integral, indivisible service" and notes that the United States shifted to the singular when referring to EPS. In China's view, the evidence establishes that different "elements" or "components" of what the United States calls "electronic payment services" are routinely supplied as different services by different service suppliers. Hence, these services are not "supplied and consumed as an integrated service".[226]

7.175 In the Panel's view, the arguments by the parties raise three issues: (i) the scope of subsector (d) as it relates to EPS; (ii) whether the fact that different components of EPS can be supplied by different suppliers means that these different components must be classified separately; and (iii) the relevance of the 2001 Scheduling Guidelines for interpreting subsector (d). We shall examine these three issues in turn.

7.176 Turning to the scope of subsector (d) as it relates to EPS, we recall that, in China's view, the "U.S. interpretation of subsector (d) as encompassing 'any service' that is somehow associated with the use of payment cards" is "vastly overbroad and inconsistent with well-established principles of interpreting Schedules of Specific Commitments".[227]

7.177 In addressing this issue, the Panel must first examine the concept of "sector" under the GATS. The Panel recalls that, in *US – Gambling*, the Appellate Body referred to the definition of "'sector' of a service" contained in Article XXVIII(e)[228] and explained that:

---

[225] United States' second written submission, paras. 16 and 17.

[226] China's second written submission, paras. 52 and 53; opening statement at the second substantive meeting, para. 20; response to Panel question No. 75, paras. 1-3; and comments on United States' response to the Panel question Nos. 73-77, paras. 3-5 and 12.

[227] China's comments on United States' response to Panel question Nos. 73-77. In this comment, China refers to United States' first written submission, para. 22. We note that the United States referred to by China reads in fact: "China's commitments pertain to 'all payment and money transmission services, including credit, charge and debit cards', indicating that the scope of the commitment covers *any service that is essential to* 'payment and money transmission' including 'credit, charge, and debit cards' payment transactions". United States' first written submission, para. 22 (emphasis added).

[228] Article XXVIII provides that:

> "(e) 'sector' of a service means,
>
> (i) with reference to a specific commitment, one or more, or all, Subsectors of that service, as specified in a Member's Schedule,

> … the structure of the GATS necessarily implies two things. First, because the GATS covers *all* services except those supplied in the exercise of governmental authority, it follows that a Member may schedule a specific commitment in respect of *any* service. Second, because a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or Subsector within which that service falls, a specific service cannot fall within two different sectors or Subsectors. In other words, *the sectors and subsectors in a Member's Schedule must be mutually exclusive*.[229]

7.178 We also recall that, when referring to Article XXVIII(e)(ii) of the GATS, the panel in *China – Publications and Audiovisual Products*, found that:

> A description of a service sector in a GATS schedule does not need to enumerate every activity that is included within the scope of that service, and is not meant to do so. A service sector or subsector in a GATS schedule thus includes not only every service activity specifically named within it, but also any service activity that falls within the scope of the definition of that sector or subsector referred to in the schedule.[230]

7.179 Hence, the definition of "sector of a service" contained in the GATS and the finding of the Panel in *China – Publications and Audiovisual Products* confirm that a "sector" may include "any service activity that falls within the scope of the definition of that sector", whether or not these activities are explicitly enumerated in the definition of that sector or subsector.

7.180 The Panel observes that, when a card holder pays for a good or a service with a credit card and the merchant accepts that form of payment, both the card holder and the merchant naturally expect that the transaction for which that payment card is used will be completed. The completion of a transaction in which payment cards are used includes, at a minimum, what we referred to as "front-end processing" (which serves to authenticate and authorize transactions) and "back-end processing" (which essentially entails clearing and settlement of the transaction).[231] In our view, there cannot be any "payment service" and "money transmission service" if the payment is not effected and the money not transferred from the customer's account to the merchant's account. In that sense and referring to the finding cited above, these activities, even though they are not explicitly listed in subsector (d), are necessarily included within the scope of the definition of that subsector because they must operate together for the payment and money transmission service to be supplied. The fact that they are not specifically listed under the subsector at issue does not matter, as stated by the panel in *China – Publications and Audiovisual Products.* Hence, we agree with the United States' characterization of subsector (d) as encompassing "any service that is essential to 'payment and money transmission'".[232] In the view of the Panel, the classification under a single entry, of a service made up of a combination of different services is not incompatible with the principle of mutual exclusivity when these combined services result in a distinct service, which is supplied and consumed as such.[233]

---

(ii) otherwise, the whole of that service sector, including all of its Subsectors;"

[229] Appellate Body Report, *US – Gambling*, para. 180 (emphasis added). The Appellate Body further explained that "[i]f this were not the case [i.e. if sectors and subsectors were *not* mutually exclusive], and a Member scheduled the same service in two different sectors, then the scope of the Member's commitment would not be clear where, for example, it made a full commitment in one of those sectors and a limited, or no, commitment, in the other." Ibid. fn. 219.

[230] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1014.

[231] See paras. 7.20 to 7.24 above.

[232] United States' first written submission, para. 22.

[233] We note that our interpretation is supported by a rule of interpretation in the CPC prov.:

7.181 Finally, contrary to China's view[234], we consider that the fact that the United States switched from plural to singular when referring to "EPS" is immaterial for the purposes of services classification.[235] In our view, in a normal hierarchical classification scheme (like the CPC or the Annex on Financial Services), a service combining different services can be described simply as a "service", or as "services" in the plural. In the latter case, "services" refers to the sum of the different services classified by reference to the "service".

7.182 We examine now whether the fact that different components of the EPS can be supplied by different suppliers means that these different components must be classified separately. We recall that, according to the United States, "EPS for payment card transactions is a single, integrated service – one that is supplied and consumed as such".[236] China submits that different "elements" or "components" of the services at issue are routinely supplied as different services by different service suppliers. In particular, the network and authorization components of the services at issue are frequently supplied by entities other than the entities that provide clearing and settlement services for the same transactions. Hence, according to China, the United States' assertion that the services at issue are "supplied and consumed as an integrated service" is incorrect.[237]

7.183 The Panel observes that the manner in which the supply of integrated services such as the services at issue is organized depends on a number of parameters, including the business models adopted by specific companies, the regulatory framework in the country concerned, and how the direct users of payment services (e.g. issuing and acquiring institutions) organize their supply in specific jurisdictions.[238] Some companies may provide the various components of the services at issue, thus supplying a final product as a "package" for the direct users and for the ultimate beneficiaries of these services (i.e. the card holder, the issuer, the acquirer and the merchant). There may, however, be other circumstances where the different components are supplied by different suppliers.[239] The evidence submitted by China indicates, for instance, that, in the case of France, the authorization process, on the one hand, and clearing and settlement, on the other hand, are provided by two different entities.[240]

7.184 Thus, the evidence before us suggests that, in practice, the services essential to a payment card transaction to be completed may be supplied by one or more service supplier(s). As we have said, while some suppliers provide all the various components of that service in an integrated manner, other suppliers may specialize in one segment of that service. In our view, the fact that some component services may be supplied by different suppliers is not a sufficient basis for classifying each or some of these services under different subsectors. Indeed, as noted by the United States, "[i]t is the

---

"1. When services are, *prima facie*, classifiable under two or more categories, classification shall be effected as follows, on the understanding that only categories at the same level (sections, divisions, groups, classes or subclasses) are comparable: (a) The category that provides the most specific description shall be preferred to categories providing a more general description; (b) *Composite services consisting of a combination of different services which cannot be classified by reference to 1(a) shall be classified as if they consisted of the service which gives them their essential character, in so far as this criterion is applicable*." Provisional Central Product Classification, Statistical Papers, Series M No.77, United Nations (1991), p. 20 (emphasis added).

[234] China's comments on United States' response to Panel question Nos. 73-77, paras. 4 and 5.

[235] China's comments on United States' response to the Panel question Nos. 73-77, para. 2.

[236] United States' second written submission, para. 11 (citing further references to United States' written submissions). See also United States' second written submission, paras. 13-18.

[237] China's opening statement at the second substantive meeting, paras. 20 and 21; response to Panel question No. 75, paras. 1-3; and comments on the United States' response to Panel question Nos. 73 and 77, para. 12.

[238] See above section VII.C.1.

[239] See our discussion above in para. 7.60.

[240] China's response to Panel question No. 75, paras. 1-3, including the evidence indicated therein.

combination that enables the payment card transaction to occur".[241] Hence, the mere fact that separate suppliers provide one particular component of a service does not in itself imply that that component should be classified as a distinct service, or that the component is not part of an integrated service. In our view, what is relevant in relation to an integrated service is not whether it is supplied by a single supplier or by several suppliers, but rather whether the component services, when combined together, result in a new and distinct service, the integrated service.

7.185 We note that China itself appears to accept that some services, although supplied by different suppliers, are nonetheless classifiable under the same subsector. Indeed, issuing and acquiring services could be considered as two "distinct and separately identifiable services", to borrow China's terminology. As evidenced by the arguments of the parties, issuing and acquiring are different activities.[242] Moreover, for any given payment card transaction, the issuing and acquiring institutions are not necessarily the same entity; in the four-party model, they are often different entities. Nevertheless, China is not proposing to classify, respectively, issuing services and acquiring services under two separate subsectors, but argues instead that these two services fall under subsector (d).[243]

7.186 We turn now to the third issue raised by the parties, namely whether the services at issue are inputs into a service classified under subsector (d). We recall that, according to China, the 2001 Scheduling Guidelines expressly recognize that a specific commitment does not extend to input services that are separately classifiable within the relevant taxonomy of services. In China's view, the services at issue are at most "inputs" to card issuance and acceptance services, which, according to China, are classified under subsector (d) of its Schedule.[244]

7.187 According to China, the 2001 Scheduling Guidelines are a supplementary means of interpretation falling under Article 32 of the Vienna Convention.[245] We understand, therefore, that China is not proposing that we rely on the 2001 Scheduling Guidelines as context in our interpretation of subsector (d) pursuant to Article 31 of the Vienna Convention. Regardless of whether the 2001 Scheduling Guidelines may be considered as context or as supplementary means of interpretation,

---

[241] Ibid.

[242] United States' response to China's request for a preliminary ruling, para. 43; and first written submission, para. 20.

[243] China submits that "China's *actual* commitment in subsector (d) … was to allow foreign financial institutions to enter its market on a commercial presence basis to issue payment cards to cardholders and acquire payment card transactions from merchants". China's first written submission, para. 8 (emphasis in the original). We recall that issuing and acquiring services are not at stake in this dispute and, hence, we do not need to determine where these services should be classified. We accept China's position merely for the sake of argument on this issue.

[244] China's first written submission, paras. 106-108; and second written submission, paras. 51 and 52. Paragraph 25 of the 2001 Scheduling Guidelines reads as follows: "[i]t is understood that market access and national treatment commitments apply only to the sectors or sub-sectors inscribed in the schedule. They do not imply a right for the supplier of a committed service to supply uncommitted services which are inputs to the committed service." See also paragraph 17 of the 1993 Scheduling Guidelines.

[245] China' response to Panel question No. 58, para. 105 ("The Appellate Body in *U.S. – Gambling* found that the 1993 Guidelines constitute 'supplementary means of interpretation' under Article 32 of the Vienna Convention. China sees no reason to depart from this finding with respect to the 2001 Guidelines.") In response to the same question, the United States submitted that "[w]ith respect to the 2001 Guidelines, there are questions that arise as to timing, such as whether they were actually available when China was negotiating its Services commitments". United States' response to Panel question No. 58, para. 145. We note that the third parties have different views as to whether the 2001 Scheduling Guidelines should be considered under Article 31 or 32 of the Vienna Convention. Australia considers that the 2001 are relevant context pursuant to Article 31 of the Vienna Convention, while the European Union and Guatemala view this document as belonging to supplementary means of interpretation pursuant to Article 32. Australia's third-party response to Panel question No. 6 (no paragraph numbering provided), the European Union's third-party response to Panel question No. 6, para. 18; and Guatemala's third-party response to Panel question No. 6, para. 24.

however, we are not persuaded by China's argument.[246] China has provided no evidence to support its assertion that EPS are "input" services into issuing and acquiring services. Nor has it explained through argument why this is so: it has merely pointed to a rule referring generally to "input" services. It is unclear to us, for example, whether it could be argued that issuing and acquiring services are "inputs" into EPS, as opposed to the other way around.[247] In the absence of supporting evidence or explanation related to EPS as inputs, we are unable to accept China's contention in this respect.

7.188 To summarize our interpretation of subsector (d) based on the structure of the GATS as context, we are of the view that the classification under a single subsector of a service made up of a combination of different services is not incompatible with the principle of mutual exclusivity if these services, when combined together, result in a distinct service that is supplied and consumed as such. Moreover, the mere fact that separate suppliers provide one particular component of a service does not in itself imply that that component should be classified as a distinct service, or that the component is not part of an integrated service. In our view, what is relevant in relation to the classification of an integrated service is not whether it is supplied by a single supplier or by several suppliers, but rather whether the component services, when combined together, result in a new and distinct service, the integrated service. This confirms our view that subsector (d) encompasses the services essential to the processing and completion of transactions using payment cards.

*(v) Schedules of other WTO Members*

7.189 China submits that other WTO Members consider the services encompassed by subsector (viii) to be limited to services that are supplied by banks and other types of financial institutions. According to China, there is no indication in any WTO Member's commitments for subsector (viii) that these services are provided by suppliers other than banks or other financial institutions.[248]

7.190 The United State submits that a 1998 Background Note by the WTO Secretariat indicates with respect to credit card services that these are "either part of 'all payment and money transmission services'" or "they constitute an independent item." Hence, WTO Members either treated "credit card services" as part of "all payment and money transmission services" or as a separate, independent entry; and no Member included "credit card services" in 7.B.j (item (xiv) of the annex) – "settlement and clearing services for financial assets, including securities, derivatives, and other negotiable instruments".[249]

7.191 The Panel recalls that, in *US – Gambling* and in *China – Publications and Audiovisual Products*, GATS schedules of other WTO Members were used by the panels and the Appellate Body as relevant context for the interpretation of a Member's Schedule. As noted by the Appellate Body, "this is the logical consequence of Article XX:3 of the GATS, which provides that WTO Members'

[246] China asserts that "[i]n many cases, services that 'manage' or 'facilitate' the provision of another service or that relate to its 'processing' could properly be seen as 'inputs' to the provision of that service". China's first written submission, para. 107.

[247] We would observe that, when licensing its brand to a bank, an EPS supplier grants permission to that bank to issue a credit card under a trademark. It is the availability of the card that will allow customers to make payments. Hence, the final service, namely the payment service, is supplied by the EPS supplier, not by the bank. From that point of view, it is at least arguable that issuing and acquiring services constitute input services into EPS. As noted above, this discussion is without prejudice to where issuing and acquiring services should be classified.

[248] China's first written submission, para. 99; and response to Panel question No. 60, para. 109.

[249] United States' response to Panel question No. 59, para. 150; and second written submission, paras. 40 and 41. The United States refers to the WTO Secretariat Background Note on Financial Services, S/C/W/72 (2 December1998), para. 13.

Schedules are 'an integral part' of the GATS."[250] At the same time, the Appellate Body acknowledged that use of other WTO Members' schedules as context must be tempered by the recognition that"[e]ach Schedule has its own intrinsic logic"; hence, Schedules of other WTO Members may be "of limited utility in elucidating the meaning of the entry to be interpreted".[251] Thus far, they have not figured as a central element in the contextual analysis of a disputed entry.

7.192 We observe that the schedules of other WTO Members cited by China use different names to describe entities supplying services under subsector (d). These include "banks", "commercial banks", "financial institutions", "specialized finance companies" and "credit institutions".[252] China did not submit evidence or make arguments as to the precise nature of these differently named entities in China's and other WTO Members' schedules. For that reason, it is not clear to us whether the schedules of other WTO Members cited by China do indicate that "all payment and money transmission services" can only be supplied by "banks and other types of financial institutions" within the meaning attributed by China to those terms. Indeed, as noted above, each schedule has its own intrinsic logic and we are not in a position to determine, without more, whether, and to what extent, the entities referred to in the schedules cited by China do coincide with "banks and other types of financial institutions". Moreover, as we explain in detail further below (see Section VII.F.1), we consider that China's commitments in subsectors (a) to (f) apply to all foreign financial institutions and that the term "foreign financial institutions" as used in China's Schedule includes EPS suppliers.

7.193 Hence, the context provided by the Schedules of other WTO Members does not point to an interpretation that is different from that suggested by other elements of context examined above.

(c) Object and purpose

7.194 China argues that the United States' interpretation of China's Schedule or items in the Annex on Financial Services is "plainly contrary to the object and purpose of the GATS", because it is "arbitrary, illogical, and completely unpredictable". In China's view, the United States' approach is contrary to the "security and predictability of WTO Members' specific commitments, which is an important object and purpose of the GATS". For China, the United States' approach leads to an interpretation of China's Schedule and the Annex list in which "nothing means what it says", services are not clearly defined, and, as a result, it is "impossible to schedule and interpret specific commitments with any degree of security or predictability". According to China, this approach is "manifestly contrary" to the object and purpose of the GATS and must be rejected.[253]

7.195 The United States submits that the "progressive liberalization" called for in the Preamble of the GATS could never be achieved where, as under China's theory, a recognized, integrated service that is supplied and consumed as such, could not be classified in one subsector. Moreover, regarding China's argument that the object and purpose of the GATS calls for greater "transparency," China's own theory would render WTO Members' services schedules "indecipherable and impossible to reconcile with the commercial reality of the services they are supposed to reflect". The United States questions how transparency could be achieved where a Member could purport to liberalize a particular subsector through specific commitments, but then dismantle an integrated service that

[250] Appellate Body Report, *US – Gambling*, para 182.
[251] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 383.
[252] China referred to the schedules of Cambodia (GATS/SC/140), FYR Macedonia (GATS/SC/138), India (GATS/SC/42), Jordan (GATS/SC/128), Korea (GATS/SC/48), Macao (GATS/SC/50), Saudi Arabia (GATS/SC/141), Slovak Republic (GATS/SC/77), Venezuela (GATS/SC/92) and Vietnam (GATS/SC/142). China's first written submission, para. 99.
[253] China's second written submission, paras. 27-29.

would otherwise fall within that subsector and argue that various pieces constitute separate "services" for which that Member has undertaken no commitments.[254]

7.196 The Panel begins its consideration of the object and purpose of the GATS and the WTO Agreement by noting one of the key objectives listed in the Preamble to the GATS, namely "the establishment of a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of *transparency* and *progressive liberalization*" (emphasis added). We note that, in *US – Gambling*, the Appellate Body found that the purpose of transparency contained in the Preamble to the GATS supported the need for precision and clarity in scheduling GATS commitments, and underlined the importance of having schedules that are readily understandable by all other WTO Members, as well as by services suppliers and consumers.[255] In that dispute, the Appellate Body also recalled that:

> … the security and predictability of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade" is an object and purpose of the WTO Agreement …. This confirms the importance of the security and predictability of Members' specific commitments, which is equally an object and purpose of the GATS.[256]

7.197 We also recall that, in examining the principle of progressive liberalization as an expression of the object and purpose of the GATS, the Appellate Body did not consider that this principle "… lends support to an interpretation that would constrain the scope and coverage of specific commitments that have already been undertaken by WTO Members and by which they are bound."[257] We are also aware that, in both *US – Gambling* and *China – Publications and Audiovisual Products*, the Appellate Body observed that the objectives of the GATS did not provide specific guidance as to the correct interpretation of the entries at stake.[258]

7.198 We find that our interpretation of the scope of China's commitment under subsector (d) is consistent with the objective of transparency because it classifies under a single subsector services which, when combined together, result in a new and distinct service, the integrated service. This integrated service is supplied and consumed as such. Furthermore, by reconciling the classification of EPS with the commercial reality of those services, our interpretation reinforces the predictability, security and clarity of GATS specific commitments. For those same reasons, our interpretation is also consistent with the objective of progressive liberalization contained in the Preamble to the GATS.

7.199 Hence, our conclusion that subsector (d) of China's Schedule encompasses EPS is consistent with the object and purpose of the GATS and the WTO Agreement.

(d) Conclusion

7.200 The Panel has now completed its analysis of the scope of China's commitment in subsector (d) of its GATS Schedule on "all payment and money transmission services, including credit, charge and debit cards, travellers' cheques and bankers' drafts (including import and export settlement)" according to the rules of interpretation codified in Article 31 of the Vienna Convention.

---

[254] United States' opening statement at the second substantive meeting, para. 17.
[255] Appellate Body Report, *US – Gambling*, para. 188.
[256] Ibid.
[257] Appellate Body Report, *China – Publications and Audiovisual Products*, para. 394.
[258] "None of the objectives listed in the GATS preamble provides specific guidance as to the correct interpretation to be given to China's GATS Schedule entry 'Sound recording distribution services'". Appellate Body Report, *China – Publications and Audiovisual Products*, para. 393. See also Appellate Body Report, *US – Gambling*, para. 189.

7.201 Our analysis of the ordinary meaning of the terms "payment", "money" and "transmission", when used in combination, refers to the transfer of money from one person or place to another. The transferred money may be due for goods or services, or for settling a debt. When examining the expressions "payment services" and "money transmission services", we determined that "payment and money transmission services" can be characterized as those services that "manage", "facilitate" or "enable" the act of paying, or transmitting money. Finally, we observed that the use of the term "all" manifests an intention to cover comprehensively the entire spectrum of the "payment and money transmission services" encompassed under subsector (d). With regard to the phrase "including credit, charge and debit cards, travellers cheques and bankers drafts" in subsector (d), we concluded that this phrase constitutes an illustrative list that provides confirmation that the phrase "[a]ll payment and money transmission services" refers to those services that are essential to the processing and completion of transactions involving the use of payment cards. Moreover, the parenthetical addition "(including import and export settlement)" confirms that subsector (d) includes settlement, and by implication clearing, when bankers' drafts are used as payment instruments. This, in our view, provides an indication that settlement, and therefore clearing, of transactions involving the use of other payment instruments, such as those listed in subsector (d), is properly classified under subsector (d).

7.202 When examining the remainder of China's Schedule, we found that neither the heading "Banking services as listed below", nor the inscriptions under the mode 1 commitment, pointed to a different interpretation of the scope of subsector (d). Moreover, our analysis of the GATS Annex on Financial Services led us to the conclusion that subsector (xiv) of that Annex does not encompass the clearing and settlement of payment card instruments listed in subsector (d) of China's Schedule. Furthermore, our contextual interpretation of subsector (d) based on the structure of the GATS led us to the view that the classification, under a single subsector, of a service made up of a combination of different services is not incompatible with the principle of mutual exclusivity if these services, when combined together, result in a distinct service, which is necessarily supplied and consumed as such. Also, the mere fact that separate suppliers may provide particular components of a service does not in itself imply that that component should be classified as a distinct service, or that the component is not part of an integrated service. In addition, the arguments submitted with respect to schedules of other WTO Members do not point to an interpretation different from that suggested by other elements of the context. Finally, we found that our interpretation of China's commitment under subsector (d) is consistent with the object and purpose of the GATS and the WTO Agreement.

7.203 We recall that the panel request defines the services at issue as follows:

> [E]lectronic payment services involve the services through which transactions involving payment cards … are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated.

7.204 Having regard to our examination of the scope of subsector (d) in China's Schedule, the Panel finds that this subsector includes the services at issue.[259]

### 3. Recourse to supplementary means of interpretation

7.205 Pursuant to Article 32 of the Vienna Convention, a treaty interpreter may have recourse to supplementary means of interpretation "in order to confirm the meaning resulting from the application of Article 31, or to determine the meaning when the interpretation according to Article 31 leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable."

[259] In our view, the services at issue are covered by subsector (d), whether they are provided in connection with payment cards that are used, for instance, at POS terminals to purchase goods or services or in connection with payment cards that are used at ATMs to withdraw cash.

7.206 The parties to the dispute referred to the CPC as supplementary means of interpretation.[260] China also referred to the 2001 Scheduling Guidelines as a source of interpretation under Article 32.[261] The Panel considers that its interpretation of China's Schedule pursuant to Article 31 of the Vienna Convention does not leave the meaning ambiguous or obscure, nor does it lead to a result which is manifestly absurd or unreasonable.

7.207 Accordingly, we do not find it necessary to resort to supplementary means of interpretation under Article 32 of the Vienna Convention.

## E. THE MEASURES AT ISSUE

7.208 The United States has identified a series of six requirements, or measures, which it claims operate alone or in combination to impose market access restrictions and national treatment limitations on service suppliers of other WTO Members seeking to supply EPS in China. The United States argues that these measures are maintained through a series of legal instruments. As will be discussed in detail in Sections VII.F and VII.G, the United States asserts that these six requirements are inconsistent with China's obligations under Articles XVI:1 and XVI:2(a), and Article XVII of the GATS.

7.209 The United States has alleged the existence of the following requirements[262]:

(a) Requirements that mandate the use of CUP and/or establish CUP as the sole supplier of EPS for all domestic transactions denominated and paid in Renminbi (RMB) (hereafter referred to by the Panel as "sole supplier requirements");

(b) Requirements on issuers that payment cards issued in China bear the CUP logo ("issuer requirements");

(c) Requirements that all ATMs, merchant card processing equipment and POS terminals in China accept CUP cards ("terminal equipment requirements");

(d) Requirements on acquiring institutions to post the CUP logo and be capable of accepting all payment cards bearing the CUP logo ("acquirer requirements");

(e) Prohibitions on the use of non-CUP cards for cross-region or inter-bank transactions ("cross-region/inter-bank prohibitions"); and

(f) Requirements pertaining to card-based electronic transactions in China, Macao, and Hong Kong ("Hong Kong/Macao requirements")[263].

7.210 The United States considers that these requirements are maintained through a series of Chinese legal instruments that are themselves identified in the United States' request for establishment of a panel.[264]

---

[260] United States' response to Panel question No. 76, paras. 12 and 39.

[261] China's first written submission, paras. 102-108.

[262] The short descriptions of the relevant requirements provided below are identical or closely similar to those that appear in written submissions of the United States. E.g., United States' response to China's request for a preliminary ruling, para. 77; first written submission, para. 12; and second written submission, para. 6.

[263] Consistent with the views taken by of the parties, this Report refers to the separate customs territories of Hong Kong, China and Macao, China as Hong Kong and Macao, respectively.

[264] WT/DS413/2, pp. 3-4.

7.211 China contends that the United States has failed to demonstrate that the alleged measures operate in a manner that is inconsistent with either Article XVI[265] or XVII[266] of the GATS. China submits that the requirements identified by the United States as measures at issue in this dispute do not violate these WTO provisions, as the United States alleges. Rather, it considers that the identified measures establish a national inter-bank network for clearing and settling RMB payment card transactions and otherwise create uniform technical and commercial standards that allow this inter-bank payment card network to function.[267] In the event that the Panel proceeded to consider the United States' claims, China argues that those claims must be based exclusively on the legal instruments specifically identified in the panel request.[268]

7.212 The Panel will consider below the United States' claims that China imposes certain requirements that are inconsistent with its obligations under Articles XVI and XVII of the GATS. In undertaking this task, we must first consider whether China in fact imposes the requirements mentioned above. This necessitates that we evaluate the precise content of the series of legal instruments that have been cited by the United States. Before turning to this assessment, however, we first address the status of three legal instruments that China alleges have been repealed or replaced as well as China's concern that the United States' has broadened the scope of its challenge to include measures that are not specifically identified in the panel request.

### 1. The specific measures at issue that form part of the United States' challenge

(a) Chinese legal instruments as the basis for the existence of the measures at issue

7.213 We explained above that the United States has identified a series of six requirements that it claims are inconsistent with Articles XVI and XVII of the GATS. For each of these six requirements, the United States has identified an "illustrative list of instruments in which the particular measure is reflected."[269]

7.214 In its rebuttal submission, China argues that the United States has sought to improperly base its claims on measures that are not specifically identified in the panel request.[270] Rather than focusing on those legal instruments, China is of the view that the United States has attempted to improperly shift the basis of its claims to target measures at issue that exist "independently" of any particular legal instrument.[271] Due to the manner in which the United States formulated its panel request, however, China argues that the United States may not shift its challenge so as to allege that the six requirements exist "independently" or as "unwritten 'rules or norms of general and prospective application'".[272] China asserts that the United States has presented "no evidence whatsoever" to meet the "high threshold" that a complaining party must face when challenging an alleged unwritten rule or

[265] China's second written submission, paras. 90-102.
[266] China's first written submission, paras. 151-160; second written submission, paras. 115-121.
[267] China's first written submission, para. 36.
[268] China's second written submission, paras. 83-89.
[269] United States' response to Panel question No. 5.
[270] China's second written submission, para. 89. China took issue with the manner in which the United States identified the measures at issue in this dispute in its second written submission, specifically in respect of the United States' claim under Article XVI:2(a) of the GATS. See China's second written submission, paras. 83-89. The United States has framed its claims under Articles XVI and XVII of the GATS in respect of the same measures and identical legal instruments. Accordingly, the Panel considers it appropriate to address this issue generally in relation to all of the United States' claims.
[271] China's second written submission, para. 84; comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 62.
[272] China's second written submission, para. 88; comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, paras. 63-70.

norm.[273] Accordingly, China requests that the Panel limit its evaluation of the United States' claims to measures that are "specifically" identified in the panel request in accordance with the requirements of Article 6.2 of the DSU.[274]

7.215 The Panel notes that Article 6.2 of the DSU requires that a complaining party identify the "specific measures at issue" among meeting other requirements. Moreover, Article XXVIII(a) of the GATS defines a "measure" for purposes of the GATS as "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form".

7.216 In three narrative paragraphs in its panel request[275], the United States describes those "requirements" or "measures" that it considers are inconsistent with China's obligations under Articles XVI and XVII of the GATS. In addition, the panel request specifies a series of instruments described as those "through which China maintains these measures."[276] The United States has referred to these six requirements throughout the proceedings as well as the identified instruments.[277] For each of the alleged six requirements, the United States explained that it provided an "illustrative list of instruments in which the particular measure is reflected".[278] The United States requested that the Panel make findings "with respect to each of the *measures* that the United States has challenged."[279]

7.217 In the light of the formulation of the United States' panel request and explanations provided in submissions and in response to questions from the Panel, we understand the United States seeks findings on the six alleged requirements, namely those referred to in paragraph 7.209 above. We further understand that the United States has submitted the relevant legal instruments as evidence in support of the existence of the six alleged requirements.

7.218 We note China's concern that the United States sought to establish the existence of the alleged six requirements "independently" from the legal instruments appearing in the panel request. We consider that the United States must establish the existence of the alleged requirements on some concrete evidentiary basis and not simply by asserting their existence. In its first written submission, its opening statement at the first substantive meeting of the Panel, and in response to questions from the Panel following the first substantive meeting, the United States specified that the instruments identified in the panel request establish the basis for the United States' claims with respect to each of the six requirements.[280] Thus, it is our view that the United States based its case on those legal instruments. We will therefore consider the United States' claims in light of these instruments.

7.219 Finally, we consider this approach is consistent with the broad definition attributed to a measure under Article XXVIII(a) of the GATS. In our view, the fact that the United States considers that a series of "instruments" "illustrate" or "reflect" the existence of six alleged requirements does not prevent making findings on the six identified requirements as the "measures" at issue in the sense of

[273] China's second written submission, para. 88, citing Appellate Body Report, *US – Zeroing (EC)*, para. 198.

[274] China's second written submission, paras. 86 and 87.

[275] WT/DS413/2, pp. 2-3.

[276] WT/DS413/2, pp. 3-4.

[277] See, e.g. United States' first written submission, para. 4; second written submission, para. 6; opening statement at the second meeting of the Panel, para. 38; response to Panel question Nos. 4 and 71.

[278] United States' response to Panel question No. 5.

[279] United States' response to Panel question No. 5 (emphasis original).

[280] United States' first written submission, paras. 55-72, 89-117 and fns. 40-45, 62-67, 81-84; opening statement following the first substantive meeting, paras. 43-44, 48-51 and fns. 37-38, 42-45; response to Panel question No. 5, paras. 24-36.

Article 6.2 of the DSU and Article XXVIII(a) of the GATS. We also observe that this approach is consistent with the United States' request as to how the Panel should consider its case.[281]

7.220 Accordingly, we will examine whether the legal instruments identified in the United States' panel request establish the existence of the six alleged requirements or measures at issue. It is incumbent on the United States as the complaining party to demonstrate their existence.

(b) The repeal or replacement of certain Chinese legal instruments

7.221 China in its first written submission to the Panel submitted evidence that Document Nos. 94[282] and 272[283] were both repealed on 23 March 2010 and ceased to have legal effect prior to the date of the Panel's establishment on 11 February 2011.[284] In response to a question from the Panel, China pointed out that a third instrument, Document No. 66[285], was replaced by Document No. 53 on 1 November 2010, also in advance of the Panel's establishment. China requests that the Panel should decline to make findings with respect to these three instruments.[286] The United States referred to all of these legal instruments in its panel request[287] and subsequently in its submissions to the Panel.

7.222 The issue here is whether the Panel should consider certain instruments – Document Nos. 66, 94 and 272 – in its assessment of the United States' claims. We consider it appropriate to address the status of these instruments first, before considering the United States' claims, since these instruments have been cited as evidence of the existence of five of the six alleged requirements at issue.

7.223 The United States indicated in response to a question from the Panel that it "does not contest that Document No. 53 indicates it will come into force simultaneously with the abolition of other instruments, including Document No. 66, and in this sense, [Document No. 53] may be considered to have replaced Document No. [66]".[288] The United States does not specifically comment on the instruments that announced the repeal of Document Nos. 94 and 272. Instead, the United States argues that "separate and apart" from Document Nos. 66, 94 and 272, the other identified instruments at issue adequately "establish a basis" for its claims.[289] Thus, the United States has not rebutted evidence submitted by China concerning the repeal of Document Nos. 94 and 272, nor does the United States contest that Document No. 66 was replaced by Document No. 53.[290] Having regard to the evidence submitted by China and the arguments of both parties, we consider that Document Nos. 94 and 272 were both repealed, and Document No. 66 was replaced by Document No. 53.

---

[281] For further discussion on this, see paras. 7.230-7.232 below.

[282] Exhibits US-42; CHN-57.

[283] Exhibits US-43; CHN-58.

[284] China's first written submission, fn. 27, referring to PBOC Announcement [2010] No. 2, Exhibit CHN-15.

[285] Exhibits US-45; CHN-61.

[286] China's first written submission, fn. 27; response to Panel question No. 21. China refers to Article VIII of Document No. 53, which was submitted as Exhibit CHI-54, as evidence of the replacement of Document No. 66. China's translation of Article VIII of this document provides as follows: "This Circular shall come into force as of November, 1 2010. The Circular of the State Administration of Foreign Exchange on Regulating the Administration of Foreign Currency bankcards [Hui Fa (2004) No. 66] … shall be abolished at this time". The translation of Document No. 53 provided by the United States indicates similarly.

[287] WT/DS413/2, p 3.

[288] United States' response to Panel question Nos. 4-6; response to Panel question No. 70.

[289] United States' response to Panel question No. 6.

[290] We noted in fn. 286 that both the United States' and China's translations of Document No. 53 provide similarly that Document No. 53 replaces Document No. 66.

7.224 In *US – Upland Cotton*, the Appellate Body noted that "the fact that a measure has expired may affect what recommendation a panel may make" but it is "not dispositive of the preliminary question of whether a panel can address claims in respect of that measure".[291] In previous cases, panels have looked to Article 3.7 of the DSU to determine whether it was appropriate to address claims in respect of such measures. Article 3.7 of the DSU provides that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". When deciding whether or not the aim of securing a positive solution warrants findings on measures that expired before a panel's date of establishment, panels have taken into account the particular circumstances of a given dispute.[292] These circumstances included such considerations as the timing of the withdrawal of a measure[293], as well as the likelihood that the respondent would later reintroduce the measure.[294]

7.225 In its panel request, the United States identified a series of requirements, which it claims impose market access restrictions and requirements on service suppliers of other WTO Members seeking to supply EPS in China.[295] It indicates in its panel request that each of these "requirements" is "maintained through a series of instruments".[296] The panel request thereafter identifies a list of instruments. The United States subsequently explained that, for each of these "requirements", it identified an "illustrative list of instruments in which the particular measure is reflected".[297]

7.226 In deciding whether to take account of Document Nos. 66, 94 and 272 for purposes of determining whether they support the existence of relevant requirements, we consider it appropriate to determine whether addressing these legal instruments would conform with the aim of securing a positive solution to the present dispute.

7.227 We note that Document Nos. 94 and 272 were repealed more than ten months before the Panel's establishment on 11 February 2011, and more than six months before the date on which consultations were requested on 15 September 2010. Document No. 66 was replaced on 1 November 2010, three days after consultations were held, but five months before the Panel's establishment. We do not know the factors that influenced China's decision to repeal Document Nos. 94 or 272, and to replace Document No. 66, and the timing of these actions. The United States has not expressed the view, or provided any indication, that any of these instruments stand to be reintroduced. Rather, it has made clear that its case stands even without these instruments, as it takes the position that the requirements are still maintained through other instruments.[298] The United States also argued that foreign suppliers did not experience any "changes in the market regarding restrictions, prohibitions,

---

[291] Appellate Body Report, *US – Upland Cotton*, para. 272. We note as well that in *US – Certain EC Products*, the Appellate Body did not disapprove of the decision by a panel to make a finding concerning a measure that no longer existed at the time of establishment of the panel. Rather, the Appellate Body concluded that the panel erred in recommending that the Dispute Settlement Body request the responding party to bring into conformity with its WTO obligations a measure which the Panel found to no longer exist. See also Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 81.

[292] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras. 60-82; Panel Reports, *EC – Approval and Marketing of Biotech Products*, paras. 7.1648-7.1654; *Argentina – Textiles and Apparel*, para. 6.4-6.15; *US – Gasoline*, para. 6.19.

[293] Panel Reports, *EC – Biotech*, para. 7.1653; and *Argentina – Textiles and Apparel*, para. 6.1 and 6.13.

[294] Panel Reports, *Argentina – Textiles and Apparel*, para. 6.14; and *US – Gasoline*, para. 6.19. The *US – Gasoline* panel contrasted its decision with that taken by the GATT panel *EEC – Apples (Chile I)* in1980, which ruled on a measure terminated before agreement on the Panel's terms of reference. As noted by the *US – Gasoline* panel, the terms of reference in that case specifically included the terminated measure and, the dispute concerning a seasonal measure, there remained the prospect of its reintroduction. See GATT Panel Report, *EEC – Apples (Chile I)*.

[295] WT/DS413/2, pp. 2-3.

[296] WT/DS413/2, pp. 3-4.

[297] United States' response to Panel question No. 5.

[298] United States' response to Panel question No. 6.

and other impediments on the supply of EPS for payment card transactions" following the entry into force of Document No. 53.[299]

7.228 On the evidence before us, we have no reason to assume that the three instruments will be re-introduced. Our determination therefore focuses on three elements that are clear. First, Document Nos. 66, 94 and 272 were no longer in force at the time of the Panel's establishment. In other words, they no longer had any legal effect. Secondly, the United States has not put forward any claim or evidence that these instruments might be re-introduced by China. Thirdly, we understand the United States to allege that China currently maintains in place each of the relevant requirements even without these instruments being in effect. For instance, the United States alleges that the requirements exist independently of the content of Document Nos. 66, 94 and 272, such that "there would be no impact on [the United States'] claims relating to the six distinct measures, comprised of instruments operating together"[300], even if the Panel were to decline to take into account Document Nos. 66, 94 and 272. Accordingly, in order to provide a positive solution to this dispute, we consider that our task is to assess the existence of the particular measures in China on the basis of those instruments that were in force at the time of panel establishment. We do not consider that in the particular circumstances of this case there is any need to go further and address also Document Nos. 66, 94 and 272. As indicated, the United States did not argue in this case that a decision by the Panel not to take these instruments into account would effectively deprive the United States of the possibility to have one or more of the challenged requirements considered by the Panel.

7.229 Therefore, for the foregoing reasons, the Panel declines to take Document Nos. 66, 94 and 272 into account in our analysis of the measures at issue. Accordingly, we do not consider them further.

### 2. Evaluation of the existence of the measures at issue

7.230 The United States asks that the Panel assess the six requirements both individually and in conjunction with each other to determine whether they give rise to a breach of Articles XVI and XVII of the GATS. The United States argues that such an approach would be consistent with past practice of panels and the Appellate Body[301], and submits that doing so would help to "ensure the effective resolution of this dispute".[302]

7.231 China recognizes in general that panels may need to consider the overall conformity of a set of measures or legal instruments and how measures interact with each other based on the content of those instruments.[303] In this dispute, however, China submits that the United States has not established that the identified instruments are related to each other as necessary to succeed with its challenge. China submits that the identified instruments "in many cases have no demonstrable relationship to each other", because the instruments were issued "at different times, by different agencies, on different topics".[304] In addition, China asserts that the United States' claims in relation to the first alleged requirement, i.e. "requirements that mandate the use of CUP and/or establish CUP as the sole supplier of EPS for all domestic transactions denominated and paid in RMB", and the fifth alleged requirement, "broad prohibition on the use of non-CUP cards", amount to "drawing a

[299] See United States' response to Panel question No. 70.
[300] United States' response to Panel question No. 6, para. 23.
[301] United States' first written submission, para. 34, citing Appellate Body Report, *EC – Asbestos*, para. 64; Panel Report, *US – Export Restraints*. paras. 8.82-8.131.
[302] United States' first written submission, paras. 30 and 32.
[303] China's second written submission, fn. 48, referring to United States' first written submission, paras. 34 and 35; Panel Reports, *US – Section 301 Trade Act*; *Australia – Apples*.
[304] China's second written submission, fn 48.

distinction without a difference".[305] Accordingly, China addresses the United States' allegations concerning these requirements together in its submissions.

7.232 The Panel notes that, in previous instances, panels and the Appellate Body have analysed measures or legal instruments not only on an individual basis, but have considered how certain measures or instruments operate collectively, in concert, or in combination, when evaluating the claims of a complainant.[306] We see no reason at the outset to decline to consider the United States' request to consider the requirements both individually and as they operate together. As in previous cases, the need to do so depends on the particular circumstances of the matter before the Panel, including the content of the particular measures before the Panel, the interrelationship of those measures, and the result of the Panel's assessment of the measures considered individually. In our evaluation here, we will assess both the content and interrelationship of those instruments before us.

7.233 We also note that there is overlap in terms of the particular legal instruments that are identified in respect of the six alleged requirements. Specifically, as the United States clarified to the Panel[307], each of the instruments identified in respect of the alleged issuer requirements, terminal equipment requirements, acquirer requirements, cross-region/inter-bank prohibitions and Hong Kong/Macao requirements, i.e. the second through sixth requirements listed in paragraph 7.209 above, are also identified in connection with the alleged sole supplier requirement, i.e. the first requirement listed in paragraph 7.209 above. In cases where the same instrument is identified in respect of more than one requirement, the United States frequently refers to the same provisions of that instrument. In view of the fact that the alleged sole supplier requirements incorporate every legal instrument cited in support of the other five requirements, we consider it appropriate to begin with a review of the issuer, acquirer and terminal equipment requirements before turning to the sole supplier requirement.

7.234 In addition, as pointed out by China, we note that the United States' claim regarding the existence of a sole supplier requirement and its claim regarding the existence of cross-region/inter-bank prohibitions address fundamentally the same concern, namely, whether the measures at issue require the processing of all domestic, RMB inter-bank payment card transactions over the CUP network, and not over the network of any other EPS supplier, including foreign ones. The United States acknowledges that the "ultimate effect" of these two "requirements" is the same on foreign EPS suppliers, but explains that it seeks separate findings in this regard "to ensure that [the Panel's] findings reach the requirement irrespective of whether they are framed in terms of a mandate to use CUP or CUP cards, or a prohibition on the use of non-CUP cards or a prohibition on the use of an EPS supplier other than CUP".[308] Due to the similar nature of these two alleged measures, and because all of the legal instruments identified in connection with the alleged cross-region/inter-bank prohibitions are also identified in connection with the sole supplier requirement, we will analyse the instruments identified in connection with the cross-region/inter-bank prohibitions in the context of our assessment of the alleged sole supplier requirement. In doing so, we will bear in mind the distinction drawn by the United States' between whether the instruments are framed so as to mandate the use of CUP or non-CUP cards, or as a prohibition.

7.235 We also recall our decision set out in paragraphs 7.221 to 7.227 above not to consider Document Nos. 66, 94 and 272. Therefore, these particular instruments are not further considered below to assess whether the six alleged requirements exist.

---

[305] China's second written submission, para. 96.

[306] See, e.g. Appellate Body Report, *China – Raw Materials*, paras. 250-255; Panel Reports, *China – Raw Materials*, para. 7.68; *US – Tuna II (Mexico)*, paras. 7.16-7.26.

[307] See United States' response to Panel question No. 4.

[308] United States' response to Panel question No. 2, para. 8.

7.236 Finally, as discussed in paragraph 1.10 and Annex H to this Report, we recall that the parties indicated their disagreement on the correct translation of a number of aspects of the identified legal instruments. As the complaining party, the United States provided its own English language versions of provisions of these instruments. China at times submitted its own English language versions of the same instruments. At the Panel's request, the parties undertook efforts to agree on a single translation. They succeeded in doing so in certain instances. For those occasions in which the parties were unable to agree on a single translation, the Panel, in consultation with the parties, appointed an independent translator – the United Nations Office at Geneva (UNOG) – to provide expert linguistic advice to assist the Panel in determining the correct translation. In general, we will refer to the complaining party's translation, unless the parties specifically agreed to a different translation, or if we elect to follow the advice of the UNOG translator. In all cases, however, we have reviewed both parties' translations. Where appropriate, we refer also to China's versions. Any citation to the United States' translation, or UNOG's suggested translation, of a particular aspect of Chinese law, should not be construed to imply that it is an authoritative translation of China's instruments.

7.237 Before proceeding to consider the relevant Chinese requirements, it is useful briefly to address the question of whether, as the United States contends[309], CUP is a supplier of the services at issue, i.e. an EPS supplier. In support of its position, the United States points *inter alia* to Article 12 of CUP's Articles of Association and to the definition of CUP's business scope contained in the Notification of Approval of CUP's Business Licence.[310] The two provisions have nearly identical terms, which is why it is sufficient to set out Article 12. It provides:

> Upon being registered according to law, the business scope of the Company is as follows: (1) To establish and operate a single nationwide inter-bank card information switching network; (2) to provide advanced electronic payment technologies and specialized services in connection with the inter-bank bank card information switching; (3) to engage in bankcard technological innovation; (4) to manage and operate the brand of "UnionPay"; (5) to formulate the code and technical standards for inter-bank card transactions, and to mediate and arbitrate any business disputes arising out of inter-bank transactions; (6) to organize trainings for the industry, business seminars and international exchange programs, and to conduct related researches and consulting services; and (7) to conduct such other businesses as may be approved by the People's Bank of China.

7.238 In addition, we note that China has not specifically contested that CUP provides the services at issue, i.e. EPS as defined in the United States' request for the establishment of a panel. In the light of these elements, CUP can in our view properly be considered a supplier of the services at issue.

(a) Requirements on issuers that payment cards issued in China bear the CUP logo ("issuer requirements")

7.239 We turn first to address the issuer requirements. The United States asserts that these requirements are imposed by specific provisions of the following Chinese legal instruments:[311]

- Document No. 37 (Articles 1.2(i), 2 and 3)

[309] United States' first written submission, paras. 1 and 3.

[310] United States' response to China's request for a preliminary ruling, paras. 70 and 72 (referring to Article 12 of CUP's Articles of Association, Exhibit US-20, and the Notification of Approval of CUP's Business Licence, Exhibit US-29). See also the 2007 China Payment System Development Report, Exhibit US-15, p. 25.

[311] United States' response to Panel question No. 4, para. 17. The United States also relies on Document Nos. 94 and 272. As explained above at paragraphs 7.221-7.229 above, the Panel has decided not to consider the substance of these documents.

- Document No. 57 (Articles 1-6)
- Document No. 129 (Article 3.2(ii))
- Document No. 219 (Article III)
- Document No. 76 (Chapter I, Article 4)
- Document No. 17 (Articles 5, 7-10 and 64)

7.240 The United States submits that through these instruments, China maintains requirements on issuers that payment cards issued in China bear the CUP logo. More particularly, in the United States' view, China imposes requirements that any bank cards issued in China for RMB purchases in China, as well as any dual currency cards issued in China, must bear the CUP logo. According to the United States, this means that issuers must have access to the CUP system, and must pay CUP for that access.[312]

7.241 China responds that the instruments at issue require all RMB-denominated payment cards issued in China to bear a common logo – the *Yin Lian* logo – and to adhere to certain technical standards so as to be capable of being processed over the CUP network.[313] These instruments allow a national inter-bank payment card network to function. China further submits that the United States fails to identify any aspect of the alleged issuer requirements that would prevent the issuance of payment cards that are capable of being processed over multiple networks.[314] China contends that there are many banks throughout the world that issue cards that are capable of being processed over more than one network.[315] China also argues that nothing in the instruments at issue prevents issuers from placing the logos of EPS suppliers other than CUP on bank cards they issue, provided that they bear the *Yin Lian* logo.[316]

7.242 The Panel will examine one by one the above-mentioned instruments relied on by the United States so as to determine whether they impose the alleged issuer requirements. Before doing so, however, we need to address a translation issue that arises in connection not only with the alleged issuer requirements, but also the alleged terminal equipment and acquirer requirements.

*(i) Preliminary translation issue*

7.243 According to the United States, the instruments that impose the aforesaid requirements make frequent references to a logo that must be displayed on bank cards issued in China or on terminal equipment operated in China.[317] The United States is of the view that the logo in question is that of China UnionPay Co., Ltd. (¨"CUP") and accordingly refers to it as the "CUP logo". In contrast, China argues that the relevant instruments refer to the "*Yin Lian* logo", which China says indicates a bank card's interoperability. In view of the parties' disagreement, it is necessary to determine the correct translation of the Chinese characters that are used in the relevant instruments to describe the logo in question.

7.244 The United States argues that the correct English translation of the logo in all instances at issue is "CUP logo", because internet translation engines commonly translate the characters "*Yin Lian*" as "CUP" and because CUP itself refers to its logo as the "CUP logo" or the "CUP label", or in

[312] United States' first written submission, paras. 4 and 100; WT/DS413/2, p. 2.
[313] China's first written submission, para. 36; China's response to Panel question No. 104(b), para. 51.
[314] China's second written submission, para. 93.
[315] China's response to Panel question No. 22(c), para. 18.
[316] China's response to Panel question No. 104(b), para. 51.
[317] The logo in question consists of a tricolour lozenge that contains the phrase "UnionPay" in English as well as the Chinese characters "*Yin Lian*".

certain instances as the "UnionPay logo". The United States further submits that contrary to China's suggestion, there is no reason to employ the transliteration "*Yin Lian*". The United States observes in this regard that the logo itself uses the English translation "UnionPay". And it adds that in the case at hand the product of transliteration – "*Yin Lian*" – has no meaning in English. The United States therefore considers that if the Panel does not translate the logo as "CUP logo", there is no basis for translating the logo into English as anything other than "UnionPay".[318]

7.245 China argues that it is incorrect to translate the Chinese term "*Yin Lian*" as CUP. The term "CUP" stands for China UnionPay and is an official abbreviation for the company "China UnionPay Co., Ltd." (CUP). Also, the word "China" is not found in the relevant provisions that use the term "*Yin Lian*". China notes that the *Yin Lian* logo was approved by the People's Bank of China (PBOC) in 2001 as a symbol of bank card interoperability. China notes that CUP was not established until March 2002. China further points out that the logo used by CUP consists of three parts: (1) the logo for bank card interoperability; (2) the Chinese phrase for China UnionPay (Zhong Guo *Yin Lian*); and (3) the English phrase "China UnionPay". According to China, this logo is used as a trademark or company identity symbol. China therefore suggests that the Panel use the term "*Yin Lian*" instead of CUP.[319]

7.246 The UNOG translator asked to advise the Panel points out that there is no ready means of distinguishing between "*Yin Lian*" when used as an idiomatic short form meaning "bank card network interoperability", and "*Yin Lian*" when used to stand for UnionPay or even, again idiomatically, the company CUP. The UNOG translator further observes that the English term "UnionPay" is itself a convenient but necessarily approximate equivalent for "*Yin Lian*" in its application as a term for "bank card network interoperability".[320] Moreover, the same term has been incorporated in the name of the relevant company. As a result, in the view of the UNOG translator, the use of the English term "UnionPay" as shorthand for the concept of interoperability and for the company gives rise to confusion. In the light of this ambiguity, the UNOG translator advises that the Panel use the compound form "*Yin Lian*/UnionPay", except where the Chinese uses the fuller "China UnionPay" or "China UnionPay Co. Ltd.".[321]

7.247 In considering this translation issue, we first note the Business Practices Appendix contained in Document No. 76, which in an annex defines the term "network logo" as "[t]he […] logo compris[ing] the uniform brand name for domestic bank cards (the Chinese characters "*Yin Lian*") and the design symbolizing the united network, as registered with the trademark office. All rights of ownership and use belong to the [United Association]…".[322] Document No. 76 was promulgated by the PBOC and dates from 2001.[323] In 2002, CUP obtained its business licence. According to that licence, the activities that are within the company's business scope include the establishment and operation of a single nationwide inter-bank card information switching network, and the management and operation of the brand "UnionPay".[324] Thus, the nationwide inter-bank network to which

[318] United States' translation comments of 4 January 2012, pp. 1-2; comments on the UNOG evaluation of 24 February 2012, pp. 1 and 3.

[319] China's translation comments of 4 January 2012, pp. 1-3.

[320] The UNOG translator notes that the English equivalent of "UnionPay" bears only tangential relation to the original Chinese meaning and that a more appropriate choice would have been "BankCardNet".

[321] UNOG evaluation, pp. 3-4 and 16.

[322] See the UNOG translator's linguistic advice as set out in Annex H. Article 4.2 of Chapter I of the Business Practices Appendix contains a very similar definition.

[323] See also the press release by the People's Bank of China entitled "Central Bank Introduces Bankcard Network Logo" (Exhibit US-26).

[324] Exhibit US-29 uses the term "UnionPay". Article 12 of CUP's Articles of Association. describes the company's business scope in the same terms as the Notification of Approval of CUP's Business Licence. According to the United States, CUP's Articles of Association also date from 2002. United States' response to Panel question No. 88(a), para. 71.

Document No. 76 and the Notification of Approval of CUP's Business Licence refer are one and the same. As the parties have explained, CUP as of 2002 took over the responsibility of that network from the United Association.[325]

7.248 We understand from the UNOG translator's evaluation that what the parties have referred to in their translations of Chinese instruments as the "CUP logo" or the "*Yin Lian* logo" is generally the aforementioned network logo, except for certain instances where the Chinese original refers to CUP. Based on the UNOG translator's advice, we accept that the network logo that uses the Chinese characters "*Yin Lian*" symbolizes interoperability, as China contends.[326] But the network logo is not a generic logo that indicates that a particular bank card is interoperable with *a* nationwide inter-bank payment card network in China. Rather, as is clear from Document No. 76 and the Notification of Approval of CUP's Business Licence, the network logo indicates that a particular bank card is interoperable with the specific network that is currently operated by CUP.

7.249 We understand from China that the company China UnionPay (CUP) has its own company logo, which incorporates the network logo. To the right of that logo, the company logo adds the term "China UnionPay" in both Chinese and English.[327] To that extent, as noted by the UNOG translator, a distinction can, in principle, be made between the network logo and the company logo. However, as also confirmed by China in response to a question from the Panel, CUP on its own CUP-branded cards issued in China does not use the full company logo, but only the network logo.[328] Plainly, this blurs the distinction between the network logo and the company logo.

7.250 In the light of the foregoing, we find persuasive the UNOG translator's suggestion that we refer to the network logo as the "*Yin Lian*/UnionPay" logo. The suggested compound form usefully distinguishes the network from the company CUP. In addition, the compound form reflects the fact that both terms appear on the network logo – "*Yin Lian*" in Chinese and "UnionPay" in English – and that the English term "UnionPay" "bears only tangential relation"[329] to the meaning of the Chinese characters "*Yin Lian*". Consequently, throughout the remainder of this Report, we will use the UNOG-suggested translation, except where the Chinese original refers to CUP or where we summarize arguments put forward by the parties.

7.251 Using the suggested translation helps to clarify that, formally speaking, the relevant legal texts generally refer to the network logo as opposed to the company logo. We hasten to recall, however, that it is CUP that currently operates the network in question, and that CUP appears to use only the network logo on its own CUP-branded cards. As a result, it is virtually inevitable, in our view, that the average bank card user whose card displays the network logo will associate that logo with CUP or the nationwide inter-bank network operated by CUP. We therefore consider that as long as CUP is the company charged with operating the relevant nationwide inter-bank network, it makes little practical difference whether the relevant Chinese instruments formally refer to the network logo or the CUP logo. We will revert to this point further below.[330]

---

[325] United States' second written submission, para. 160; response to Panel question Nos. 71, para. 7; 115, para. 104; China's response to Panel question No. 99, para. 40.

[326] Specifically, China has said that the *Yin Lian* logo designates that the RMB bank card on which the logo appears can be used on an inter-bank, interoperable basis. China's response to Panel question No. 105(a), para. 54.

[327] China's response to Panel question No. 105(b), para. 55.

[328] China's response to Panel question No. 105(b) and (c), paras. 55-57. Evidence submitted by China demonstrates that there are CUP-branded credit and debit cards that display only the network logo (Exhibit CHN-105).

[329] UNOG evaluation, p. 16.

[330] See, below para. 7.696.

*(ii) Document No. 37*

7.252 The Panel now addresses the Chinese legal instruments cited by the United States as sources of the alleged issuer requirements. We begin with Document No. 37.

7.253 In relation to Document No. 37, the United States refers the Panel to the text of Articles 1.2(i) and 2.[331] In one footnote, the United States also cites Article 3 as a provision requiring the use of the CUP logo.[332] Regarding Article 2, the United States observes that it prohibits the use of non-CUP cards for cross-region or cross-bank transactions.[333]

7.254 China states that Document No. 37 establishes uniform technical standards for inter-bank payment cards. It also establishes the *Yin Lian* logo as the common logo for inter-bank payment cards that conform to these standards. It requires commercial banks that issue inter-bank payment cards to use the *Yin Lian* logo and to join the national inter-bank payment card network.[334]

7.255 The Panel notes that the United States identified Articles 1.2(i), 2 and 3 of Document No. 37 as the relevant provisions. Article 1.2(i) imposes a requirement on all commercial banks to complete, by the end of 2001, the transformation of their internal bank card processing system according to the uniform standards and specifications for bank cards, and to make technical preparations for accepting bank cards bearing the *Yin Lian*/UnionPay logo.[335] This provision does not impose a requirement that all bank cards issued in China must bear the *Yin Lian*/UnionPay logo. Rather, it appears to require that all commercial banks, which include issuers, be capable of processing transactions involving bank cards bearing the *Yin Lian*/UnionPay logo.

7.256 Article 2.1(i) provides in relevant part that "bank cards issued by all commercial banks with inter-bank usability in China must bear the [*Yin Lian*/UnionPay] logo" on the front of the cards.[336] Article 2.2(i) stipulates that by the end of 2003, commercial banks had to replace all bank cards that did not conform to the *Yin Lian*/UnionPay logo use requirement. As from 2004, bank cards not bearing the *Yin Lian*/UnionPay logo could no longer be used for cross-region or inter-bank transactions.

7.257 Article 2.1(iii) states that all cards bearing the *Yin Lian*/UnionPay logo must abide by the unified technical specifications, and that all issuers of bank cards must provide corresponding cross-region and inter-bank services pursuant to the unified business specifications. Moreover, pursuant to Article 2.2(i), by the end of 2003 commercial banks had to replace all bank cards that did not conform to the unified requirements. These Articles do not require that all bank cards issued in China must bear the *Yin Lian*/UnionPay logo. But they do impose requirements on issuers that relate to bank cards issued in China and bearing the *Yin Lian*/UnionPay logo.

7.258 Regarding Article 3, the United States states that it requires the use of the *Yin Lian*/UnionPay logo. We see nothing in Article 3 that would support this assertion. We note, however, that Article 3.1 requires commercial banks that engage in bank card business in China to join the nationwide bank card inter-bank exchange network.[337]

---

[331] United States' first written submission, para. 94.
[332] United States' second written submission, fn. 201.
[333] United States' preliminary ruling submission, para. 106.
[334] China's first written submission, para. 45.
[335] See the UNOG translator's linguistic advice as set out in Annex H.
[336] Pursuant to Article 2.1(i), "special cards" are not subject to this requirement. Articles 7 and 8 of Document No. 17 suggest that "special cards" are one type of debit card.
[337] The United States has referenced Article 3.1 in the context of a discussion concerning applicable technical specifications. United States' response to Panel question No. 119, para. 118.

7.259 Based on the foregoing, we consider that Articles 2.1(i) and 2.2(i) require issuers to ensure that all bank cards issued in China for use in connection with domestic inter-bank transactions bear the *Yin Lian*/UnionPay logo. In contrast, Article 1.2(i) requires issuers to transform their processing systems so that they can process transactions involving bank cards bearing the *Yin Lian*/UnionPay logo. Article 2.1(iii) imposes requirements on issuers that appear intended to ensure that bank cards bearing the *Yin Lian*/UnionPay logo are interoperable, i.e. that they can be used in domestic inter-bank and cross-region transactions. Article 3.1 requires issuers to join the national inter-bank bank card network.

*(iii) Document No. 57*

7.260 The United States submits that Document No. 57 contains several requirements – set out in Articles 1-6 – that mandate that payment cards bear the CUP logo.[338]

7.261 China argues that Document No. 57 elaborates on the requirements set forth in Document No. 37. It requires payment cards issued for domestic inter-bank use to bear the *Yin Lian* logo, and requires commercial banks that issue inter-bank payment cards to adhere to the business specifications for bank card interoperability contained in Document No. 76.[339]

7.262 The Panel notes that the provisions of Document No. 57 identified as relevant by the United States are Articles 1 through 6. Article 1 stipulates that bank cards issued by all commercial banks solely for domestic interoperable use must bear the uniform *Yin Lian*/UnionPay logo, and RMB credit cards must also bear the *Yin Lian*/UnionPay holographic anti-counterfeiting logo.[340] Article 2 makes it mandatory for "dual-account" (i.e. dual currency) bank cards issued by all commercial banks in China for both domestic and foreign interoperable use to bear the uniform *Yin Lian*/UnionPay logo.[341]

7.263 Article 3 provides that bank cards issued for cross-region or inter-bank use must comply with the unified business specifications and technical standards. It further stipulates that commercial banks must provide card samples to the PBOC that comply with the *Yin Lian*/UnionPay logo use requirements. Neither of these two elements of Article 3 imposes a requirement that bank cards issued in China bear the *Yin Lian*/UnionPay logo. The former element – that bank cards must comply with the unified business specifications and technical standards – nonetheless imposes a requirement on issuers that relates to bank cards bearing the *Yin Lian*/UnionPay logo. Regarding the second element of Article 3 – that commercial banks must provide card samples to the PBOC that comply with the *Yin Lian*/UnionPay logo use requirements – the United States asserts that this means that issuers must submit any cards to be issued for approval by the PBOC.[342] China responds that the United States misinterprets Article 3.[343] We are not persuaded on the basis of the text of Article 3 and in the absence of other evidence that this article confers on the PBOC the power to deny issuance of a bank card that complies with the logo use requirements of Document No. 57.

---

[338] United States' first written submission, para. 93; second written submission, fn. 201.

[339] China's first written submission, para. 45.

[340] Credit card logos, like the *Yin Lian*/UnionPay bank card logo, appear in the lower right corner of the front side of the card. They serve to identify the card's brand. Holographic anti-counterfeiting logos also appear on the front side of the card, on the right-hand side, above the card logo. They serve a security function. We note that the United States' description of the issuer requirements makes no mention of the *Yin Lian*/Union Pay anti-counterfeiting logo. United States' first written submission, para. 4.

[341] Regarding the translation of Articles 1 and 2, see the UNOG translator's linguistic advice as set out in Annex H.

[342] United States' response to Panel question No. 15, para. 57.

[343] China's second written submission, fn. 51.

7.264 Article 4 is concerned with the *Yin Lian*/UnionPay holographic anti-counterfeiting logo, which is different from the *Yin Lian*/UnionPay logo. Also, Article 4 does not impose a requirement on issuers or require the use of the *Yin Lian*/UnionPay logo.

7.265 Article 5 states in relevant part that commercial banks must take the job of promoting the use and acceptance of the *Yin Lian*/UnionPay seriously[344], and that they were gradually to reduce the role of their own bank card brands in the market. Article 6 provides *inter alia* that as from 2002, no bank cards were allowed to bear a regional interoperability logo.

7.266 Based on the above, we consider that Articles 1, 2, 5 and 6 impose a requirement that all bank cards, including dual currency cards, issued in China for use in connection with domestic inter-bank transactions bear the *Yin Lian*/UnionPay logo. Article 3 also imposes a requirement on issuers. However, it concerns ensuring that bank cards bearing the *Yin Lian*/UnionPay logo are interoperable, i.e. that they can be used in domestic inter-bank and cross-region transactions.

*(iv) Document No. 129*

7.267 The United States submits that Article 3.2(ii) of Document No. 129 requires that all newly issued bank cards must bear the CUP logo and must conform to unified business specifications and meet technical CUP standards.[345]

7.268 China does not specifically address Document No. 129.

7.269 The Panel notes that Article 3.2(ii) relates to the "universal use of bank cards bearing the [*Yin Lian*/UnionPay] logo". It provides in relevant part that all RMB bank cards newly issued by commercial banks must conform to the unified business specifications and technical standards, and must bear the unified *Yin Lian*/UnionPay logo. It further states that commercial banks must formulate and submit to PBOC specific plans for replacement of remaining bank cards not bearing the *Yin Lian*/UnionPay logo.

7.270 In the light of this, we consider that Article 3.2(ii) imposes a requirement that all RMB bank cards issued in China for use in connection with domestic inter-bank transactions must bear the *Yin Lian*/UnionPay logo. The Article further imposes a requirement on issuers that seeks to ensure that bank cards bearing the *Yin Lian*/UnionPay logo are interoperable.

*(v) Document No. 219*

7.271 The United States argues that Article III of Document No. 219 provides for both the use of CUP to process authorized card transactions and also that no supplier of EPS can process a card transaction that is not authorized (i.e. cards not bearing the CUP logo).[346]

7.272 China states that Article III regulates acquirers in China's border areas and is designed to combat payment card fraud. It requires that the acquiring agreement between an acquirer and merchant stipulate that the merchant must not use the *Yin Lian* logo for purposes outside the scope of the agreement.[347]

---

[344] The parties have provided no elaboration on the meaning of this requirement, other than to confirm that it is a requirement. United States' response to Panel question No. 123, para. 122; China's response to Panel question No. 123, para. 89.

[345] United States' first written submission, para. 95.

[346] United States' first written submission, para. 95; United States' response to China's request for a preliminary ruling, para. 107.

[347] Exhibit CHI-74.

7.273 The Panel notes that Article III is addressed to RMB bank card acquiring institutions.[348] It provides that the RMB card acquisition agreements that such institutions conclude with merchants are to stipulate, *inter alia*, that merchants must not use the *Yin Lian*/UnionPay logo or POS terminals for purposes outside the scope of the acquisition agreement.[349] Thus, Article III is concerned with RMB bank card acquirers and the merchants with whom they enter into acquisition agreements. It is not concerned with issuers or the issuance of bank cards.

7.274 In the light of this, we consider that Article III does not impose a requirement on issuers that bank cards issued in China must bear the *Yin Lian*/UnionPay logo.

*(vi) Document No. 76*

7.275 The United States draws the Panel's attention to Chapter I, Article 4 of Document No. 76, which assigns to the "United Association" ownership of the "UnionPay" logo and gives it the use and management rights of the logo. As the rights of the United Association were eventually transferred to CUP, CUP has exclusive control over the UnionPay logo. According to the United States, CUP can therefore refuse permission for the logo to appear on any bank cards that carry the logo of a competing EPS supplier. The United States argues that if CUP does so, the bank cards carrying the logo of the competing supplier cannot be issued and the competing supplier is effectively barred from the market.[350]

7.276 China points out that Document No. 76 sets forth detailed specifications concerning the technical and commercial aspects of inter-bank payment card transactions.[351] China argues that the United States has failed to identify anything in the instruments at issue that would give CUP the "negative" power to prevent banks from placing other logos on a bank card that bear the *Yin Lian* logo.[352]

7.277 The Panel begins by recalling that CUP was given the role of operating the "United Association" when CUP was established in 2002.[353] We further observe that pursuant to Article 4.2 of Chapter I of the Business Practices Appendix of Document No. 76, the United Association does indeed possess the ownership in and the use and management rights of the *Yin Lian*/UnionPay network logo.[354] However, Article 4.2 must in our view be read together with the Article that follows it, Article 4.3. Article 4.3 is entitled "Right to use the logo". It stipulates that "Interoperating Members" "automatically obtain" the right to use the logo as from the date on which they officially engage in the inter-bank business upon approval by the United Association.[355] Document No. 76 makes clear that "Interoperating Members" include issuing banks that participate in the bank card interoperating business.[356] To become an "Interoperating Member", an issuing bank must be

[348] As its title indicates, Document No. 219 concerns "Relevant Issues on Accepting and Using RMB Bankcards in Border Areas" (Exhibit US-47).

[349] See the UNOG translator's linguistic advice as set out in Annex H.

[350] United States' response to Panel question No. 71, para. 7.

[351] China's first written submission, para. 45.

[352] China's response to Panel question Nos. 106, para. 58; 117, para. 81.

[353] See para. 7.247 above.

[354] We also recall that the Notification of Business License Approval and Issuance (Exhibit US-29) makes clear that CUP's business scope includes the management and operation of the network brand "UnionPay/*Yin Lian*".

[355] The United States has provided two exhibits with translated versions of Document No. 76. In this instance, we rely on Exhibit US-63. The translation provided of Article 4.3 in Exhibit US-56 is slightly different. It reads: "The members are automatically granted the rights to use the logo when they are approved by the Association to initiate the cross-bank business".

[356] Articles 2.3 and 5.2.3 of Chapter I as well as the Appendix (Definition of Terms and Phrases) of the Business Practices Appendix contained in Document No. 76.

approved as such by the United Association following an examination by a testing team.[357] As we understand Article 4.3, once an issuing bank officially becomes an "Interoperating Member", it as a consequence has the right to use the network logo.[358] We therefore fail to see how Article 4.2 could provide a basis for the United Association, or CUP, to refuse permission for the network logo to appear on bank cards bearing the logo of competing EPS suppliers.[359] In other words, Article 4.2 in our view does not demonstrate that the logo use requirements enable CUP to prevent issuers from issuing bank cards of competing EPS suppliers.

7.278 We observe as an additional matter that the United States also refers to a provision of the CUP's Operating Regulations in support of its argument based on Article 4.2.[360] The United States submitted the relevant provision of the Operating Regulations as part of its response to a Panel question that was posed after the second substantive meeting.[361] According to the United States, the Operating Regulations prohibit the logo of a competing EPS supplier from appearing on the surface of "UnionPay Cards".[362] China responds that the United States' assertion that CUP does not licence the *Yin Lian*/UnionPay network logo for use on bank cards that carry the logo of competing EPS suppliers is contradicted by the evidence on record. Specifically, China points to the prevalence of dual logo cards that bear the *Yin Lian*/UnionPay network logo as well as the logo of other EPS suppliers.[363]

7.279 We note that the relevant provision of the Operating Regulations, submitted very late in the proceedings, raises a number of questions that the United States did not address. For instance, it is not clear to us from the text of the relevant provision whether the bank cards on which other logos may not appear – referred to in the relevant provisions as "UnionPay Cards" – are only CUP-branded bank cards (China UnionPay cards) or also perhaps any bank card issued in China supported by a foreign EPS supplier and that in addition to the logo of the foreign EPS supplier, would have to bear the *Yin Lian*/UnionPay network logo. Nor do we have a response from the United States to China's argument about the existence of dual logo bank cards that are issued in China. Moreover, the United States, in its response to the Panel's question, has not tried to reconcile its interpretation of the Operating Regulations with Article 4.3 of the Business Practices Appendix, which indicates that the right to use the *Yin Lian*/UnionPay logo is automatically granted to "Interoperating Members". The United States merely asserts, without elaboration, that the Operating Regulations implement the mandate regarding the requirements in the Business Practices Appendix related to the use and non-use of the UnionPay/*Yin Lian* logo.[364] For these reasons, we are not persuaded that the relevant provision of the

[357] Articles 2.1, 2.3, 5.2.1, 5.3.1.1 and 5.3.4 of Chapter I of the Business Practices Appendix contained in Document No. 76.

[358] The United States itself appears to share this understanding. In response to Panel question No. 92 (para. 86), it states in relation to acquirers that "[o]nce an acquiring institution has been approved as a member of CUP, the acquiring institution gains the right to the CUP logo" according to Article 4.3 of the Business Practices Appendix contained in Document No. 76.

[359] The United States' argument based on Article 4 is that CUP could refuse permission to use the network logo, not that CUP could bar an issuing bank from becoming an "Interoperating Member". It is pertinent to note in this respect that according to the parties, several foreign banks are currently members of CUP. United States' response to Panel question No. 15, para. 108 (citing six foreign banks as examples); China's response to Panel question No. 115, para. 76; Exhibit CHN-105.

[360] United States' response to Panel question No. 94, para. 94 (citing Document No. 76 and the Operating Regulations together); and also response to Panel question Nos. 86, para. 64, and No. 117, para. 113.

[361] We note that the Operating Regulations date from April 2011, which is before this Panel was composed. Also, the United States did not submit the entire text of the Operating Regulations, but only the relevant provision.

[362] The United States identifies Article 2.5.3.2 of the Operating Regulations (Exhibit US-115).

[363] China's comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 67. China also points out that the document in question was not identified in the request for establishment of a panel. China's comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 68.

[364] United States' response to Panel question No. 86, para. 64.

Operating Regulations supports the United States' assertion that the logo use requirements allow CUP to prevent issuers from issuing bank cards of competing EPS suppliers.

7.280 Finally, we note that in response to another question from the Panel concerning CUP's alleged power to refuse permission to use the network logo, the United States asserts that CUP at times did not approve EPS suppliers' applications for new dual-branded, dual-logo cards, and that it achieved this "essentially through the card approval process".[365] According to the United States, this is demonstrated in various press reports that date from 2006 and 2007.[366] We note, initially, that the United States provides no elaboration on what the relevant "card approval process" entails and what the governing rules and procedures are.[367] Furthermore, and without entering into a discussion of the evidentiary value of these press reports, we observe that the press reports do not refer to either Article 4 of the Business Practices Appendix or the Operating Regulations, or another instrument cited by the United States in support of the issuer requirements. Nor do they indicate that CUP denied or prevented approval of a card programme specifically by refusing permission to use the network logo.[368] In the light of this, the press reports in question in our view do not assist the United States in demonstrating that by virtue of the logo use requirements CUP can prevent issuers from issuing bank cards of competing EPS suppliers.

*(vii) Document No. 17*

7.281 The United States observes that the issuer requirements concern "bank cards" and that Document No. 17 defines that term. According to the United States, Document No. 17 in Articles 5 and 7-10 defines "bank cards" as encompassing the range of payment cards that are broadly used in card-based electronic payment transactions.[369] The United States further asserts that Article 64 of Document No. 17 requires the use of the unified standards of the Business Practices Appendix of Document 76, which are CUP-only.[370]

7.282 China does not specifically address the provisions identified by the United States, except to note that Document No. 17 was issued in 1999 and that subsequent instruments have established additional requirements.[371]

7.283 The Panel notes that Articles 5 and 7-10 of Document No. 17 do not impose any requirements. Rather, they provide legal definitions. They notably indicate that the term "bank cards", which appears in several of the instruments at issue, comprises both credit cards and debit cards, and that the latter category includes cards for transferring accounts and stored-value cards (Articles 5 and 7). It is further stipulated that bank cards may be classified into both domestic currency cards – RMB cards – and foreign currency cards (Article 5).

7.284 The United States' claims in this case concern EPS for "payment card" transactions and not EPS for "bank card" transactions.[372] However, "payment cards" as defined by the United States

[365] United States' response to Panel question No. 117, para. 113.
[366] Exhibits US-119, US-120, US-121, US-122 and US-123.
[367] The only card approval process that we have been made aware of is that provided for in Article 3 of Document No. 57. It states in relevant part that commercial banks must submit to PBOC a card sample which complies with the requirements of the *Yin Lian*/UnionPay logo as laid down in Document No. 57. On its face, Article 3 does not provide for any involvement of CUP in the approval process.
[368] For example, one of the press reports indicates merely that CUP refused the request of a commercial bank for card issuance (Exhibit US-120).
[369] United States' response to China's request for a preliminary ruling, fn. 153.
[370] United States' second written submission, para. 170 and fn. 201.
[371] China's response to Panel question No. 122, para. 88.
[372] WT/DS413/2, p. 1.

include bank cards, credit cards, debit cards and prepaid cards. Thus, the term "bank card" as defined in Document No. 17 covers at least some important types of "payment card".

7.285 The United States suggests that the definition of "bank cards" provided in Document No. 17 is also applicable when this term appears in other instruments at issue. China has not asserted anything to the contrary. We see nothing in Document Nos. 37, 57, 129, 219 or 76 to indicate that we should not take that definition into account in our analysis of these instruments.[373]

7.286 As regards Article 64, it provides in relevant part that a commercial bank in China, when issuing any variety of bank cards (other than those of an international credit card organization), must implement the technical standards prescribed by the State.[374] In our view, Article 64 does not require that all bank cards issued in China must bear the *Yin Lian*/UnionPay logo. Nor does Article 64 itself require the use of the unified standards set out in the Appendix on Business Practices contained in Document No. 76. But we agree that the Business Practices Appendix includes technical standards prescribed by the State that are applicable to issuers.[375] In the light of this, we consider that Article 64 in conjunction with Document No. 76 requires issuers to implement technical standards when issuing bank cards that must bear the *Yin Lian*/UnionPay logo.

*(viii) Yin Lian/UnionPay logo use requirements versus interoperability requirements*

7.287 Before reaching overall conclusions, it is necessary to address an additional point that was made by the United States. According to the United States, the fact that issuers in China are subject to *Yin Lian*/UnionPay logo use requirements means that they must have access to the CUP system and pay CUP for that access. As this contention concerns two distinct elements, we first consider the issue of access to the CUP system.

7.288 In our view, the *Yin Lian*/UnionPay logo use requirements do not in and of themselves mean that issuers must have access to the CUP system.[376] As the preceding analysis shows, however, China does maintain related requirements on issuers that are designed to ensure that issuers join CUP and that the bank cards that must bear the *Yin Lian*/UnionPay logo meet uniform business specifications and technical standards and thus be interoperable with CUP.[377] The specific provisions and instruments that impose these requirements are the following: Articles 1.2(i), 2.1(iii), 2.2(i) and 3.1 of

[373] Document No. 76 in Chapter 10 specifically refers to Document No. 17.

[374] In response to a question from the Panel concerning the reference to international credit card organizations, China has said that Document No. 17 dates from 1999 and that subsequent instruments have established that all RMB payment cards must have the technical capability of being processed over the CUP network. China's response to Panel question No. 122, para. 88. We do not understand this response to mean that Document No. 17 does not require compliance with technical standards prescribed by the State that post-date Document No. 17. The United States similarly responded that Article 64 predates the creation of CUP and that it does not mean that banks in China can issue RMB cards that carry only the logo of an international credit card organization. United States' response to Panel question No. 122, para. 121.

[375] See, e.g. Articles 5.2.2 and 5.2.3 of Chapter I and paragraph 3 of the Notice.

[376] The United States appears to acknowledge this when it states, in response to Panel question No. 119 (para. 118), that Article 2.1 of Document No. 37 "requires that all cards bearing the UnionPay/*Yin Lian* logo (which, by virtue of measures described elsewhere, includes all cards issued in China for domestic use) 'must strictly abide by the unified technical specification and all bank card issuers must provide [...] services pursuant to the unified business specifications.'"

[377] The United States has itself distinguished these two requirements. United States' response to Panel question No. 15, para. 57. According to the United States, the uniform business specifications include relevant provisions of the Business Practices Appendix contained in Document No. 76. With regard to the uniform technical specifications, the United States points out that they include a variety of technical documents (including Document No. 76), some of which have been issued by CUP and some of which have been issued by the PBOC or other agencies. United States' response to Panel question Nos. 15, para. 57; and 72, paras. 14 and 15.

Document No. 37; Article 3 of Document No. 57; Article 3.2(ii) of Document No. 129; and Article 64 of Document No. 17 in conjunction with Document No. 76. Having regard to these provisions, it is in our view correct to say that issuers must have access to the CUP network.[378]

7.289 The United States in response to a question from the Panel referred to this category of issuer requirements as "interoperability requirements".[379] As the United States has raised the element of access to the CUP system from the beginning in connection with the requirements on issuers that bank cards bear the *Yin Lian*/UnionPay logo[380], we will proceed on the basis that there are two categories of issuer requirements for us to address: those that relate to the *Yin Lian*/UnionPay logo use and those that relate to interoperability.

7.290 We now turn to the issue of payment for access to the CUP network. The United States alleges that in order to join the network, issuers must pay fees to CUP.[381] Here again, it appears that what triggers the alleged fees are not the *Yin Lian*/UnionPay logo use requirements per se, but rather the interoperability requirements imposed on issuers. In response to a question from the Panel, the United States identifies two types of fee that may need to be paid to CUP: membership fees and testing fees.[382] In support of its allegation, the United States refers the Panel to Article 3.1(iii) of Document No. 94. That Article states in relevant part that CUP must "regulate fee charging methods and standards for inter-bank transactions at all city centers". We recall that Document No. 94 was repealed and ceased to have legal effect prior to the date of the Panel's establishment. As indicated above[383], we therefore decline to take this document into account in our analysis of the measures at issue, which include the issuer requirements. In any event, even if Document No. 94 were relevant for our purposes, it is not clear that it supports the United States' allegation regarding fees payable for joining the CUP network. The United States does not address whether the fees referred to in Article 3.1(iii) are fees payable to CUP for access to the network. As the United States points out, Article 3.1(iii) is concerned with the regulation of inter-bank transactions, including fee-setting.[384] China has explained that inter-bank transactions often involve so-called interchange fees that are usually paid by acquirers to issuers.[385]

7.291 The United States also relies on Articles 11 and 12 of CUP's Articles of Association.[386] However, these Articles do not mention any fees that CUP charges issuers. Additionally, the United States in response to a Panel question posed after the second substantive meeting submitted the previously mentioned CUP Operating Regulations.[387] They include provisions on membership and testing fees payable to CUP.[388] However, as also pointed out by China, the Operating Regulations are

---

[378] China appears to agree that its instruments require that all inter-bank bank cards adhere to a common technical standard and that all issuers of such cards in China must be members of CUP. China's response to Panel question No. 22(c), para. 17.

[379] United States' response to Panel question Nos. 15, para. 55; 92, para. 88.

[380] WT/DS413/2, p. 2; United States' response to China's request for a preliminary ruling, paras. 102 and 111; first written submission, paras. 12, 50 and 100; and second written submission, para. 201.

[381] United States' response to Panel question No. 94, para. 96.

[382] United States' response to Panel question No. 93, para. 93.

[383] See paras. 7.221 et seq. above.

[384] United States' response to Panel question No. 93, para. 91. We also note that Article 2.4.1 of Document No. 76 refers to obligations to be met by Interoperating Members that include "abiding by relevant regulations governing interoperation fees".

[385] China's first written submission, para. 52. We note that the Visa IPO Prospectus (Exhibit US-3), at page 146, confirms China's explanation. It also states that Visa sets default interchange rates in the United States and other regions, and that in certain jurisdictions interchange rates are subject to government regulation.

[386] Exhibit US-20.

[387] United States' response to Panel question No. 93, para. 93.

[388] The United States identifies Chapter 7 of the Operating Regulations (Exhibit US-116).

not identified as a relevant legal instrument in the United States' request for the establishment of a panel.[389] Moreover, unlike in the context of the logo use requirements where the United States also refers to the Operating Regulations, in the present context the United States does not specifically contend that they implement a requirement contained in one of the instruments cited by it in support of the issuer requirements.[390] We note in this respect that the provisions on membership and testing fees provided to us by the United States do not, by their terms, establish a link to any of the aforementioned instruments.[391] In the absence of further explanation on the Operating Regulations, it is therefore not clear to us that its provisions on membership and testing fees are linked to any of the specific provisions and instruments cited by the United States in support of the issuer requirements. We are therefore not persuaded that the Operating Regulations demonstrate what the United States asserts, i.e. that as a result of Document Nos. 37, 57, 129, 219, 76 or 17, issuers in China must pay fees to CUP for access to the CUP network.

7.292 For these several reasons, the United States in our view has not established that the issuer requirements entail, or are associated with, access fees payable to CUP.

*(ix) Conclusions and implications*

7.293 Having regard to the preceding analysis, we reach the following conclusions in respect of the United States' assertions concerning the issuer requirements. First, China maintains requirements on commercial banks as issuers of bank cards. The term "bank cards" as defined in Document No. 17 covers at least some types of what the United States has defined as "payment cards".

7.294 Secondly, all RMB bank cards issued in China by commercial banks for use in domestic inter-bank RMB transactions must bear the *Yin Lian*/UnionPay logo on the front of the card. This requirement is maintained through Articles 2.1(i) and 2.2(i) of Document No. 37; Articles 1, 5 and 6 of Document No. 57; and Article 3.2(ii) of Document No. 129. Similarly, dual currency (dual account) bank cards issued by commercial banks in China for use *inter alia* in domestic inter-bank or cross-region RMB transactions must also bear the *Yin Lian*/UnionPay logo on the front of the card. This requirement is imposed through Article 2 of Document No. 57. Additionally, all RMB credit cards must bear the *Yin Lian*/UnionPay holographic anti-counterfeiting logo. This requirement is imposed by Article 1 of Document No. 57.

7.295 Thirdly, China requires that issuers join CUP, and that the bank cards which they issue and which must bear the *Yin Lian*/UnionPay logo meet uniform business specifications and technical standards. These interoperability requirements are maintained through the following provisions: Articles 1.2(i), 2.1(iii), 2.2(i) and 3.1 of Document No. 37; Article 3 of Document No. 57; Article 3.2(ii) of Document No. 129; and Article 64 of Document No. 17 in conjunction with Document No. 76.

7.296 Finally, and in contrast, we have determined that Article 4 of Document No. 57, Article III of Document No. 219 and Article 4.2 of Document No. 76, when considered individually, either do not impose requirements on issuers or do not constitute relevant issuer requirements. We find no basis to modify our conclusion when considering these provisions either together or with the other provisions and instruments cited by the United States in connection with the issuer requirements.

---

[389] China's comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 68.

[390] United States' response to Panel question Nos. 86, para. 64; and 93, para. 93. We note that CUP's Articles of Association are not among the instruments cited in support of the issuer requirements.

[391] Exhibit US-116. We observe in this connection that the Panel's question asked the United States to indicate, "in any of the instruments before the Panel", the specific provisions concerning access fees for issuers. The Operating Regulations were not among these instruments at the time the question was put to the United States.

7.297 It remains for us to address an assertion made by China regarding the implications of the issuer requirements. China asserts that the United States has not demonstrated that the issuer requirements would prevent the issuance in China of bank cards that are capable of being processed over more than one network and that bear both the *Yin Lian* logo and the logo of an EPS supplier other than CUP. Thus, the issue to be addressed is whether the issuer requirements would prevent commercial banks from issuing single or dual currency bank cards in China that could be used in domestic inter-bank RMB transactions and that would be capable of being processed over a network in China that is not the CUP network.

7.298 We understand that it is technically possible for a single bank card to be capable of being processed over more than one network.[392] We can therefore proceed to consider the issuer requirements. We begin with the *Yin Lian*/UnionPay logo use element of these requirements. The relevant provisions of Document Nos. 37, 57 and 129 concern the requirement to bear the *Yin Lian*/UnionPay logo. They do not state that bank cards cannot be issued in China if they are capable of being processed over a network in China other than that of CUP. Nor do they say that bank cards can bear the logo of only one – CUP's – network.[393] The United States contends, however, that the *Yin Lian*/UnionPay logo use requirement is incompatible with logo use requirements of competing EPS suppliers.[394] China responds that the United States has cited no evidence of this incompatibility and points out that bank cards in China frequently bear more than one logo.[395] China notably provided unrefuted evidence of the existence of dual-logo bank cards.[396] For these reasons, we see no basis on which to conclude that the provisions in question would prohibit the issuance of relevant cards that would be capable of being processed over more than one inter-bank network in China, provided these cards also bear the *Yin Lian*/UnionPay logo.[397] We note that the United States itself appears to view the issuance of such cards as a possible, if unlikely, scenario.[398] Specifically, the United States has said that "[e]ven if a foreign supplier of EPS was to convince an issuer to issue a card, [the issuer] requirements ensure that it will not be able to compromise CUP's prominent logo or obtain any market share to the certain exclusion of CUP."[399]

7.299 Turning to the interoperability element of the issuer requirements, China submits that these requirements do not preclude issuers from being members of networks other than the CUP network, and do not prevent bank cards from adhering at the same time to technical standards that are not those of CUP.[400] In support of its view, China points to the issuance of dual-branded, dual-currency bank cards issued in China.[401] To us, the existence of dual-branded (dual-logo), dual-currency bank cards issued in China suggests that it is technically possible for bank cards simultaneously to comply with different sets of business specifications and technical standards. Moreover, nothing in the relevant

---

[392] The parties have, for instance, provided the example of dual-branded (dual-logo), dual-currency bank cards. Additionally, China contends that it is technically possible for POS terminals to give card holders or merchants a choice as to the network over which a payment card transaction will be processed. China's response to Panel question No. 7, para. 61.

[393] We note that Exhibit CHN-112 shows examples of dual-branded (dual-logo), dual-currency bank cards issued in China.

[394] United States' response to Panel question No. 86, para. 62.

[395] China's comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123. , paras. 56 and 73.

[396] Exhibit CHN-112.

[397] We recall that we have already rejected relevant arguments developed by the United States on the basis of Article 4.2 of Document No. 76 and CUP's Operating Regulations. See paras. 7.275 to 7.279 above.

[398] Para. 7.360 below addresses the United States' claim that the logo use requirements modify the conditions of competition to the detriment of EPS suppliers of other Members.

[399] United States' first written submission, para. 101. See also first written submission, para. 80.

[400] China's response to Panel question Nos. 22(c), para. 18; 112, para. 73; and 119, para. 84.

[401] China's comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 56; response to Panel question No. 116, para. 78; Exhibit CHN-112.

provisions of Document Nos. 37, 57, 129 or 17 (in conjunction with No. 76) indicates that issuers who are members of CUP may not join other networks in China, or that bank cards that meet CUP's uniform business specifications and technical standards must not, or cannot, simultaneously meet those of other networks. The United States refers to paragraph 5 of the Notice of Document No. 76.[402] It states that bank card business rules that are inconsistent with the Business Practices contained in Document No. 76 must be abolished as from the date of implementation of Document No. 76. As we understand it, paragraph 5 means that bank card business rules that differ from those of the Business Practices can be implemented, provided they do not conflict with the Business Practices.[403] The United States has not demonstrated that any of the aforementioned provisions are inconsistent with central issuer-related bank card business rules that have been adopted by EPS suppliers other than CUP. Consequently, we find no basis to conclude that the issuer requirements that relate to interoperability would prevent the issuance of single or dual currency cards that would be capable of being processed over more than one inter-bank network in China. But if any such cards are issued by commercial banks in China, they must bear the *Yin Lian*/UnionPay logo.

(b) Requirements that all ATM, and POS terminals in China accept CUP cards ("terminal equipment requirements")

7.300 The requirements to which the Panel turns next are the alleged terminal equipment requirements. The United States asserts that these requirements are maintained through specific provisions of the following Chinese legal instruments:[404]

- Document No. 17 (Article 64)
- Document No. 37 (Articles 1.2(i); 2.1(ii) and (iii))
- Document No. 57 (Articles 3, 5 and 6)
- Document No. 153 (Article 2.2)
- Document No. 149 (Article 2(5)(iii))
- Document No. 76 (Chapter II, Article 1.2)

7.301 The United States submits that through these instruments China requires that all ATMs, merchant card processing equipment and POS terminals in China be capable of accepting CUP cards.[405]

7.302 China responds that the measures at issue require that all POS terminals used for domestic inter-bank transactions denominated in RMB in China be capable of accepting bank cards that bear the *Yin Lian* logo and they must adhere to certain technical standards.[406] These measures create uniform technical and commercial standards that allow a national inter-bank payment card network to function. China further submits that the United States fails to identify any aspect of the alleged terminal equipment requirements that would prevent the acceptance of payment cards that are capable

[402] United States' second written submission, para. 163.
[403] Paragraph 5 does not say that any and all bank card business rules that differ from those contained in the Business Practices are to be abolished.
[404] United States' response to Panel question Nos. 4, para. 18; and 6, para. 32. The United States also relies on Document Nos. 94 and 272. As explained above at paras. 7.221-7.229, the Panel has decided not to consider the substance of these documents.
[405] United States' first written submission, paras. 4 and 102; WT/DS413/2, p. 2.
[406] China's first written submission, para. 36; response to Panel question Nos. 22(c), para. 17; 101, para. 43.

of being processed over multiple networks.[407] China observes in this respect that most POS terminals are capable of processing any type of bank card.[408]

7.303 Below, the Panel will examine the above-listed instruments so as to determine whether they impose the requirements alleged by the United States. It is important to point out in this respect that the United States has described the terminal equipment requirements as mandating that terminal equipment in China – ATMs and POS terminals used by merchants or other operators such as banks – be capable of accepting *Yin Lian*/UnionPay bank cards. The alleged requirements are not about whether the *Yin Lian*/UnionPay logo must be posted on terminal equipment.[409] The issue of the posting of the *Yin Lian*/UnionPay logo has been raised by the United States only in the context of its challenge to the alleged acquirer requirements.[410]

*(i) Document No. 17*

7.304 The United States submits that Document No. 17 mandates the use of unified, CUP-only standards. It asserts that this in turn means that any POS terminal must be capable of accepting CUP cards for any payment card transaction in China.[411]

7.305 China does not address the specific requirement on which the United States relies.

7.306 The Panel notes that the requirement referred to by the United States may be found in Article 64 of Document No. 17, which has been addressed earlier.[412] Article 64 requires commercial banks in China to implement technical standards prescribed by the State when issuing bank cards. It makes no reference to terminal equipment, or to acceptance of bank cards. In the absence of any elaboration by the United States, it is not clear to us why and how Article 64, which on its face focuses on the activity of bank card issuance, "means that any POS terminal must be capable of accepting CUP cards".[413]

7.307 In the light of this, we do not consider that Article 64 of Document No. 17 imposes a requirement that all ATMs, merchant card processing equipment and POS terminals must be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo.

*(ii) Document No. 37*

7.308 The United States also refers the Panel to the text of Articles 1.2(i) and 2.1(ii) and (iii) of Document No. 37.[414]

7.309 China states that Document No. 37 establishes uniform technical standards for POS terminals that accept inter-bank payment cards.[415]

---

[407] China's second written submission, para. 93.
[408] China's response to Panel question No. 101, para. 43.
[409] In the context of the Chinese instruments before us, the two issues – the posting of the UnionPay/*Yin Lian* logo and the capability of terminal equipment to accept bank cards bearing the logo – are not one and the same. As will be clear from the analysis below and that concerning the alleged acquirer requirements, the relevant instruments address these two issues in separate requirements.
[410] See, e.g. United States' first written submission, paras. 4, 12, 102 and 111; WT/DS413/2, p. 2.
[411] United States' second written submission, para. 177.
[412] See para. 7.286 above.
[413] United States' second written submission, para. 177.
[414] United States' first written submission, paras. 103 and 105.
[415] China's first written submission, para. 45.

7.310 The Panel notes that Article 1.2(i) does not specifically mention ATMs or POS terminals.[416] However, it requires commercial banks to make "technical preparations for accepting bank cards bearing the [*Yin Lian*/UnionPay] logo".[417] We note the references to "technical preparations" and "acceptance" of bank cards. ATMs or POS terminals of commercial banks constitute technical equipment used for accepting bank cards. In our assessment, these elements support the view that Article 1.2(i) requires, *inter alia*, that terminal equipment of commercial banks must be capable of accepting cards bearing the *Yin Lian*/UnionPay logo.

7.311 Article 2.1(ii) prescribes in relevant part that "[a]ll terminals (such as ATMs and POS) which join the nationwide bank card inter-bank processing network must be capable of accepting all bank cards bearing the [*Yin Lian*/UnionPay] logo". As regards Article 2.1(iii), as pointed out above, this provision is concerned with bank cards bearing the *Yin Lian*/UnionPay logo and the services to be supplied by issuers of bank cards pursuant to the unified business specifications.[418] In the absence of an explanation by the United States on how this provision lays down a requirement concerning terminal equipment , we are not persuaded that this is the case.

7.312 Based on the foregoing, we consider that Articles 1.2(i) and 2.1(ii) require that all terminal equipment of commercial banks that join China's national inter-bank bank card network be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo. China has clarified in response to a question from the Panel that there is terminal equipment in China that does not need to be connected to the national inter-bank network. Such terminal equipment is used exclusively for foreign currency transactions.[419]

*(iii) Document No. 57*

7.313 The United States also relies on Document No. 57, specifically its Articles 3, 5 and 6.[420]

7.314 China argues that Document No. 57 requires payment cards issued for domestic inter-bank use to bear the *Yin Lian* logo, and requires commercial banks that issue inter-bank payment cards to adhere to the business specifications for bank card interoperability contained in Document No. 76.[421]

7.315 As the Panel explained above, Article 3 provides that bank cards issued for domestic inter-bank use must comply with the unified business specifications and technical standards. It further provides that commercial banks must provide card samples to the PBOC that comply with the *Yin Lian*/UnionPay logo use requirements.[422] Article 5 provides in relevant part that POS terminals must have the *Yin Lian*/UnionPay logo posted. Article 6 mandates the abolition of regional bank card interoperability logos and requires that terminal equipment such as ATMs and POS terminals not bear any regional bank card interoperability logo.[423] In our view, none of these Articles imposes a requirement that terminal equipment in China be capable of accepting bank cards bearing the *Yin*

[416] Article 1.2(i) was discussed above in connection with the issuer requirements. See para. 7.255 above.

[417] See the UNOG translator's linguistic advice as set out in Annex H.

[418] See para. 7.257 above.

[419] China's response to Panel question No. 101, para. 43. The United States has confirmed that there are a small number of POS terminals that can only accept foreign-issued bank cards and that are not required to be connected to the CUP network. United States' comments on China's response to Panel question No. 101, para. 37.

[420] United States' second written submission, para. 179; response to Panel question Nos. 6, para. 32; 71, para. 8.

[421] China's first written submission, para. 45.

[422] See para. 7.263 above.

[423] Article 5 contains a corresponding requirement that all POS terminals in the bank card acceptance market must have the UnionPay/*Yin Lian* logo posted.

*Lian*/UnionPay logo. Article 3 deals with bank cards. Only Articles 5 and 6 mention terminal equipment. Article 5 requires the posting of the *Yin Lian*/UnionPay logo on POS terminals, while Article 6 is concerned with regional interoperability logos that terminal equipment may not display. Neither Article 5 nor Article 6 addresses the issue of whether terminal equipment in China must be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo.[424] This is consistent with the title of Document No. 57, which is "Circular on Uniform Use of CUP Logo and its Holographic Label for Anti-Counterfeiting".[425] As we have explained earlier the terminal equipment requirements as described by the United States are not concerned with the posting of the *Yin Lian*/Union Pay logo on such equipment.

7.316 Based on the above, we consider that Articles 3, 5 and 6 of Document No. 57 do not impose a requirement that all terminal equipment in China be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo.

*(iv) Document No. 153*

7.317 The United States identifies Document No. 153 as another instrument that imposes a terminal equipment requirement. According to the United States, the relevant provision is Article 2.2.[426]

7.318 China does not specifically address Document No. 153 in connection with the alleged terminal equipment requirements.

7.319 The Panel notes that Article 2 of Document No. 153 is entitled "Principles to be complied with in the merchant acquiring business". Article 2.2 requires that POS terminals placed by acquirers or third-party service providers conform to the business specifications and technical standards of cross-network interoperability, be posted with the unified *Yin Lian*/UnionPay logo, and be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo.

7.320 In the light of this, we consider that Article 2.2 imposes a requirement that merchant POS terminals in China that have been placed by acquirers or third-party providers be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo.

*(v) Document No. 149*

7.321 The United States submits that Document No. 149 contains a clear prohibition on accepting non-CUP cards. According to the United States, Article 2(5)(iii) prevents acquirers and merchants from accepting prepaid bank cards that do not bear the CUP logo.[427]

7.322 China argues that Article 2(5)(iii) relates to prepaid cards issued by non-financial institutions, including cards issued by a retailer that are meant to be used only at that retailer. China states that the point of this provision is that these types of non-interoperable payment cards should not be processed through the same POS terminals used to process interoperable payment cards that bear the *Yin Lian* logo. According to China, Article 2(5)(iii) is intended to prevent payment card crimes. Specifically, it seeks to prevent a situation in which someone tries to use a prepaid card issued by a retailer, for example, to complete a transaction with someone other than that retailer. China points out that this would be a form of fraud since the merchant that accepts the card is unlikely to be able to obtain payment from the retailer that issued the prepaid card. China maintains, therefore, that

[424] We recall in this connection that there are other provisions, e.g. in Document No. 37, that specifically require that terminal equipment be capable of accepting bank cards bearing the UnionPay/*Yin Lian* logo.

[425] Exhibit US-41, heading.

[426] United States' second written submission, para. 176.

[427] United States' second written submission, para. 175.

Article 2(5)(iii) merely reflects the fact that all interoperable RMB payment cards must be capable of being processed over the CUP network and bear the *Yin Lian* logo. China also states that Article 2(5)(iii) does not prohibit accepting cards that bear the *Yin Lian* logo and the logo of another network operator (i.e. dual-logo cards).[428]

7.323 The Panel notes that Document No. 149 is about security management of bank cards and preventing and fighting crime in bank cards.[429] Article 2(5)(iii) of Document No. 149 relates to access to bank card terminals, and to prepaid cards. Prepaid cards are among the payment cards at issue in this dispute. Moreover, according to linguistic advice provided by the UNOG translator, Article 2(5)(iii) concerns prepaid cards issued by "non-financial social enterprises". The UNOG translator indicates that "non-financial social enterprises" are social enterprises that are not financial institutions, such as charitable institutions or social enterprises that provide prepaid debit cards to their clientele.[430] China states that the relevant enterprises would also include retailers. Even if this means that China argues for a broader category of non-financial enterprises, China's position does not contradict the fundamental point that the relevant prepaid cards are issued by *non-financial* enterprises.[431]

7.324 Article 2(5)(iii) states that acquirers may not allow prepaid cards to be accepted at bank card terminal equipment (POS terminals) if these cards do not bear the *Yin Lian*/UnionPay logo or do not meet the PBOC 2.0 standard. In our view, this Article is not about which prepaid cards POS terminals must be capable of accepting. Rather, the Article is about which prepaid cards such terminals must *not* accept. This view is consistent with the purpose of Document No. 149, which is to prevent bank card crime. In the case of Article 2(5)(iii), as China has explained, the specific concern is to prevent fraud involving prepaid cards issued by relevant enterprises.

7.325 In our view, the fact that prepaid cards without the *Yin Lian*/UnionPay logo are not allowed to be accepted at bank card POS terminals does not imply that all prepaid cards bearing the *Yin Lian*/UnionPay logo must be allowed.[432] It implies merely that the relevant terminals may allow such cards to be accepted.[433] We also note that no evidence other than the text of Article 2(5)(iii) itself has been provided to assist us in determining the legal effect of this provision.[434]

7.326 As a result, we are not persuaded that Article 2(5)(iii) imposes a requirement that all merchant POS terminals be capable of accepting prepaid cards issued by relevant enterprises and bearing the *Yin Lian*/UnionPay logo.

---

[428] China's response to Panel question Nos. 104(b), paras. 52 and 53; 110, para. 68; Exhibit CHN-74.

[429] Exhibit US-50, heading.

[430] UNOG evaluation, p. 13.

[431] This view also draws support from the fact that Article 2(5)(iii) refers to prepaid "cards" rather than to prepaid bank cards.

[432] We note that prepaid cards bearing the *Yin Lian*/UnionPay logo would appear to include dual-logo prepaid cards that at the same bear the logo of another EPS supplier.

[433] In response to a Panel question, the United States itself states that Article 2(5)(iii) "means that only CUP cards may be used at such terminals". United States' response to Panel question No. 91, para. 85.

[434] Given this, it is important, in our view, not to read into Article 2(5)(iii) more than it says, or necessarily implies, all the more so as there are provisions of other Chinese instruments, notably Document Nos. 37 and 153, which explicitly require that bank cards bearing the UnionPay/*Yin Lian* logo be accepted at relevant terminals.

*(vi) Document No. 76*

7.327 The United States cites Document No. 76 as a further source of the alleged terminal equipment requirements. The United States refers the Panel to Article 1.2 of Chapter II of the Business Practices Appendix.[435]

7.328 China points out that Document No. 76 sets forth detailed specifications concerning the technical and commercial aspects of inter-bank payment card transactions.[436]

7.329 The Panel notes that in accordance with Article 1.2 of Chapter II, the "Unified Network Logo"[437] must be posted on the machines and equipment of any merchant in accordance with relevant regulations of interoperability, and must be posted on the merchant's cash register machines. This requirement mandates the posting of the *Yin Lian*/UnionPay logo. It does not address the issue of whether merchants' terminal equipment must be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo.[438] As mentioned above, the alleged terminal equipment requirements as described by the United States are not about the posting of logos.

7.330 In the light of this, we do not consider that Article 1.2 of Chapter II imposes a requirement that all merchant terminal equipment be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo.

*(vii) Conclusions and implications*

7.331 Having regard to the preceding analysis, we agree that China maintains terminal equipment requirements with regard to bank cards for use in domestic inter-bank RMB transactions. More specifically, in our view China requires that terminals (ATMs, merchant processing devices and POS terminals) in China that are part of the national bank card inter-bank processing network be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo.[439] This requirement is maintained through Articles 1.2(i) and 2.1(ii) of Document No. 37 (for terminal equipment of commercial banks) and also through Article 2.2 of Document No. 153 (for merchant terminal equipment).

7.332 However, we are not convinced that Article 64 of Document No. 17, Articles 3, 5 or 6 of Document No. 57, Article 2(5)(iii) of Document No. 149, or Article 1.2 of Chapter II of the Business Practices Appendix contained in Document No. 76, when considered individually, require that all terminal equipment in China be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo. We find no basis to modify our conclusion when considering these provisions together, or with the other provisions cited by the United States in connection with the terminal equipment requirements.

---

[435] United States' response to China's request for a preliminary ruling, para. 113.

[436] China's first written submission, para. 45.

[437] The Business Practices Appendix to Document No. 76 defines this term as meaning the uniform brand name for domestic bank cards (the Chinese characters *yinlian*) and the design symbolizing the united network, as registered with the trademark office. See the UNOG's translator's linguistic advice as set out in Annex H.

[438] As is clear from our findings so far, there are provisions of other Chinese instruments – such as Document Nos. 37 and 153 – which explicitly require that bank cards bearing the UnionPay/*Yin Lian* logo be accepted at relevant terminals. Therefore, we are not persuaded that we can infer that a logo posting requirement amounts at the same time to a requirement that terminal equipment be capable of accepting bank cards bearing the relevant logo.

[439] The terminals in question are those that are used for domestic inter-bank RMB transactions. China's response to Panel question No. 101, para. 43.

7.333 Finally, we recall that Document Nos. 37 and 153 use the term "bank card". The term "bank card" as defined in Document No. 17 covers at least some types of "payment card", which is the term used by the United States in its request for the establishment of a panel.[440]

7.334 Having reached these conclusions, we now consider China's argument concerning the implications of the terminal equipment requirements. According to China, the United States has not identified any aspect of the terminal equipment requirements that would prevent the acceptance of bank cards that are capable of being processed over multiple networks. China submits that POS terminals can accept bank cards that bear different logos.[441] We also understand that modern ATMs and POS terminals are typically capable of accepting not just bank cards with the logo of one particular EPS supplier, but also bank cards with the logo of other EPS suppliers. Furthermore, the relevant provisions of Document Nos. 37 and 153 do not state that the terminal equipment that must be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo must not be capable of accepting, at the same time, bank cards bearing the logo of different EPS suppliers. Hence, in the absence of other evidence, we see no basis for concluding that the terminal equipment requirements would prevent the acceptance of bank cards that would be capable of being processed over an inter-bank network in China other than that of CUP.[442]

(c) Requirements on acquiring institutions to post the CUP logo and be capable of accepting all payment cards bearing the CUP logo ("acquirer requirements")

7.335 We now consider the alleged acquirer requirements. The United States asserts that these requirements are maintained through specific provisions of the following Chinese legal instruments:[443]

- Document No. 153 (Article 2.2)
- Document No. 149 (Article 2(5)(iii))
- Document No. 37 (Article 1.2(i))
- Document No. 76 (Notice, paragraphs 2 and 3; Chapter I, Articles 2.1 and 5.2.1)

7.336 The United States submits that through these instruments China requires that all acquirers in China post the CUP logo and be capable of accepting CUP cards.[444]

7.337 China responds that the measures at issue require POS terminals in China to adhere to certain technical standards and to bear a common logo indicating their ability to be used for domestic inter-bank transactions.[445] These measures create uniform technical and commercial standards that allow a national inter-bank payment card network to function. China further submits that the United States

[440] See para. 7.284 above.

[441] China's response to Panel question No. 22(c), para. 18; comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 73.

[442] We note that the United States itself appears to suggest that terminal equipment in China could in principle accept relevant bank cards. The United States points out that "a foreign EPS [supplier] must build that network [of merchants that accept its card] by marketing itself to merchants and acquiring banks" (United States' first written submission, para. 110). Similarly, the United States observes that "[t]o the extent a foreign supplier of EPS was to create or secure access to a POS, then CUP would also gain as well because of the [terminal equipment] requirement" (United States' first written submission, para. 80).

[443] United States' response to Panel question No. 4, para. 19. The United States also relies on Document Nos. 94 and 272. As explained above at paras. 7.221-7.229, the Panel has decided not to consider the substance of these documents.

[444] United States' first written submission, paras. 4 and 111.

[445] China's first written submission, para. 36.

fails to identify any aspect of the alleged acquirer requirements that would prevent the acceptance of payment cards that are capable of being processed over multiple networks.[446]

7.338 The Panel begins its analysis by noting that the acquirer requirements as defined by the United States comprise two distinct elements (i) requirements that acquirers post the *Yin Lian*/UnionPay logo, and (ii) requirements that acquirers be capable of accepting payment cards bearing the *Yin Lian*/UnionPay logo. We gather from the specific provisions relied on by the United States that the second element includes alleged requirements that terminal equipment operated or provided by acquirers (ATMs and merchant POS terminals) must be capable of accepting payment cards bearing the *Yin Lian*/UnionPay logo. To that extent, there is overlap between the acquirer and the above-discussed terminal equipment requirements. The United States itself has pointed out, however, that there is a "significant degree of overlap" among the six categories of requirements it has distinguished.[447] In addition, the United States has stated that the acquirer requirements include alleged requirements on acquirers to join CUP and to comply with business standards and technical specifications of inter-bank interoperability.[448] The United States has explained that these requirements concern the capabilities of acquirers themselves, regardless of the type of terminal equipment located at merchants' places of business.[449] Consequently, the alleged requirements that acquirers be capable of accepting *Yin Lian*/UnionPay logo payment cards appear to comprise both terminal equipment and interoperability requirements. With this in mind, we now proceed to determine whether the four instruments identified by the United States impose the alleged acquirer requirements.

*(i) Document No. 153*

7.339 The United States cites Article 2.2 of Document No. 153 as one source of the alleged acquirer requirements.[450]

7.340 China does not specifically address Document No. 153 in connection with the alleged acquirer requirements.

7.341 As previously noted by the Panel[451], Article 2.2 states that merchant POS terminals in China that have been placed by qualified merchant acquirers[452] or third-party providers must: (i) conform to the business specifications and technical standards of cross-network interoperability, (ii) be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo, and (iii) be posted with the unified *Yin Lian*/UnionPay logo.[453] Thus, Article 2.2 establishes a requirement that acquirers be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo (interoperability requirement (i) and terminal equipment requirement (ii)). It also requires that acquirers post the *Yin Lian*/UnionPay logo on the POS terminals they provide to merchants (requirement (iii)).

7.342 In the light of this, we consider that Article 2.2 imposes a requirement that qualified acquirers in China post the *Yin Lian*/UnionPay logo and be capable of accepting, through the merchant POS terminals they place with merchants, all bank cards bearing the *Yin Lian*/UnionPay logo.

---

[446] China's second written submission, para. 93.
[447] United States' response to Panel question Nos. 4, para. 14; 1, para. 1.
[448] United States' second written submission, para. 181; response to Panel question No. 92, para. 90.
[449] United States' response to Panel question No. 1, para. 1.
[450] United States' first written submission, para. 112.
[451] See para. 7.319 above.
[452] According to Article 1.1 of Document No. 153, merchant acquiring institutions comprise financial institutions and qualified professional acquiring institutions.
[453] See para. 7.320 above.

*(ii) Document No. 149*

7.343 The United States submits that Article 2(5)(iii) of Document No. 149 also sets forth acquirer requirements.[454]

7.344 China argues that Article 2(5)(iii) simply reflects the fact that all POS terminals must be capable of accepting prepaid payment cards that bear the *Yin Lian* logo. It does not prohibit accepting cards that also bear other logos.[455]

7.345 As explained above[456], the Panel is not persuaded that this Article *requires* that prepaid cards bearing the *Yin Lian*/UnionPay logo must be accepted at any POS bank card terminals.[457] As a result, we find that the United States has failed to demonstrate that Article 2(5)(iii) imposes a requirement that acquirers be capable of accepting all prepaid cards that have been issued by the relevant non-financial enterprises and bear the *Yin Lian*/UnionPay logo.

*(iii) Document No. 37*

7.346 The United States considers that acquirer requirements are also laid down in Article 2.1(i) of Document No. 37. According to the United States, Article 2.1(i) requires all commercial banks to make technical preparations for accepting bank cards bearing the CUP logo, and requires acquirers to join CUP for accepting cards.[458]

7.347 China states that Document No. 37 establishes uniform technical standards for POS terminals that accept inter-bank payment cards. It also requires commercial banks that acquire inter-bank payment cards to use the *Yin Lian* logo and to join the national inter-bank payment card network.[459]

7.348 The Panel notes that the United States has identified the wrong provision of Document No. 37. Article 2.1(i) imposes neither of the two alleged requirements. However, as explained above, Article 1.2(i) of Document No. 37 imposes an interoperability requirement addressed to all commercial banks, which include acquiring banks[460], and also a requirement that terminal equipment operated by acquiring banks and merchant terminal equipment provided by acquiring banks be technically capable of accepting cards bearing the *Yin Lian*/UnionPay logo.[461] Moreover, Article 3.1(i) requires that commercial banks, which include acquiring banks, join the national inter-bank exchange network, i.e. the CUP network.

7.349 For these reasons, we agree that, by imposing a terminal equipment requirement (Article 1.2(i)) and interoperability requirements (Articles 1.2(i) and 3.1(i)), Articles 1.2(i) and 3.1(i) require that acquiring banks be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo.

*(iv) Document No. 76*

7.350 The United States also relies on Document No. 76. The United States asserts that in accordance with Document No. 76, any financial institutions seeking to acquire merchant bank card

[454] United States' first written submission, para. 113.
[455] Exhibit CHN-74.
[456] See para. 7.323 above.
[457] See para. 7.323 above.
[458] United States' second written submission, para. 182.
[459] China's first written submission, para. 45.
[460] See para. 7.255 above.
[461] See para. 7.310 above.

transactions must join CUP and process transactions according to CUP's rules and procedures, including the logo requirements and the unified CUP standards.[462]

7.351 China points out that Document No. 76 sets forth detailed specifications concerning the technical and commercial aspects of inter-bank payment card transactions.[463]

7.352 The Panel notes that in connection with the alleged acquirer requirements, the United States has referred to the following provisions of Document No. 76: paragraphs 2 and 3 of the Notice; Articles 2.1, 5.2.1, 5.2.2 and 5.2.3 of Chapter I of the Business Practices Appendix.[464] Paragraph 2 provides in relevant part that the Business Practices contained in Document No. 76 apply to all commercial banks participating in bank card service in China. Paragraph 3 states *inter alia* that acquiring banks that have been participating in the bank card acceptance business must meet the relevant requirements of the Business Practices Appendix. Articles 2.1 and 5.2.1 of Chapter I are among these requirements. These Articles make clear that commercial banks that conduct bank card business in China must join the United Association (i.e. CUP) before they can apply to participate in bank card interoperable service. To qualify as interoperating banks, applying banks must meet technical specifications and business requirements laid down in Articles 5.2.2 and 5.2.3 of Chapter I. In our view, the provisions identified by the United States mean that acquiring banks must join CUP and comply with United Association (CUP) business standards and technical specifications of inter-bank interoperability.

7.353 In the light of this, we consider that, together, paragraphs 2 and 3 of the Notice, as well as Articles 2.1 and 5.2.1-5.2.3 of Chapter I of the Business Practices Appendix, impose a requirement that all acquiring banks must be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo.

*(v) Conclusions and implications*

7.354 Based on the above analysis, we conclude that China imposes a requirement that acquirers post the *Yin Lian*/UnionPay logo. This requirement is maintained through Article 2.2 of Document No. 153 (for all qualified acquirers). In addition, we find that China maintains requirements that acquirers be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo. These requirements are maintained through Article 2.2 of Document No. 153 (for all qualified acquirers); Articles 1.2(i) and 3.1(i) of Document No. 37 (for acquiring banks); and paragraphs 2 and 3 of the Notice as well as Articles 2.1 and 5.2.1-5.2.3 of Chapter I of the Business Practices Appendix, both of which are contained in Document No. 76 (for acquiring banks).

7.355 Furthermore, and in contrast, we are not convinced that Article 2(5)(iii) of Document No. 149, considered on its own, imposes a requirement that acquirers must be capable of accepting all bank cards that bear the *Yin Lian*/UnionPay logo. We find no basis to modify our conclusion when considering this provision together with the other provisions cited by the United States in connection with the acquirer requirements.

7.356 Finally, we recall that Document Nos. 153, 37 and 76 use the term "bank card". The term "bank card" as defined in Document No. 17 covers at least some types of "payment card", which is the term used by the United States in its request for the establishment of a panel.[465]

---

[462] United States' second written submission, para. 182.

[463] China's first written submission, para. 45.

[464] United States' response to Panel question No. 71, para. 11 (referring to second written submission, paras. 153-165); second written submission, paras. 155 and 157; response to Panel question No. 72, para. 17; response to Panel question No. 92, para. 86 (referring to business standards and technical specifications).

[465] See para. 7.284 above.

7.357 As regards the implications of the acquirer requirements, we note China's argument that the United States has not identified any aspect of the acquirer requirements that would prevent the acceptance of bank cards that are capable of being processed over multiple networks. China submits that acquirers can accept bank cards that bear different logos.[466]

7.358 We first consider the terminal equipment element of the acquirer requirements. For the same reasons as those we have enunciated above in connection with the terminal equipment requirements[467], in the absence of other evidence we see no basis for concluding that these acquirer requirements would prevent the acceptance by acquirers of bank cards capable of being processed over an inter-bank network in China other than that of CUP.

7.359 As concerns the interoperability element of the acquirer requirements, we understand that it would be technically possible for acquirers simultaneously to comply with different sets of business standards and technical specifications. Also, the relevant provisions of Document Nos. 153, 37 and 76 do not indicate that acquirers that are members of CUP may not join other networks in China, or that acquirers complying with CUP's uniform business standards and technical specifications must not simultaneously abide by those of other networks. With regard to paragraph 5 of the Notice of Document No. 76[468], we note that the United States has not demonstrated that the relevant provisions are inconsistent with key acquirer-related bank card business rules of EPS suppliers other than CUP. As a result, there are no reasonable grounds to conclude that the acquirer requirements pertaining to interoperability would prevent the acceptance of bank cards that are capable of being processed over more than one inter-bank network in China.

7.360 We address, lastly, the *Yin Lian*/UnionPay logo element of the acquirer requirements. Document No. 153 does not say that terminal equipment provided by acquirers must not post the logos of EPS suppliers other than CUP. The United States contends, however, that the requirement to post the *Yin Lian*/UnionPay logo is incompatible with requirements of competing networks that do not use the *Yin Lian*/UnionPay logo.[469] China responds that the United States cited no evidence in support of this contention and avers that merchants in China frequently post more than one logo.[470] In the light of this, we have no basis, given the absence of evidence, to conclude that the acquirer requirement that mandates the posting of the *Yin Lian*/UnionPay logo prevents the posting of other EPS suppliers' logo, much less the acceptance by acquirers of bank cards that are capable of being processed over an inter-bank network in China other than that of CUP.

(d) Requirements pertaining to card-based electronic transactions in China, Hong Kong and Macao ("Hong Kong/Macao requirements")

7.361 The United States argues that China requires that CUP handle the clearing of all RMB bank card transactions in Hong Kong or Macao using bank cards issued in China, and that CUP handle the clearing of any RMB bank card transaction in China using bank cards issued in Hong Kong or Macao.[471] It asserts that these requirements are reflected in and imposed by the following Chinese legal instruments:

- Document No. 16 (Article 6)

[466] China's response to Panel question No. 22(c), para. 18; comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 73.
[467] See para. 7.334 above.
[468] See para. 7.299 above.
[469] United States' response to Panel question No. 86, para. 62.
[470] China's comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 56.
[471] United States' response to China's request for a preliminary ruling, para. 132; first written submission, para. 4; United States' second written submission, paras. 147 and 189.

- Document No. 8 (Article 6)
- Document No. 219 (Article 3)
- Document No. 254 (Articles 3, 4 and 17)

7.362 China rejects the view that this requirement or any of the identified legal instruments are relevant to the modes of supply at issue in this dispute, on the basis that the measures concern the clearing of RMB transactions taking place in either Hong Kong or Macao, both of which are separate customs territories. Therefore, China requests the Panel to reject the United States' claims concerning alleged Hong Kong and Macao requirements.

7.363 The Panel will examine in this section whether the above-mentioned instruments impose the alleged requirements. We will address China's arguments regarding the status of Hong Kong and Macao as separate customs territories and the relevance of the measures and the modes of supply at issue in the context of the United States' Article XVI claims in Section VII.F below.

*(i) Document No. 16*

7.364 The United States argues that Document No. 16 establishes CUP as the sole entity responsible for clearing any RMB bank card transaction taking place in Hong Kong using a bank card issued in China, and any RMB bank card transactions taking place in Hong Kong or China using a bank card issued in Hong Kong. Therefore, the United States considers this provision precludes foreign suppliers from processing these transactions.[472]

7.365 China argues that this measure relates to the clearing and settlement of RMB bank card transactions that take place in the separate customs territory of Hong Kong and, therefore, there is no "legal basis" for the claims advanced by the United States in relation to EPS services in Hong Kong under the modes of supply at issue.[473] China considers its commitments relate only to the supply of services in China.

7.366 The Panel notes that Document No. 16 governs "clearing arrangements" for various RMB-related matters in Hong Kong, including individual bank card matters. Article 6 indicates that "[t]he clearance of individual RMB bankcards is organized and handled by the clearing banks and [CUP]". This provision provides that Chinese residents may use individual RMB bank cards issued by the domestic banks to pay for expenses including shopping, meals and lodging in Hong Kong, or to withdraw small amounts of cash in Hong Kong dollars from ATMs in Hong Kong. In addition, RMB bank cards issued to Hong Kong individual residents by participating banks can be used to pay for individual expenses in China and to withdraw small amounts of RMB cash from ATMs in China. Article 1 of Document No. 16 specifies that PBOC in conjunction with the Hong Kong Monetary Authority will select and authorize "a licensed bank in Hong Kong" to serve as a clearing bank for related Hong Kong banks in handling RMB bank card services. Pursuant to Article 2, this clearing bank will enter into "business clearing agreements" with other banks that wish to participate in the RMB bank card business.

7.367 Based on the text of Article 6, as identified by the United States, we understand that Document No. 16 expressly governs the clearance of RMB bank card transactions that take place in

[472] United States' response to China's request for a preliminary ruling, para. 91; first written submission, paras. 55 and 58; response to Panel question No. 89, para. 81.

[473] China's second written submission, para. 97 (citing Exhibit CHN-74).

Hong Kong.[474] Based on the second and third sentences of Article 6, this Article expressly covers transactions that involve either an RMB bank card issued in China and used in Hong Kong, or a bank card issued in Hong Kong that is used in China in an RMB bank card transaction. Article 6 explicitly requires that CUP, as the EPS supplier working in conjunction with designated "clearing banks", is to handle the clearing of these RMB bank card transactions involving individual RMB bank cards issued in Hong Kong. It is thus not possible, based on the text of this instrument, for any clearing channel other than CUP – be it a foreign-based channel or a domestic-based provider other than CUP – to clear any of the aforementioned types of RMB bank card transactions.[475] We note that China does not contest that the measure operates as contested by the United States; rather, it disagrees as to the relevance of this provision in light of the status of Hong Kong as a separate customs territory.

7.368 We therefore conclude that Article 6 of Document No. 16 requires that CUP and no other EPS supplier is to handle the clearing of RMB bank card transactions that involve an RMB bank card issued in China and used in Hong Kong, or an RMB bank card issued in Hong Kong that is used in China in an RMB bank card transaction.

*(ii) Document No. 8*

7.369 The United States argues that Document No. 8 establishes CUP as the sole entity responsible for clearing any RMB bank card transaction taking place in Macao using a bank card issued in China, and any RMB bank card transaction taking place in Macao or China using a bank card issued in Macao. Therefore, the United States considers this provision precludes foreign suppliers from processing these transactions.[476]

7.370 China argues that this measure relates to the clearing of RMB payment card transactions in the separate customs territory of Macao and, therefore, there is no "legal basis" for the claims advanced by the United States in relation to EPS services in Macao under the modes of supply at issue.[477] China considers its commitments relate only to the supply of services in China.

---

[474] The Panel notes that the United States provided an English translation of Article 6 of Document No. 16. See Exhibits US-44 and US-46; United States' response to Panel question No. 12. China provided an English translation of the full text of Document No. 16 as Exhibit CHN-60.

[475] In response to Panel question No. 9, the United States identified three scenarios in which it considers Document Nos. 8, 16, 219 and 254 operate together to ensure CUP's exclusivity in respect of card-based RMB transactions taking place in China, Macao and Hong Kong. These include: (i) the case of a Chinese national travelling to Hong Kong and making a purchase with a card issued in China; (ii) the case of a Hong Kong or Macao national travelling to China and making a purchase with a card issued in Hong Kong or Macao; and (iii) the case of a Hong Kong or Macao national making an RMB purchase in either of these territories with an RMB payment card issued in either Hong Kong or Macao. However, the Panel considers only the United States' claim in the case of the first and second scenarios. The United States' panel request provides a brief narrative description that explicitly covers these two scenarios, but does not refer, either explicitly or implicitly, to a third scenario in which an RMB-denominated bank card is both issued and used in either Hong Kong or Macao. We recognized above that, through narrative paragraphs in its panel request, the United States described those "requirements" or "measures" that it considers are inconsistent with China's obligations under Articles XVI and XVII of the GATS. Accordingly, the Panel considers that the two types of transactions that are specified in the relevant narrative paragraph fall within its terms of reference. In contrast, the third type of transaction – those involving cards issued and used in Hong Kong or Macao – is nowhere specified in the relevant narrative paragraph. For this reason, we consider that the Hong Kong/Macao requirements as described in the panel request do not include the third scenario. Put differently, we consider that the United States' claim in respect of the third scenario falls outside our terms of reference. We therefore reject this claim.

[476] United States' response to China's request for a preliminary ruling, para. 91; first written submission, paras. 55 and 58; response to Panel question No. 89, para. 81.

[477] China's second written submission, para. 97 (citing Exhibit CHN-74).

7.371 The Panel notes that the content of Document No. 8 is identical to that of Document No. 16, except that it concerns "clearing arrangements" for various RMB-related matters in Macao instead of Hong Kong.[478] Taking this into account, for the same reasons as those set out in paragraphs 7.367 and 7.368 above, we conclude that Article 6 of Document No. 8 requires that CUP and no other EPS supplier is to handle the clearing of RMB bank card transactions that involve an RMB bank card issued in China and used in Macao, or a bank card issued in Macao that is used in China in an RMB bank card transaction.

*(iii) Document No. 219*

7.372 The United States argues that Article 3 of Document No. 219 prohibits EPS suppliers other than CUP from processing RMB card transactions based on the fact that this provision mandates that merchants shall not authorize "third parties" to handle RMB card business or otherwise transfer such business to a third party.[479] The United States additionally submits that this measure is applicable in "border areas", which includes Macao and Hong Kong.[480]

7.373 China argues that this provision addresses RMB card fraud in connection with the acquiring of RMB card transactions in border areas within China and does not prohibit EPS suppliers from processing RMB card transactions as the United States alleges. In addition, China argues that Hong Kong and Macao are not "border areas" within the meaning of the term as it is used in Document No. 219. It argues that this term refers to "regions within [China] that neighbour a foreign country (such as Russia) or region (such as Hong Kong or Macao)".[481] China further notes that the only reference to CUP is the requirement that acquiring agreements require merchants not to use the *Yin Lian* logo for purposes outside the scope of the acquiring agreement.[482]

7.374 The Panel notes, as reflected in the title of Document No. 219 ("Notice of the People's Bank of China concerning Relevant Issues on Accepting and Using Renminbi Bank Cards in Border Areas"), that Article 3 requires *inter alia* that acquiring institutions handling RMB transactions in "border areas" enter into "card acquisition agreements" with merchants. In accordance with these agreements, merchants are prohibited from using sales documentation, the *Yin Lian*/UnionPay logo or POS for purposes falling outside the acquisition agreement. Under Article 3, merchants are also prohibited from "entrust[ing] or transfer[ing] the handling of RMB card business to a third party", or otherwise falsely reporting transactions or using POS terminals to fraudulently withdraw RMB cash.

7.375 Based on these elements, the Panel understands that Article 3 contains various anti-fraud measures applicable in "border areas". The focus on fraud, money laundering and other criminal concerns is further evident in other provisions of the document. In our view, this focus informs the interpretation of the principal language in contention within this provision, namely that of "entrust[ing] or transfer[ing] the handling of RMB card business to a third party". There is no textual basis elsewhere in the provision of Document No. 219 to conclude that EPS suppliers should be considered as a "third party" and thus be prevented from handling RMB bank card inter-bank information, clearing and settlement. On this basis, we do not agree with the United States' interpretation that Article 3 of Document No. 219 prevents EPS suppliers other than CUP from handling RMB transactions in "border areas" in China. Like China, we consider this provision prohibits a merchant from outsourcing any aspect of its core *acquisition* business to a third party, such

[478] The United States provided an English translation of Article 6 of Document No. 16. See Exhibits US-44 and US-46; United States' response to Panel question No. 12. China provided an English translation of the full text of Document No. 16 as Exhibit CHN-62.

[479] United States' first written submission, para. 58; second written submission, para. 152; comments on China's response to Panel question No. 109, para. 51.

[480] United States' response to Panel question No. 16.

[481] China's second written submission, fn. 53.

[482] China's second written submission, para. 97 (citing Exhibit CHN-74).

as a third-party "acquirer processor". To that extent, we do not understand this provision to reserve certain transactions to CUP.

7.376 Turning to the parties' arguments regarding the meaning of the term "border areas", we noted, the title of this instrument makes clear that the scope of Article 3 relates to bank card acceptance in border areas. The United States asserts that Hong Kong and Macao qualify as border areas within the meaning of this instrument. However, the United States has not provided any evidence in support of its assertions in this respect. China has argued that "border areas" refers to regions within China that neighbour a foreign country such as Russia or a region such as Hong Kong or Macao. . Thus, it argues that Hong Kong and Macao are not border regions themselves. To us, it is not readily apparent from the evidence before us, namely the text of Document No. 219, that Hong Kong and Macao should be considered border areas for the purposes of Document No. 219. In the absence of any supporting evidence on this issue, we consider we lack the necessary elements to determine the precise scope of application of Document No. 219 As noted, however, we are not persuaded that his provision reserves certain transactions to CUP.

7.377 For the foregoing reasons, in the absence of additional evidence, we are unable to conclude that Article 3 of Document No. 219 prohibits EPS suppliers other than CUP from processing RMB card transactions taking place in Hong Kong or Macao using RMB cards issued in either Hong Kong, Macao or China, or RMB card transactions taking place in China using RMB cards issued in Hong Kong or Macao.

*(iv) Document No. 254*

7.378 The United States argues that Document No. 254 establishes and maintains CUP as the sole EPS supplier that may handle the processing of RMB bank card transactions taking place in Hong Kong and Macao using bank cards issued in either Hong Kong, Macao or China, or RMB bank card transactions taking place in China using RMB bank cards issued in Hong Kong and Macao.[483]

7.379 As with Document Nos. 16 and 8, China argues that there is no "legal basis" for the claims advanced by the United States as this instrument relates to the clearing of RMB bank card transactions in the separate customs territories of Hong Kong and Macao.[484]

7.380 The Panel notes that United States refers to Articles 3, 4 and 17 of Document No. 254 in support of its claim. Article 3 states that, "[w]here RMB bank cards issued by domestic banks are used for paying expenses or withdrawing cash in Hong Kong dollars or Macao dollars in Hong Kong or Macao, the issuers shall process clearing in RMB with [CUP]". In addition, it provides that CUP shall process clearing in Hong Kong dollars or Macao dollars with acquiring banks in Hong Kong and Macao after purchasing foreign exchange from designated foreign exchange banks. Article 4 provides that CUP shall handle clearing in RMB between issuers and acquiring banks "[w]here the RMB bank cards issued by Hong Kong or Macao participating banks are used for paying expenses or withdrawing RMB cash in Mainland China". Finally, Article 17 provides that banks in China shall clear all transactions with CUP and "shall not directly carry out RMB transactions with the other Hong Kong or Macao Institutions".

7.381 The Panel notes that, much like Document Nos. 16 and 8, Articles 3, 4 and 17 of Document No. 254 govern particular bank card transactions that involve RMB bank cards issued in China and used in Hong Kong or Macao, and bank cards issued in Hong Kong or Macao and used in China in RMB-denominated transactions. These transactions concern payments for consumption or tourism or

[483] United States' response to China's request for a preliminary hearing, para. 93; first written submission, para. 58; second written submission, para. 147.

[484] China's second written submission, para. 97 (citing Exhibit CHN-74).

limited cash withdrawals. In each case, Articles 3, 4 and 17 specify that CUP is to handle clearing of these transactions through purchasing foreign currency (Hong Kong dollars or Macao dollars) from designated foreign exchange banks and clearing with the relevant acquirer in either Hong Kong or Macao, or in China. As with Document Nos. 16 and 8, these provisions of Document No. 254 expressly require that CUP is to handle the clearing of these RMB bank card transactions as the EPS supplier working in conjunction with issuers and acquirers.

7.382 Based on the clear language in Articles 3, 4 and 17, we therefore conclude that Document No. 254 requires that CUP and no other EPS supplier is to handle the clearing of RMB bank card transactions that involve an RMB bank card issued in China and used in Hong Kong or Macao, or a bank card issued in Hong Kong that is used in China in an RMB payment card transaction.

*(v) Conclusions*

7.383 Based on the above analysis of Document Nos. 16, 8 and 254[485], we conclude that China requires that CUP and no other EPS supplier shall handle the clearing of certain RMB bank card transactions that involve either an RMB bank card issued in China and used in Hong Kong or Macao, or a bank card issued in Hong Kong or Macao that is used in China in an RMB transaction. These bank card transactions concern payment for expenses incurred through purchases, meals and accommodation, or limited cash withdrawals. We recall from above[486] that the term "bank cards" as defined in Document No. 17 covers at least some types of what the United States has defined as "payment cards". We further conclude that Article 3 of Document No. 219 does not require that CUP is the sole supplier to handle the clearing of these RMB bank card transactions. We found that Article 3 is directed at third parties involved with the outsourcing of any aspect of a merchant's acquisition business, rather than EPS suppliers.

7.384 Because we have already concluded that the identified provisions of Document Nos. 16, 8 and 254 individually mandate the use of CUP to process the clearing of the particular RMB bank card transactions discussed above, we do not consider it necessary to assess these instruments further in combination with each other. Regarding the applicability or relevance of Document No. 219 to RMB matters taking place in Hong Kong or Macao, we find nothing in Document Nos. 16, 8 or 254 that modifies our conclusions in respect of Document No. 219. Accordingly, we do not consider Document No. 219 further in respect of requirements pertaining to Hong Kong or Macao.

(e) Requirements that mandate the use of CUP and/or establish CUP as the sole supplier of EPS for all domestic transactions denominated and paid in RMB ("sole supplier requirement") and prohibitions on the use of non-CUP cards for cross-region or inter-bank transactions ("cross-region/inter-bank prohibitions")

7.385 The United States asserts that China imposes measures that mandate the use of or establish CUP as the sole supplier of EPS for all domestic transactions denominated and paid in RMB through the following Chinese legal instruments:[487]

- Document No. 37 (Articles 1.2(i), 2.1(i)-(iii), 2.2(i), and 3.1)
- Document No. 57 (Articles 1, 2, 3, 5, and 6)

[485] The Panel specifically refers to Article 6 of Document No. 16, Article 6 of Document No. 8 and Articles 3, 4 and 17 of Document No. 254. See paras. 7.364-7.368, 7.369-7.371 and 7.378-7.382 above.

[486] See para. 7.283 above.

[487] United States' response to China's request for a preliminary ruling, para. 77; first written submission, para. 49; response to Panel question No. 4. The United States also relies on Document Nos. 94 and 272. As explained above at paragraphs 7.221-7.229, the Panel has decided not to consider the substance of these documents.

- Document No. 16 (Article 6)
- Document No. 8 (Article 6)
- Document No. 219 (Article 3)
- Document No. 254 (Articles 3,4, and 17)
- Document No. 103 (Section II.5(1) and Section III)
- Document No. 153 (Articles 1.2, 1.3, 2.2, 4, 5, and 6)
- Document No. 149 (Article 2(5)(iii))
- Document No. 53 (Articles V.2, and VII.3)
- Document No. 49 (Article 4)
- Document No. 129 (Articles 3.2 and 3.4)
- Document No. 76 (Notice, paragraph 5, Business Practices Appendix, Chapter I, Articles 1.1, 2.1, 4, and Chapter 10)
- Document No. 17 (Article 64)
- Document No. 142 (Articles 2.3, 4, 5, and 6)

7.386 The United States argues that the preceding legal instruments interact to establish and maintain CUP as the sole supplier in three ways: (i) certain instruments explicitly state that CUP must be used to process specific types of bank card transactions; (ii) certain instruments establish and/or require the use of business specifications and technical standards which mandate the use of CUP; and (iii) certain instruments implicitly recognize that CUP is the sole supplier of EPS services for RMB denominated transactions.[488]

7.387 The United States argues that in the Notification of Approval of CUP's Business Licence, China's State Council and the PBOC explicitly approved and authorized only CUP to "establish and operate a single nationwide inter-bank bank card information switching network".[489] The United States argues that the use of the word "single" in this document, in addition to similar language appearing in CUP's Articles of Association, confirms that CUP was established to operate an exclusive nationwide inter-bank card information switching network.[490]

7.388 China rejects that the identified legal instruments operate to establish CUP as sole supplier for the clearing and settlement of all RMB domestic inter-bank bank card transactions.[491] Rather, China submits that the identified measures operate to establish a common national network for processing RMB domestic inter-bank bank card transactions. In its view, this does not equate to establishing an exclusive provider of network services in China.[492] Under a common network, China submits that inter-bank bank cards and POS devices must adhere to certain technical standards. However, it does not consider the above instruments preclude adherence to other technical standards. Similarly, it argues that issuers that participate in the CUP network are not precluded from being members of other

[488] United States' second written submission, para. 144.
[489] United States' first written submission, para. 46.
[490] United States' comments on China's response to Panel question No. 121, para. 62; see also second written submission, para. 184
[491] China's second written submission, paras. 90-102.
[492] China's first written submission, para. 64; response to Panel question No. 121, para. 87.

networks.[493] Thus, China argues, there is nothing in any of these instruments that would prevent a foreign provider of network services from establishing a domestic clearing channel in China.[494]

7.389 The Panel will examine the above-mentioned instruments to determine whether they impose the alleged requirements in respect of bank card transactions denominated and paid in RMB. In other words, in conducting our analysis, we need to assess, not whether as a factual matter there is a single supplier operating in China, but whether the instruments in question require that CUP is the sole EPS supplier for RMB bank card transactions involving bank cards issued and used in China. We first examine the instruments individually and thereafter, we consider them in conjunction. We recall also that certain of the instruments identified in connection with the sole supplier requirement have also been identified in relation to the other requirements that are alleged in this dispute. Where this is the case, we will refer to our preceding analysis as appropriate. In addition, we recall[495] that we will analyse the instruments identified in connection with the cross-region/inter-bank prohibitions in the context of our assessment of the sole supplier requirement, bearing in mind the distinction drawn by the United States between whether the instruments are framed so as to mandate the use CUP or CUP cards, or as a prohibition.

*(i) Document No. 37*

7.390 As discussed in paragraphs 7.253, 7.308, and 7.346 above, the United States submits that Document No. 37 establishes and entrenches CUP as the exclusive EPS supplier for inter-bank transactions by requiring the use of the CUP logo for inter-bank bank cards, requiring that all ATM and POS terminals in China accept CUP cards, and by requiring that acquiring banks be capable of accepting all bank cards bearing the CUP logo.[496]

7.391 China responds[497] that Document No. 37 requires the use of the *Yin Lian*/UnionPay logo as the common logo for inter-bank bank cards, ATMs and POS terminals, and otherwise, this document requires that commercial banks that issue and acquire inter-bank bank cards meet business and technical standards. However, China argues that the identified provisions do not preclude banks from becoming members of other networks.[498] As a general matter, in its view, the fact that bank cards and POS devices must adhere to certain technical standards does not preclude adherence to other technical standards.[499]

7.392 The Panel concluded in paragraphs 7.256-7.259, 7.311, 7.312, and 7.349 above that Articles 1.2(i), 2.1(ii) and 3.1 of Document No. 37 mandate the use of the *Yin Lian*/UnionPay logo and impose certain interoperability requirements. As stated previously[500], however, we see nothing in these requirements themselves or elsewhere in Document No. 37 that precludes bank cards issued in China from bearing logos of other EPS suppliers in addition to the *Yin Lian*/UnionPay logo, nor do the identified provisions prohibit the use of bank cards on other networks with the same or different technical/interoperability requirements, so long as the cards meet CUP interoperability requirements. Therefore, we do not identify anything on the face of these provisions that establishes or maintains CUP as the exclusive EPS supplier for all RMB bank card transactions involving bank cards issued and used in China. In the absence of specific evidence demonstrating otherwise, we reject the assertion that this instrument on its own establishes or maintains CUP as a sole supplier.

---

[493] China's response to Panel question No. 22(c), paras. 17 and 18.
[494] China's response to Panel question No. 103, para. 45.
[495] See para. 7.234 above.
[496] United States' response to China's request for a preliminary ruling, para. 126; second written submission, paras. 186 and 187.
[497] See paras. 7.254, 7.297, 7.309, 7.334, 7.347 and 7.357 above.
[498] China's first written submission, para. 45; response to Panel question No. 22(c), para. 18.
[499] China's response to Panel question No. 22(c), para. 18.
[500] See paras. 7.299, 7.334 and 7.358- 7.360 above.

*(ii) Document No. 57*

7.393 As discussed in paragraphs 7.260 and 7.265 above, the United States argues that Document No. 57 requires that all regional non-CUP logo bank card interoperability logos be gradually eliminated[501], and that commercial banks promote the use of the CUP logo.[502] In addition, it argues that Document No. 57 requires that newly issued bank cards with cross-region or inter-bank functionality comply with relevant technical standards and with unified "Business Specifications for Interoperable Service of Bank Cards" in Document No. 76.[503]

7.394 China states that Document No. 57 elaborates on requirements set forth in Document No. 37 and discussed above, namely, it requires bank cards issued for domestic inter-bank use to bear the *Yin Lian*/UnionPay logo, and requires that commercial banks that issue and acquire inter-bank bank cards to meet business and technical standards.[504] China disputes that these requirements preclude banks from becoming members of other networks.[505]

7.395 The Panel concluded in paragraph 7.266 above that Articles 1, 2, 5 and 6 of Document No. 57 mandate the use of the *Yin Lian*/UnionPay logo and impose certain interoperability requirements. However, as mentioned above in respect of Document No. 37 and as stated previously[506], we do not identify anything on the face of this document that precludes bank cards issued in China from bearing logos of other EPS suppliers in addition to the *Yin Lian*/UnionPay logo. Nor do the identified provisions prohibit the use of bank cards on other networks with the same or different technical/interoperability requirements, so long as the cards meet CUP interoperability requirements. Therefore, we do not identify anything on the face of these provisions that establishes or maintains CUP as the exclusive EPS supplier for all RMB bank card transactions involving bank cards issued and used in China. In the absence of specific evidence demonstrating otherwise, we reject the assertion that this instrument on its own establishes or maintains CUP as a sole supplier.

*(iii) Document No. 16*

7.396 As discussed in paragraph 7.364 above, the United States argues that Article 6 of Document No. 16 establishes CUP as the sole entity responsible for clearing and settling RMB bank card transactions taking place in Hong Kong using bank cards issued in China, and RMB bank card transactions taking place in Hong Kong or China using bank cards issued in Hong Kong. The United States considers this instrument demonstrates that CUP is the sole supplier for *all* RMB bank card transactions involving bank cards issued and used in China.[507]

7.397 China maintains its position that this measure relates to the clearing of RMB bank card transactions that take place in the separate customs territory of Hong Kong and, therefore, there is no "legal basis" for the claims advanced by the United States in relation to EPS services in Hong Kong under the modes of supply at issue.[508] China considers its commitments relate only to the supply of services in China.

7.398 The Panel recalls from paragraphs 7.364-7.368 above its conclusion that Article 6 requires that CUP and no other EPS supplier is to be involved in the clearing of RMB bank card transactions

[501] United States' response to Panel question No. 2, para. 10; second written submission, para. 186.
[502] United States' response to Panel question No. 6, para. 36.
[503] China's comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123.
[504] China's first written submission, para. 45.
[505] China's comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123.
[506] See para. 7.299 above.
[507] United States' response to China's request for a preliminary ruling, para. 91; first written submission, paras. 55 and 58; response to Panel question No. 89, para. 81.
[508] China's second written submission, para. 97 (citing Exhibit CHN-74).

that involve either an RMB bank card issued in China and used in Hong Kong, or a bank card issued in Hong Kong that is used in Hong Kong or China in an RMB transaction. As Document No. 16 is limited in scope to bank card transactions that involve bank cards issued in China and used in Hong Kong, or alternatively, bank cards issued in Hong Kong and used either in Hong Kong or China, we fail to see how this instrument establishes CUP as the sole supplier of EPS for *all* domestic transactions denominated and paid in RMB. Therefore, we do not consider that Article 6 establishes CUP as the sole supplier of EPS for *all* domestic transactions denominated and paid in RMB. Below, we further consider this instrument as it operates in relation to other identified instruments, in the context of the United States' assertion that the measures at issue establish CUP as the sole supplier of EPS for *all* domestic transactions.

*(iv) Document No. 8*

7.399 As discussed in paragraphs 7.369 above, the United States argues that Article 6 of Document No. 8 also establishes CUP as the sole entity responsible for clearing and settling RMB bank card transactions taking place in Macao using bank cards issued in China, and RMB bank card transactions taking place in Macao or China using bank cards issued in Macao. The United States considers this instrument demonstrates that CUP is the sole supplier for *all* RMB bank card transactions involving bank cards issued and used in China.[509]

7.400 China again maintains that this measure relates to the clearing of RMB bank card transactions in the separate customs territory of Macao and, therefore, there is no "legal basis" for the claims advanced by the United States in relation to EPS services in Macao under the modes of supply at issue.[510] China considers its commitments relate only to the supply of services in China.

7.401 The Panel recalls its conclusion from paragraphs 7.369-7.371 that the content of Document No. 8 is identical to that of Document No. 16, except that it concerns "clearing arrangements" for various RMB-related matters in Macao, instead of Hong Kong. Taking this into account, for reasons set out in paragraphs 7.367 and 7.368 above, we are unable to conclude that Document No. 8 establishes CUP as the sole supplier of EPS for *all* domestic transactions denominated and paid in RMB. As with Document No. 16, we further consider below this instrument as it operates in relation to other identified instruments, in addressing the United States' claim that the measures at issue establish CUP as the sole supplier of EPS for *all* domestic transactions.

*(v) Document No. 219*

7.402 As discussed in paragraphs 7.372 above, the United States argues that Article 3 of Document No. 219 prohibits processing of RMB card transactions by EPS suppliers other than CUP based on the fact that this provision mandates that merchants shall not authorize "third parties" to handle RMB card business or otherwise transfer such business to a third party.[511] The United States submits that this measure is applicable in "border areas", which specifically refers to the "special administrative regions" of Macao and Hong Kong.[512]

7.403 China maintains that this provision does not establish CUP as a sole supplier as the United States alleges, but rather, this provision addresses RMB card fraud in connection with the acquiring of RMB card transactions in border areas within China. China asserts that the only reference to CUP is

[509] United States' response to China's request for a preliminary ruling, para. 91; first written submission, paras. 55 and 58; response to Panel question No. 89, para. 81.

[510] China's second written submission, para. 97 (citing Exhibit CHN-74).

[511] United States' first written submission, para. 58; second written submission, para. 152; comments on China's response to Panel question No. 109, para. 51.

[512] United States' response to Panel question No. 16.

the requirement that acquiring agreements require merchants not to use the *Yin Lian*/UnionPay logo for purposes outside the scope of the acquiring agreement.[513]

7.404 The Panel recalls from paragraphs 7.372-7.376 above its conclusion that Article 3 is concerned with RMB bank acquirers and the merchants with whom they enter into acquisition agreements and, as such, it is not evident on its face that this provision prohibits processing of bank card transactions by EPS suppliers other than CUP. Accordingly, we do not consider that this provision on its own establishes or maintains CUP as the exclusive EPS supplier for all RMB card transactions involving bank cards issued and used in China

*(vi) Document No. 254*

7.405 As discussed in paragraphs 7.378 above, the United States argues that Document No. 254 establishes CUP as the sole entity responsible for processing RMB bank card transactions using bank cards issued in China and used in Hong Kong or Macao, or RMB bank cards issued in Hong Kong and Macao and used in China.[514]

7.406 China maintains that this measure relates to the clearing of RMB bank card transactions taking place in the separate customs territory of Hong Kong and Macao and, therefore, there is no "legal basis" for the claims advanced by the United States in relation to EPS services in Hong Kong and Macao under the modes of supply at issue.[515] China considers its commitments relate only to the supply of services in China.

7.407 The Panel recalls its conclusion from paragraphs 7.378-7.381 above that Articles 3, 4 and 17 of Document No. 254 expressly require that CUP is to handle the clearing of RMB bank card transactions that involve RMB bank cards issued in China and used in Hong Kong or Macao, and bank cards issued in Hong Kong or Macao and used in China in an RMB transaction. Due to the fact that Document No. 254 is limited in scope to bank card transactions that involve bank cards issued in China and used in Hong Kong or Macao, or alternatively, bank cards issued in Hong Kong or Macao and used in China, we fail to see how this instrument establishes CUP as the sole supplier of EPS for *all* domestic transactions denominated and paid in RMB. Below, we further consider this instrument as it operates in relation to other identified instruments, in the context of the United States' assertion that the measures at issue establish CUP as the sole supplier of EPS for *all* domestic transactions denominated and paid in RMB.

*(vii) Document No. 103*

7.408 The United States argues that Section III of Document No. 103 provides explicit recognition by multiple Chinese government agencies of China's awareness that any purported limitations on market access to the RMB "bank card industry" were to be eliminated by 2006. Moreover, it argues that Document No. 103 sets out a requirement that banks competing in the RMB bank card business use uniform business specifications and technical standards that mandate the use of CUP. [516]

7.409 China considers this provision to reflect that issuers and acquirers would be permitted to enter the Chinese market beginning in 2006, but not EPS suppliers. In general, China maintains that a requirement to comply with one set of business rules and technical standards does not preclude a bank

[513] China's second written submission, para. 97 (citing Exhibit CHN-74).
[514] United States' response to China's request for a preliminary ruling, para. 93; first written submission, para. 58; second written submission, para. 147.
[515] China's second written submission, para. 97 (citing Exhibit CHN-74).
[516] United States' response to China's request for a preliminary ruling, para. 100; first written submission, paras. 43, 44, 83; second written submission, para. 154.

card issuer from issuing cards that also comply with other rules and standards, which would enable that card to operate over other networks.[517]

7.410 The Panel observes that Article III provides that "[t]he RMB bankcard business opens fully to the outside world at the close of 2006, posing greater challenges to the China bankcard industry; the limited time remaining must be used to boost that industry's competitiveness". The United States also points to Section II.5(1), which provides that any newly issued RMB bank cards shall comply with applicable technical standards.

7.411 The Panel takes note of the identified provisions of Document No. 103, including the statement that newly issued RMB bank cards shall comply with applicable technical standards. Following the advice we received from the UNOG translator[518], we do not understand this provision to impose a normative mandate that establishes CUP as the sole supplier of EPS in China. In the absence of further information, it is also not clear to us from reading the text of Document No. 103 what is encompassed by the term "RMB bankcard business" and specifically whether this term covers the provision of EPS, or whether it refers only to other relevant business activities, such as issuing bank cards and acquiring bank card transactions. Concerning Section II.5(1), as we stated in respect of other instruments that impose interoperability requirements[519], in the absence of evidence demonstrating otherwise, we cannot conclude that Section II.5(1) on its own maintains or establishes CUP as the sole supplier of EPS in respect of domestic transactions denominated or paid in RMB. Accordingly, we are not persuaded that this instrument alone maintains or establishes CUP as the sole supplier in China.

*(viii) Document No. 153*

7.412 The United States argues that Article 1.2 of Document No. 153 explicitly establishes CUP as the sole supplier of EPS for RMB bank card transactions in China through its invocation that "[CUP] is *the* domestic clearance organization" (emphasis added). The United States submits that this conclusion is supported in other provisions of Document No. 153. It argues that Article 1.3 prohibits EPS suppliers other than CUP from clearing RMB bank card transactions in China as this provision states that "[n]o third party service provider shall engage in bank card information exchange services".[520] In addition, according to the United States, Article 5 establishes CUP as the only entity that is permitted to promote bank card acceptance[521] and Article 6 prevents any "organizations" from interfering with bank card processing by CUP.[522] Finally, it asserts that Articles 2.2 and 4 require that POS terminals and merchant acquirers comply with the business specifications and technical standards for cross-network interoperability, and inter-bank business, respectively.[523]

7.413 China disputes the United States' translation of Article 1.2, arguing instead that this provision states that "[CUP] is *a* domestic clearing organization" (emphasis added), and that, as such, it does not establish CUP as the sole supplier of EPS. Even accepting the translation provided by the United States, China submits that Document No. 153 does not support the United States' claims.[524] China

[517] China's response to Panel question No. 22(c), para.18; comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 56.

[518] See Annex H.

[519] See the Panel's discussion of Document Nos. 37 and 57 above.

[520] United States' response to China's request for a preliminary ruling, para. 88; second written submission, para. 148; response to Panel question No. 2, para. 8; response to Panel question No. 90, para. 84.

[521] United States' response to Panel question No. 6, paras. 25 and 27; response to Panel question No. 88(a), para. 76 (quoting the second and third paragraphs of Article 5 of Document No. 153).

[522] United States' second written submission, para. 150; response to Panel question No. 90, para. 84.

[523] United States' second written submission, para. 154; response to Panel question No. 71(c), para. 9.

[524] China's comments on United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 78.

argues that the context in Article 1.3 makes clear that Document No. 153 prohibits acquiring institutions from outsourcing their switching functions to third-party service providers, but it does not prevent the establishment of other inter-bank card networks.[525] In its view this is clear from the fact that this provision addresses security of financial information[526] as well as the fact that "third-party service providers" are clearly defined in the text. China argues that the definition of third-party service providers in Document No. 153 refers to merchant or acquirer "processors" at the point of interconnection between the acquirer and EPS suppliers, and not EPS suppliers themselves.[527] Thus, China does not prevent the establishment of other inter-bank EPS networks.[528] Finally, China argues that Article 6 is not relevant to the United States' claims as it relates to use of bank cards outside China. In particular, it asserts that Article 6 was a response to efforts by international EPS suppliers to prevent acceptance of *Yin Lian* bank cards outside of China, particularly dual logo cards.[529] Regardless, China contends that this provision only requires that Chinese issuers are capable of processing transactions over the CUP network, but does not require them to process transactions over the CUP network.[530]

7.414 The Panel recalls at the outset its conclusion in paragraphs 7.319, 7.341, and 7.342 above, that Articles 2.2 and 4 mandate the use of the *Yin Lian*/UnionPay logo and impose certain interoperability requirements. We further note that Document No. 153, which was issued in 2005, set outs responsibilities directed at agencies to promote the development of a bank card acceptance market in China. Following the advice we received from the UNOG translator, Article 1.2 of this document, labelled "Regarding bank card clearance organizations", specifies that CUP is "currently the domestic clearing organization" that specializes in the supply of EPS for RMB bank card inter-bank transactions. CUP is designated to formulate specifications and standards for this inter-bank network. Article 1.3 defines "third party service providers of merchant acquiring business" as "the legal person enterprises which engage in non-core businesses of the bank card acquiring business entrusted by merchant acquiring institutions on the basis of making their own operation decisions…" Article 1.3 states further that "[n]o third party service provider shall engage in bank card information exchange services".

7.415 Article 1.3 further explains that the bank card exchange system concerns the security of financial information and payment systems and is subject to strict access and management. We further note that Article 3 sets out that merchant acquiring institutions may "freely decide" whether to outsource to third party services providers their non-core business such as "equipment placement and services, system construction and maintenance, and customer service and training". Merchant acquiring institutions can choose third-party providers that meet security management requirements and technical standards of PBOC.

7.416 Article 5 expressly authorizes CUP to establish branches in certain areas of China "in accordance with the company's overall plan to provide bank card information exchange and clearance services". This "engagement in inter-bank POS transaction information transfer shall be directly managed and operated by [CUP], and shall not be indirectly managed or operated through authorization". Finally, Article 6 of Document No. 153 provides that "Chinese issuing banks should support routing through the CUP network" and "[n]o organizations should set any obstacles or cause any interference".

---

[525] China's second written submission, paras. 97 (citing Exhibit CHN-74) and 98; response to Panel question No. 109, para. 65.

[526] China's response to Panel question No. 109, para. 65.

[527] China's response to Panel question No. 102, para. 44; response to Panel question No. 109, para. 66; comments on the United States' response to Panel question No. 90, para. 57.

[528] China's second written submission, paras. 97 (citing Exhibit CHN-74) and 98.

[529] China's response to Panel question No. 100.

[530] China's second written submission, para. 97 (citing Exhibit CHN-74); response to Panel question No. 100.

7.417 With this in mind, we address the United States' contention that Article 1.2 explicitly recognizes CUP as the sole supplier of EPS for RMB bank card transactions in China, and that Articles 1.3, 5 and 6 support this conclusion.

7.418 Beginning with Article 1.2, as we noted above, it is not in dispute that this provision acknowledges that CUP was an EPS supplier for RMB bank card transactions before June 2005, the date on which Document No 153 was published. Through the use of the term "currently", this provision refers to the situation as it existed at that time, but does not, by its terms, impose a limitation going forward.[531] As the parties' submissions highlight[532], there was no nationwide EPS supplier operating in China before June 2005. Article 1.2 appears to recognize this. Against this background, it is at least understandable that Document No. 153 would have designated CUP to formulate the specifications regarding relevant inter-bank processing (as discussed in Article 1.2). Taking this into account, it follows logically that CUP was authorized to establish branches in certain areas of China (as discussed in Article 5, which states that "[a]fter being approved by PBOC, [CUP] may set up branches in regions where there is a market demand"), as well as expand RMB bank card acceptance in overseas markets (as discussed in Article 6). China would not have been in a position to direct an entity or EPS supplier outside of China to do this.

7.419 We do not consider the authority granted to CUP under Article 5 to set up new branches in China precludes other EPS suppliers from establishing a network in China. In our view, this language instructs CUP to manage and operate the network that it is tasked to establish, and CUP should not delegate this authority.

7.420 In addition, we do not understand the guidance found in Article 6 that CUP expand RMB bank card acceptance in overseas markets to mean that other suppliers of EPS are prohibited from establishing a network in China. We note that Article 6 addresses setting up an international network for acceptance of RMB bank cards bearing the *Yin Lian*/UnionPay logo. This provision indicates that Chinese-based issuing banks "should support" inter-bank EPS processing for dual currency credit and debit card transactions that take place abroad and "should open the RMB accounts related transactions and settlements to the CUP network". We note first that, in certain respects, Article 6 employs the use of the term "should" differently from the use of the word "shall" that appears elsewhere in Document No. 153. This suggests that the guidance to support routing through the CUP network is not mandatory. By stating that issuing banks "should support" this routing, the provision does not appear to prevent them from routing transactions through other networks. Moreover, we do not read the guidance that "[n]o organizations should set any obstacles or cause any interference" to mean that other suppliers of EPS are prohibited from establishing a network in China. In our view, the fact that Article 6 provides that issuing banks should support routing through the CUP network, and should open RMB accounts to the network, with the further guidance that other organizations should not interfere, does not preclude any bank or entity from additionally having relationships with other EPS

[531] In stating this, we note that the advice provided by the UNOG translator indicates that the context provided by the Chinese text "strongly implies that the situation (whatever it is) may change". See Annex H.

[532] United States' response to China's request for a preliminary ruling, paras. 64-71; citing Steve Worthington, The Chinese payment card market: an exploratory study, 21 Int'l J. of Bank Marketing, pp. 324, 325, 327 (2003), Exhibit US-21; Pecht, Michael, China's Electronics Industry: The Definitive Guide for Companies and Policy (2006), pp. 82-83, Exhibit US-22; Strong Measures to be Taken to Achieve the Target of Commecting Bank-Card Networks This Year, PBOC (March 27, 2002), available at http://www.pbc.gov.cn/publish/english/955/1965/19655.html , Exhibit US-25; Marina Yu Zhang & Mark Dodgson, High Tech Entrepreneurship in Asia: Innovation, Industry and Institutional Dynamics in Mobile Payments, Edward Elgar Publishing Limited (2007), pp. 215-216, Exhibit US-30; China's first written submission, paras. 38-46.

suppliers or routing transactions through other networks. We further do not understand this provision would prohibit another supplier of this service from establishing a network in China.[533]

7.421 Finally, we do not agree that Article 1.3 can be read to prohibit the use of EPS suppliers other than CUP. Article 1.3 refers to and defines "third party service providers" as those entities that may engage in "non-core business of the bank card acquiring business" as entrusted by merchant acquiring institutions. We note in this respect that third-party providers are discussed separately from provisions addressing "bank card clearing organizations" (Article 1.2), suggesting that these entities are different in nature. In addition, since the "main business" in which CUP specializes is the supply of EPS for RMB bank card transactions and not the acquisition of bank card transactions (i.e. acquirer services), the fact that third-party service providers may only engage in the "non-core business of the bank card acquiring business" would seem to indicate that third-party providers would not handle any of those activities falling within the principal activities of CUP.

7.422 We further consider that the language referred to by the United States in Article 1.3 must be read in the light of Article 3 of Document No. 153, which addresses "Rules of merchant acquiring business' outsourcing". As indicated above, this provision indicates which is the "non-core business" that a merchant acquiring institution may outsource to a third party service provider. These activities include "equipment placement and services, system construction and maintenance, and customer service and training", none of which are primary activities in respect of RMB bank card inter-bank information routing and exchange. Reading these provisions together, we understand that Document No. 153 seeks to prevent third party service providers of merchant acquiring business from addressing core aspects related to supply of EPS in such a way that would compromise the security of sensitive financial information exchange. It would seem, therefore that this provision seeks to limit the number of actors including third parties that work in conjunction with acquirers that have access to sensitive information, so as to prevent fraudulent misuse of information. For these reasons, we are not convinced that Article 1.3 effectively bans other EPS suppliers – which are different from third party service providers of merchant acquiring business – from the marketplace in China, taking into account the focus of this provision.

7.423 Accordingly, for the reasons set out above, we conclude that Articles 1.2, 1.3, 5 or 6 of Document No. 153 do not establish or maintain CUP as the sole supplier of EPS for RMB bank card transactions in China or otherwise prohibit the use of EPS suppliers other than CUP. In concluding this, we take into account the reference in Article 1.2 that "[CUP] is currently the domestic clearing organization". As we discuss further in paragraphs 7.431-7.441 below, we note that our conclusion is consistent with the reference to "domestic clearing channels" that appears in the plural form in Document No. 53. It is pertinent to note in addition that Document No. 53 postdates Document No. 153.

*(ix) Document No. 149*

7.424 The United States argues that Article 2(5)(iii) of Document No. 149 prohibits acquirers from allowing "non-CUP" and "non-PBOC 2.0 prepayment cards" to be accepted at POS terminals.[534] In

[533] According to China, Article 6 of Document No. 153 relates to the development of a payment card acceptance network outside of China for RMB cards that bear the *Yin Lian*/UnionPay logo and is therefore not relevant to this dispute. China submits that Article 6 is a response to efforts by international EPS suppliers to prevent the acceptance of payment cards bearing the *Yin Lian*/UnionPay logo outside of China. China's response to Panel question No. 100, paras. 41 and 42, citing Exhibits CHN-108 and CHN-109.

[534] United States' second written submission, para. 151; response to Panel question No. 71(c)(iii), para. 10; response to Panel question No. 72, para. 19; response to Panel question No. 91, para. 85.

its view, this provision effectively limits the number of suppliers of EPS in China, and establishes and maintains CUP's monopoly on EPS for RMB bank card transactions in China.[535]

7.425 China argues, as indicated in paragraph 7.322 above, that Document No. 149 as a whole addresses RMB bank card crimes in respect of prepayment cards and that the purpose of Article 2(5)(iii) is to prevent the card holder from fraudulently using a non-interoperable card on an interoperable basis.[536] In China's view, it does not prohibit the acceptance of cards bearing other logos in addition to the *Yin Lian* logo.[537]

7.426 The Panel observes, as indicated by the UNOG translator[538], that Article 2(5)(iii) provides that "[n]o acquiring institutions may allow non-"*Yin Lian*/UnionPay" and non-PBOC 2.0 standard prepaid cards issued by non-financial social enterprises to be accepted at bankcard terminal equipment". We understand this provision prevents acquirers from allowing non-YinLian/UnionPay *prepaid* cards issued by non-financial enterprises to access bank card terminals.[539] In other words, this provision relates to access to terminal equipment by prepaid cards that were issued by relevant enterprises[540] and that do not bear the *Yin Lian*/UnionPay logo. This provision is itself limited in focus to a narrow subset of bank cards.

7.427 Setting aside this particular provision, we recall that Document No. 149 broadly relates to security management of bank cards and preventing bank card-related crimes. This is reflected in the title of the instrument, which refers to "Strengthening the Safety Management of Bank Cards and Preventing and Fighting Crimes in Bank Cards". It is also reflected in other references in the document. Notably, Article 1 refers to the objective of "stabilizing the market order of bank cards". Article 2(4) addresses issues related to card holder identity fraud. CUP is designated to participate in reporting on identity-related crimes.[541]

7.428 In our assessment of Article 2(5)(iii) in paragraphs 7.323 and 7.325 above, we noted that this provision addresses specifically those cards that may not be accepted at bank card POS terminals, which we found to be consistent with the purpose of preventing bank card-related crimes. These include non-"*Yin Lian*/UnionPay" and "non-PBOC 2.0" prepaid cards. We noted as well that the United States did not provide evidence other than the text of Article 2(5)(iii) to elucidate the legal effect of this provision.

7.429 We have explained in Section VII.E.2(a) above that China imposes requirements on issuers that bank cards issued in China bear the *Yin Lian*/UnionPay logo, and furthermore, China requires that issuers become members of the CUP network, and that the payment cards they issue in China meet certain uniform business specifications and technical standards. In addition, China requires acquirers to post the *Yin Lian*/UnionPay logo, become members of the CUP network and be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo. In our assessment of these instruments, we have explained that the requirement that a given bank card bear the *Yin Lian*/UnionPay logo would not preclude bank cards issued in China from bearing logos of other EPS suppliers in addition to the *Yin Lian*/UnionPay logo. Moreover, such a requirement would not preclude the use of a bank card on other networks with the same or different technical/interoperability requirements, so long as it was at the same time compatible with the CUP network.

---

[535] United States' comments on China's response to Panel question No. 104, para. 41.
[536] China's comments on the United States' response to Panel question No. 91, para. 58.
[537] China's response to Panel question No. 110, para. 68.
[538] See Annex H.
[539] As noted above in paragraph 7.323, the exact nature of the relevant enterprises is not entirely clear. We understand, though, that the relevant prepaid cards are issued by *non-financial* enterprises.
[540] As explained in fn. 430 above, "non-financial social enterprises" refer to entities that are not financial institutions.
[541] See, e.g. Articles 2(4)(xii)-(xiii).

7.430 We see nothing on the face of Article 2(5)(iii) that would prevent acceptance at a bank card terminal of a prepaid card issued by a relevant enterprise that bears the logo of another EPS supplier and is interoperable with that supplier's network, provided the card also bears the *Yin Lian*/UnionPay logo and is interoperable over the CUP network. In our view, Article 2(5)(iii) is about access to bank card terminal equipment. At that level, there is no exclusive access for CUP. Article 2(5)(iii), by its terms, does not speak to the processing of the transactions that involve the use of the relevant prepaid cards. In the absence of any argument and evidence on this, we have no basis for assuming that any transaction would have to be processed over the CUP network. Therefore, the United States in our view has not demonstrated that Article 2(5)(iii) establishes or maintains CUP as the exclusive supplier in respect of prepaid cards.

*(x) Document No. 53*

7.431 The United States argues that the references to "domestic clearing channels" and "domestic RMB card clearing organizations" in Articles V.2 and VII.3 of Document No. 53, respectively, have the effect of guaranteeing that CUP processes all RMB-denominated transactions in China that involve bank cards issued in China. It considers this to be further evident when these provisions are read in conjunction with Article 1.2 of Document No. 153, which refers to CUP as the "domestic clearing organization".[542] The United States does not consider that the references to "domestic clearing channels" and "domestic RMB card clearing organizations" in their plural forms alters the fact that CUP exclusively processes all RMB bank card transactions.[543] To the extent this language alone is not clear, the United States argues that additional language in Article V.2 regarding payment of overdrafts in RMB provides further evidence that only CUP may process domestic RMB bank card transactions.[544] Moreover, it considers that the requirement in Article VII.3 that bank card issuers report the bank identification numbers (BINs) of their cards "to the domestic RMB card clearing organization" facilitates and ensures that transactions will automatically be processed over the CUP network.[545]

7.432 China argues that the purpose of Document No. 53 is to require that RMB card transactions are cleared and settled in RMB to avoid unnecessary foreign exchange transactions in cases where a dual- or foreign-currency card is used in China.[546] Setting aside the purpose of this document, China argues that the references to "domestic clearing channels" and "domestic RMB card clearing organizations" do not establish that CUP will be the only domestic clearing organization in China going forward in time.[547] It considers this to be clear, based on the fact that the terms appear in the plural, and because Document No. 53 does not expressly refer to CUP by name.[548]

7.433 The Panel notes that Document No. 53 is entitled "Notice of the State Administration of Foreign Exchange on the Management of Foreign Currency Bank Cards". Article I of this document defines "foreign currency bank cards" as "domestic foreign currency cards … issued by domestic

[542] United States' second written submission, para. 167; response to Panel question No. 6, para. 28
[543] United States' response to Panel question No. 88(b), para. 78.
[544] United States' first written submission, paras. 59 and 60; response to Panel question No. 15, paras. 58 and 59.
[545] United States' response to Panel question No. 1, paras. 58 and 59; response to Panel question No. 6, para. 28; response to Panel question No. 15, paras. 58 and 59; response to Panel question No. 87, para. 68; response to Panel question No. 95, para. 100; response to Panel question No. 116, para. 112; comments on Chinese replies to Panel question No. 106, para 48 (citing CUP's Operating Regulations, Volume III, Rules on UnionPay Card, BIN and Logo, April 2011, Section 2.5.3.2, Exhibit US-115).
[546] China's second written submission, para. 99; response to Panel question No. 111, paras. 69 and 70; comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para.77.
[547] China's comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para.78.
[548] China's second written submission, paras. 97 (referencing Exhibit CHN-74) and 100.

financial institutions … and foreign bank cards … issued by overseas institutions … except … RMB cards issued by [domestic financial institutions and overseas institutions]". Article II.3 states that "domestic cards are classified into foreign currency cards, which refers to those denominated in only one foreign currency, and home-foreign currency cards, which refers to those denominated in both RMB and one or more foreign currencies".[549]

7.434 Article V.2 of Document No. 53 specifies that "[d]omestic card transactions inside China shall be settled in RMB through domestic clearing channels…".[550] It provides further that "[a]ny overdraft arising from domestic transactions shall be paid by the cardholder in RMB". According to the translation advice provided by the UNOG translator[551], Article V.3 in turn identifies two circumstances in which international bank card organizations may clear transactions involving domestically issued bank cards. These are:

> (1) where domestic foreign currency card transactions occurring within China are cleared through an international bankcard organization; and (2) "wrong hand-off" transactions, in which domestic dual-currency cards, which should be treated as RMB cards, are mistakenly identified by the acquiring financial institution as foreign currency cards and are thus handed off to an international bankcard organization for clearance.

7.435 Article VII.3 provides that "[d]omestic RMB card clearing organizations shall do a good job in the RMB clearing of domestic transactions of home-foreign currency cards". As noted above[552], home-foreign currency cards are dual-currency cards. In addition, Article VII.3 requires that card issuers report the BIN of cards that are issued to "the domestic RMB card clearing organizations".

7.436 Articles V.2, V.3 and VII.3, when read together, make clear that domestically based EPS suppliers are to handle the clearing and settlement of RMB payment transactions involving domestically issued RMB cards. Article V.2 provides that "*domestic* card transactions *inside* China shall be settled in RMB through *domestic* clearing channels" (emphasis added). Article V.3 characterizes "wrong hand-off" transactions as those cases in which domestic dual-currency cards are "mistakenly identified" as foreign currency cards and are thus handled by an "international bankcard organization". Articles I and II.3 indicate that "foreign currency bank cards" include single-currency, foreign currency cards issued by domestic institutions, as well as single-currency, foreign currency cards issued by overseas institutions. However, "domestic cards" include dual-currency cards denominated in RMB and any other currency that are issued jointly by domestic financial institutions and overseas institutions. These do not qualify as foreign currency cards. Thus, any transaction made in China with a card that is denominated in part or in whole in RMB should not as a rule be handled by an international bank card organization. The requirement in Article VII.3 for issuers to report BINs appears directed at avoiding "wrong hand-off" transactions as described in Article V.2 that arise when dual-currency cards are mistakenly treated as foreign-currency-only cards, and are thereby cleared and settled by international bank card organizations.[553]

---

[549] We note that this dispute concerns exclusively bank cards issued in China.

[550] United States' second written submission, para. 145; response to Panel question No. 87, para. 67.

[551] See Annex H.

[552] In paragraph 7.433, we note that Article II.3 defines "home-foreign currency cards" as "those denominated in both RMB and one or more foreign currencies".

[553] In stating this, we understand the United States' position to be that an EPS supplier would sort through different transactions based on the card-specific BIN, enabling it to distinguish between transactions that are initiated with a dual-currency card or a foreign-currency card. It considers that, when a transaction is initiated at a merchant POS terminal, the transaction will automatically be processed over the CUP network as the card's BIN will match the BIN transferred to, and stored in, CUP's BIN table. See United States' response to Panel question Nos. 1, paras. 58 and 59; 6, para. 28; and 87, para. 68

7.437 Taking into account the operation of these provisions together, we understand that any transaction made in China with an RMB bank card that is issued in China or a card with an RMB component must be handled by a domestic clearing channel. It is evident on the face of Articles V.2, V.3 and VII.3 that a domestic clearing channel may not be an international bank card organization. China itself explains that an international bank card organization or "international network operator" should be distinguished from a "domestic network" or "RMB clearing channel".[554] Therefore, we understand a domestic clearing channel must be based in China in accordance with Document No 53. We further understand from China that Document No. 53 is directed at avoiding unnecessary foreign exchange transactions; this is why the relevant transactions must be cleared through domestic RMB clearing channels, and not over the networks of international bank card organizations.

7.438 Setting aside the purpose behind this instrument, it is clear that foreign-based EPS suppliers are excluded from handling the clearing of RMB payment transactions involving domestically issued cards. This would seem to be the case regardless of whether it were possible for a foreign-based EPS supplier to clear such a transaction abroad in RMB, i.e. without involving foreign exchange, since Article V.2 states that all such transactions "*shall* be settled in RMB through *domestic* clearing channels" (emphasis added).

7.439 Nevertheless, we have not identified any language in Articles V.2, V.3 or VII.3 that specifies that CUP alone must be that domestic clearing channel, or that EPS suppliers of other WTO Members could not meet the definition of domestic clearing channels or domestic RMB card clearing organizations. For one thing, the language seems to acknowledge the possibility of more than one domestic clearing channel, through the reference to "channels" in the plural form. In addition, there is no explicit indication in any of these provisions that CUP specifically must process all RMB payment transactions involving domestically issued cards.[555]

7.440 Turning to the United States argument that the reference to CUP in Article 1.2 of Document No. 153 confirms that CUP is the only entity that may process domestic RMB bank card transactions, we recall that Article 1.2 of Document No. 153 provides that "[CUP] is currently the domestic clearing organization specializing in RMB bank card inter-bank information routing and exchange".[556] This document dates from June 2005. We recall our conclusion that, while CUP may have been the only domestic clearing channel operating in China in 2005, and may still be the sole domestic channel operating in China that clears domestic RMB bank card transactions, the relevant language in Document No. 153 does not grant CUP the exclusive privilege to clear and settle RMB for transactions involving domestic foreign currency and dual currency bank cards.

7.441 Therefore, having addressed the foregoing aspects of Document No. 53, as well as the United States' argument regarding Document No. 153, we conclude that Document No. 53 does not impose a

[554] In response to Panel question No. 116, China explained that a number of "complex" factors affect the network over which a dual-logo card is processed. For international transactions, where the issuing bank is not located in the country in which the transaction occurs, China explains that certain transactions will be permitted to be processed over "domestic" networks, while in other cases, they may need to be processed over an external network, such as "VisaNet". See China's response to Panel question No. 116, para. 79 and fns. 39 and 40. See also Visa International Operating Regulations, Core Principle 7.4, Exhibit CHN-113.

[555] We also recall that Document No. 53, which was promulgated on 11 October 2010 and entered into force on 1 November 2010, replaced Document No. 272. We stated above that we would not consider Document No. 272 in our analysis in part due to its repeal prior to the establishment of the panel. See paras. 7.221-7.227 above. We do not wish to make any findings in respect of Document No. 272 here, but find it pertinent to note that, differently from Document No. 53, Article 4.1 of Document No. 272 expressly required that all domestic RMB transactions involving domestic foreign currency and dual currency bank cards be handled through CUP.

[556] See also discussion in paras. 7.412-7.421 above.

requirement or otherwise maintain or establish CUP as the sole supplier of EPS in respect of domestic RMB bank card transactions.

*(xi) Document No. 49*

7.442 The United States argues that Document No. 49 requires that a wholly foreign-funded bank or a Chinese-foreign equity joint bank that plans to issue bank cards comply with the bank card business and technical standards formulated by the PBOC. In its view, this requirement to follow uniform business specifications and technical standards establishes a mandate that CUP be used to process all RMB bank card transactions.[557]

7.443 China did not specifically address Document No. 49. In general, China argues that a requirement to comply with one set of business rules and technical standards does not preclude a bank card issuer from issuing cards that also comply with other rules and standards that enable that card to operate over other networks. China submits that many such cards exist around the world.[558]

7.444 The Panel notes that Article IV, in a translation agreed between the parties, requires a wholly foreign-funded bank or Chinese-foreign equity joint bank that plans to issue bank cards to abide by the business and technical standards formulated by the PBOC and to ensure that issued bank cards meet the general requirements regarding the network for bank card interoperability.[559]

7.445 In our view, this provision intends to ensure *inter alia* that bank cards issued in China can be used in domestic inter-bank transactions. Similarly to what we have said above in respect of other instruments that impose interoperability requirements[560], we do not identify anything on the face of this document that requires that all cross-region or inter-bank transactions occur over the CUP network, or that prohibits the use of cards on other networks with different technical/interoperability requirements. Accordingly, in the absence of evidence demonstrating otherwise, we cannot conclude that this instrument on its own mandates or establishes CUP as the sole supplier of EPS in respect of domestic bank card transactions denominated or paid in RMB.

*(xii) Document No. 129*

7.446 The United States argues that Article 3.2 of Document No. 129 mandates that all RMB bank cards newly issued by commercial banks and postal savings and remittance bureau comply with unified business specifications and technical standards of the CUP network and bear the CUP logo. Based on adherence to these standards, the United States argues, therefore, that this provision mandates and establishes CUP as the sole supplier to process all RMB bank card transactions issued and used in China.[561] The United States notes as well that Article 3.4 of this document requires commercial banks to work with CUP to "improve procedures for dealing with errors".[562] It submits that, if suppliers other than CUP were permitted in the market, then all other EPS suppliers would be subject to similar requirements. The fact that other suppliers are not subject to the same requirements demonstrates that CUP is a sole supplier, in its view.

---

[557] United States' second written submission, para. 154 (citing Article 4 of Document No. 49).

[558] China's response to Panel question No. 22(c), para.18; comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 56.

[559] See Translation Issues in DS413, Table I: Translation Issues Agreed by China and the United States, dated 6 December 2011.

[560] See paras. 7.299, 7.334 and 7.358- 7.360 above; see also the Panel's discussion of Document Nos. 37, 57, 103 and 149 in this section of the Report.

[561] United States' second written submission, para. 154; response to Panel question Nos. 88(a), para. 73; 119, para. 118.

[562] United States' second written submission, para. 168.

7.447 China does not specifically refer to Document No. 129. In general, China argues that a requirement to comply with one set of business rules and technical standards does not preclude a bank card issuer from issuing cards that also comply with other rules and standards, which would enable that card to operate over other networks. China submits that many such cards exist around the world.[563]

7.448 The Panel concluded above[564] that Article 3.2(ii) requires that all RMB bank cards issued in China must bear the *Yin Lian*/UnionPay logo and must be interoperable with the CUP network. In addition, Article 3.4(i) provides that "[CUP] shall, in conjunction with all commercial banks, further supplement and perfect error processing management measures and implementation rules, establishing a scientific and effective error processing procedures, clarify the responsibilities of the parties involved in error processing and specify the task assignment".

7.449 We have indicated in respect of Document No. 129 above[565], and in respect of other instruments at issue[566] our view that the requirement to comply with logo and business and technical requirements for interoperability does not preclude banks from issuing cards that meet other technical or business requirements and also bear the logo of a foreign EPS supplier. Similarly here, we consider the requirement to bear the *Yin Lian*/UnionPay logo and meet interoperability requirements does not on its own establish or maintain CUP as a sole supplier. We find nothing on the face of this measure that would prevent cards from bearing the logo of another EPS supplier or operating over the network of another EPS supplier, so long as that card also bears the *Yin Lian*/UnionPay logo and is interoperable with the CUP network.

7.450 We note that Article 3.4 refers to CUP by name, and directs CUP to work together with all commercial banks to develop and perfect error processing related to bank card transactions. Document No. 129 dates from July 2003. As we have discussed above[567], CUP may have been the only EPS supplier operating in China in 2003, and may today still be the sole EPS supplier operating in China, that clears domestic RMB-denominated bank card transactions for cards issued in China. If this is the case, then this could explain the reference in Document No. 129 to CUP in its direction to work with commercial banks to handle error processing. That is, in referring to CUP, Document No. 129 does not exclude other suppliers; it merely reflects the fact that CUP was and perhaps still is the only supplier. Moreover, if the CUP network was and is the only EPS supplier in China, any errors in bank card processing would occur on CUP's network. In other words, we have not identified any language in Articles 3.2(ii) and 3.4(i) of Document No. 129 that grants CUP the exclusive privilege to process RMB transactions on a continuing basis. There is also no evidence before this Panel that other EPS suppliers were prevented from establishing alternative networks to process RMB transactions. In the absence of additional evidence, we are unable to conclude that Document No. 129 mandates or establishes CUP as the sole supplier of EPS in respect of domestic transactions denominated or paid in RMB.

*(xiii) Document No. 76*

7.451 The United States contends that Document No. 76 requires that all entities participating in the bank card business comply with a series of "business practices" and implement technical standards as set out in the Business Practices Appendix to Document No. 76. Consistent with the way that laws are typically written, the United States considers that these rules and procedures must be followed to

[563] China's response to Panel question No. 22(c), para. 18; comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 56.
[564] See para. 7.270 above.
[565] See para. 7.299 above.
[566] See the Panel's discussion of Document Nos. 37, 57, 103, 149 and 49 in this section of the Report.
[567] See para. 7.440 above.

the exclusion of other rules.[568] It argues that all entities participating in the bank card business participate in the common network, process all RMB bank card transactions over the network, and process transactions according to uniform rules and procedures, including conforming to CUP logo requirements.[569] The United States considers the net effect is to mandate the use of CUP for all RMB bank card transactions, and otherwise prohibit the use of EPS suppliers other than CUP.[570] Moreover, the United States submits that CUP's own operating regulations "implement the mandate in Document No. 76", and similarly prohibit logos of competing EPS suppliers from appearing on CUP cards.[571]

7.452 According to the United States, a number of elements in Document No. 76 support the conclusion that CUP alone may handle RMB bank card transactions. It considers that references to a "countrywide", "unified logo" or "standardize[d]" system throughout Document No. 76 reinforce that CUP alone may process RMB transactions taking place in China.[572] It argues that the reference to the establishment of a "unified" network in CUP's Articles of Incorporation and Notification of Approval of CUP's Business Licence support this interpretation.[573] It further submits that the "precise" ways in which Document No. 76 describes how transactions must be processed and how participating banks must organize themselves further supports the intention that all issuers and acquirers must comply with uniform standards which are exclusive to CUP and necessitate that all RMB transactions will be processed by CUP.[574]

7.453 In addition, the United States considers the fact that Chapter 10 of the Business Practices Appendix to Document No. 76 excludes application of the business practices to foreign currency cards issued outside China, conversely demonstrates that the business practices are intended to apply to all transactions involving domestically issued cards in China.[575] The United States also notes that paragraph 5 of the Notice to Document No. 76 requires that all "bankcard business rules that are inconsistent with the Specifications shall be abolished"[576]. In its view, this limitation contradicts any assertions by China that bank cards may conform to other standards and rules, and consequently, that other EPS suppliers may process RMB transactions.[577] Finally, the United States submits that Article 4 of the business practices assigns exclusive ownership and management rights of the network logo to CUP.[578] The United States argues that CUP is thus capable of protecting its exclusivity in the marketplace by refusing permission to use the CUP logo to issuers of cards carrying the logo of competing EPS suppliers.[579]

7.454 China agrees that Document No. 76 sets forth detailed rules and technical specifications pertaining to bank card interoperability.[580] However, as repeated throughout its submissions and reflected in preceding sections, China argues that compliance with one set of business rules does not preclude compliance with another set of business rules, the latter of which would enable bank cards to

---

[568] United States' second written submission, para. 163.
[569] United States' response to Panel question No. 88(a), para. 72.
[570] United States' second written submission, paras. 153, 159 and 161.
[571] United States' response to Panel question No. 8; comments on China's response to Panel question No. 104.
[572] United States second written submission, para. 164 (referring to Chapter I, Articles 1.1, 2.1 and 4.1 of the Business Practices Appendix to Document No. 76); comments on China's response to Panel question No. 119, para. 60.
[573] United States' second written submission, para. 165.
[574] United States' second written submission, paras. 157-171.
[575] United States' response to Panel question No. 88(a), para. 74.
[576] United States' response to Panel question No. 88(a), para. 74; comments on China's response to Panel question No. 119, para. 69.
[577] United States' second written submission, para. 163.
[578] United States' response to Panel question No.15, para. 57.
[579] United States response to Panel question No. 71(b)(i), para. 7.
[580] China's first written submission, para. 45.

operate over other networks. China considers that many bank cards in the marketplace are capable of operating over numerous networks.[581]

7.455 The Panel concluded in paragraph 7.330 above that Article 1.2 of Chapter II of the Business Practices Appendix does not impose a requirement that all merchant terminal equipment be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo. The Panel further concluded in paragraphs 7.352 and 7.353 that paragraphs 2 and 3 of the Notice to Document No. 76 as well as Articles 2.1 and 5.2.1-5.2.3 of Chapter I of the Business Practices Appendix do impose a requirement that all acquiring banks must be capable of accepting bank cards bearing the CUP logo. We understand that Document No. 76 establishes clear business and technical standards to facilitate the processing of transactions over the CUP network. With this in mind, we assess the United States' contention that Document No. 76 requires that all domestic RMB transactions on domestically issued cards be processed over the CUP network.

7.456 We begin with the United States' argument that paragraph 5 of the Notice and Chapter 10 of the Business Practices Appendix to Document No. 76 support the United States' allegation that only CUP may process domestic RMB transactions on domestically issued cards, and that other EPS suppliers may not do so. The United States contends that the requirement in paragraph 5 to abolish all business rules that are inconsistent with the Business Practices Appendix to Document No. 76 following the entry into force of Document No. 76 effectively grants CUP sole supplier status. Given the context provided by Articles 1.1 and 2.1 and elsewhere in Document No. 76, we understand paragraph 5 serves to ensure that entities participating in the bank card business do not apply business rules that are inconsistent with the Business Practices Appendix, thereby effectively preventing the establishment of a unified, interoperable network. As we have indicated above[582], the United States has provided no evidence to demonstrate that it would not be possible for a bank card issuer to issue a card, or an acquirer or terminal equipment to accept a card, that is at the same time interoperable with the business rules of EPS suppliers of other WTO Members and the rules of the Business Practices Appendix to Document No. 76. In the absence of any such evidence, we are not persuaded that it can be inferred from paragraph 5 that all cross-region or inter-bank transactions must occur over the CUP network, or that it would not be technically or legally possible to issue and use cards in China on other networks that apply different business rules, while at the same time ensuring their consistency with the Business Practices Appendix. Accordingly, we cannot conclude that paragraph 5 mandates that CUP is the sole supplier of EPS in respect of domestic transactions denominated or paid in RMB.

7.457 We next turn to Chapter 10 of the Business Practices Appendix, which provides that Document No. 76 does not apply to foreign currency cards issued outside China that are used in China. The United States' claims are directed toward all RMB cards issued *and* used in China. In our view, when read in isolation, it is not clear to us that this statement means that Document No. 76 is applicable to all RMB-denominated payment cards issued in China. Regardless, we do not consider that this statement alone would support the conclusion that the business and technical standards set out in the Business Practices Appendix must apply to all cards issued in China to the exclusion of other rules. As we have already stated above[583], we do not consider the requirement to bear the *Yin Lian*/UnionPay logo and meet business and technical requirements for interoperability on its own establishes or maintains CUP as a sole supplier. We are thus not persuaded that the United States' reference to Chapter 10 supports its allegations.

7.458 We have found throughout Section VII.E.2(e) that the requirement to bear the *Yin Lian*/UnionPay and meet certain business and technical requirements for interoperability does not

[581] China's response to Panel question No. 119, para. 84.
[582] See paras. 7.299 and 7.358- 7.360 above.
[583] See the Panel's discussion of Document Nos. 37, 57, 103, 149, 49 and 129 in this section of the Report.

preclude issuers from issuing bank cards that are also interoperable with the business and technical rules of EPS suppliers of other WTO Members. In view of this, we similarly reject the United States' contention that the "way" in which Document No. 76 is written as a regulation means that the rules and procedures in Document No. 76 must be followed to the exclusion of other procedures.[584] We therefore consider whether any other elements identified by the United States in Document No. 76 mandate the use of CUP for all RMB-denominated transactions.

7.459 We next consider the United States' contention that references to a "unified logo" or "standardize[d]" system throughout Document No. 76 support the conclusion that CUP is intended to be a sole supplier of EPS services for RMB bank card transactions in China. The United States argues that the use of the phrase "to set up and operate a single nationwide inter-bank card information switching network" and particularly the word "single", that is used both in CUP's Articles of Association[585] and Notification of Approval of CUP's Business Licence[586], confirm that CUP alone may supply EPS services for RMB transactions in China for those cards issued in China. It argues that "China's decision early on to position CUP as the monopoly supplier of EPS in China is reflected in these foundational documents".[587]

7.460 We first note that the Article 2.1 of the Business Practices Appendix to Document No. 76 provides that the "bank card united association" that was to be established pursuant to this document, (and that later became CUP) means a "countrywide bank card united operational organization". In discussing the meaning of "bank card interoperation", Article 2.2 provides that bank card institutions and merchants should "link themselves with the countrywide… system to achieve the sharing of information …and interoperation". Article 4.2 of the Business Practices Appendix states that the logo of the network consists of "the Chinese character of 'UnionPay' and a graph symbolising the *united* network" (emphasis added). In our view, the references to the establishment of a "countrywide" network, or the provision mentioning that the logo of the network should symbolize that the network is "united", reflects foremost an intention to establish a common, nationwide network. Evidence on record indicates that, prior to 2001, when Document No. 76 was issued, no EPS supplier had in place a nationwide, interoperable network.[588] The fact that a nationwide network did not exist in China previously meant that bank cards were not guaranteed to be usable throughout China. Hence, we understand the focus in Document No. 76 was to create a network that is "united" and "countrywide". In reaching this view, however, we do not agree with the United States that one can properly infer from this effort to create a nationwide network an intention to create an exclusive network in China, wherein all other EPS suppliers except the association that would later become CUP would be prohibited from operating. We do not find the inference drawn by the United States is supported by the aforementioned references, nor do we find such support elsewhere in Document No. 76. As we explained above, we have found nothing in Document No. 76 that prevents issuers from incorporating logos of other EPS suppliers, or issuing cards that comply with the rules of other EPS suppliers, so long as those cards bear the *Yin Lian*/Union Pay logo and are interoperable with the CUP network.

7.461 As noted, the United States also refers to the reference to the establishment of a "single" network in CUP's Articles of Association and Notification of Approval of CUP's Business Licence in support of its interpretation of what was intended through Document No. 76, in particular the references to a "unified logo" or a "standardize[d]" system. We note that the term "single" does not appear in Document No. 76 itself. One meaning of the term "single" is "consisting of only one part",

[584] In this respect, we respond to the United States' argument as set out in paragraph 163 of its second written submission.

[585] See CUP's Articles of Association, Articles 11 and 12, Exhibit US-20.

[586] Notification of Approval of CUP's Business Licence, Exhibit US-29.

[587] United States' response to Panel question No. 121.

[588] See United States' response to China's request for a preliminary ruling, paras. 64-71; China's first written submission, paras. 38-46. See also fn. 532 above.

as a limitation in number.[589] However, we note that the term "single" may also be understood to mean "undivided, united".[590] In addition to the meaning of this term, we also note that the phrase "to set up and operate a single nationwide inter-bank card information switching network" uses the indefinite article "a", and not the definite article "the", and to that extent does not appear to indicate an intention to limit the number of EPS suppliers in the marketplace to one. Moreover, we note that Article 11 of CUP's Articles of Association specifies that the purpose of CUP is "to set up a unified, highly efficient and safe inter-bank card information exchange network across the country". In view of the different meanings of "single" and its use in CUP's foundational documents, we do not agree with the United States that these documents should inform the conclusion that CUP is a sole supplier of EPS services for RMB bank card transactions in China. Rather, we find the use of "single" in these identical phrases in CUP's Articles of Association and Notification of Approval of CUP's Business Licence is consistent with the stated objective in Articles 1.1 and 2.1 of Document No. 76 to establish a "countrywide", "interoperable" bank card network in China. In our view, therefore, the stated objective to establish a "single" network is not indicative of an intention to create an exclusive network.

7.462 Finally, we turn to the United States' contention that CUP's control of the ownership and management rights of the *Yin Lian*/UnionPay logo enables it to prohibit other EPS suppliers from operating in China. We concluded in paragraph 7.277 above that Article 4.2 of the Appendix grants the United Association (now CUP) exclusive ownership and use and management right of the *Yin Lian*/UnionPay logo. However, we observed that, pursuant to Article 4.3 of the Business Practices Appendix, "Interoperating Members" (which include issuing banks) "automatically obtain" the right to use the logo from the date they officially engage in inter-bank business upon approval by the United Association/CUP. Therefore, we stated[591] that we were not persuaded that Article 4.2, when read together with Article 4.3, provides a basis for CUP to refuse permission for the logo to appear on bank cards bearing the logo of competing EPS suppliers. Rather, banks that already engage in the bank card business would be permitted to incorporate additional logos of EPS suppliers.

7.463 In its responses to several of the Panel's questions following the second substantive meeting of the parties[592], the United States submitted the text of CUP's Operating Regulations[593] as well as reports from China's press[594] in support of its allegation that CUP uses its control over the CUP logo to prevent other logos from appearing on the cards and thereby limits the ability of other EPS suppliers to enter the Chinese market. According to the United States, CUP's Operating Rules state in relevant part:

> The following logos cannot appear on UnionPay Card surface (including card face and card back).
>
> - Name/logo/trademark of credit card or debit card of the companies and their subsidiaries that are deemed to have competitive relationship with UnionPay by UnionPay Board of Directors …

[589] *Shorter Oxford English Dictionary*, Vol. 2, p. 2843.
[590] *Shorter Oxford English Dictionary*, Vol. 2, p. 2843.
[591] See paras. 7.277-7.279
[592] United States' response to Panel question No. 117. See also United States' response to Panel question Nos. 86 and 94.
[593] CUP's Operating Regulations, Volume III, Rules on UnionPay Card, BIN and Logo, April 2011, Section 2.5.3.2, Exhibit US-115
[594] See Exhibits US-119, US-120, US-121, US-122, and US-123.

7.464 As we noted above[595], CUP's Operating Regulations are not identified as a relevant legal instrument in the United States' panel request. We are unclear why the United States did not identify these regulations earlier. We recall China's view that evidence on record does not support the United States' assertion that CUP does not licence the *Yin Lian*/UnionPay logo for use on cards that also carry the logo of other EPS suppliers.[596] China submits Exhibit CHN-112 as evidence that a large number of cards in China are "dual logo" cards.[597]

7.465 We set out reasons in paragraph 7.279 above why we are not convinced that the identified provisions of CUP's Operating Regulations support the United States' assertion that the logo use requirements enable CUP to prevent an issuer from issuing bank cards of competing EPS suppliers. We noted that the Regulations, submitted very late in the proceedings, raise a number of questions concerning their operation that the United States did not address. In particular, the Operating Regulations do not specify whether the bank cards on which other logos may not appear – referred to above – are only CUP-branded bank cards, or also bank cards issued in China that bear more than one logo. We also took note of evidence submitted by China that numerous cards issued in China – "one quarter of all bank cards issued in China in 2010" – carry the logo of other EPS suppliers.[598] In our view, the United States failed to reconcile its interpretation of CUP's Operating Regulations with this evidence. The United States also failed to explain its interpretation of the language taking into account that Article 4.3 of the Business Practices Appendix to Document No. 76 indicates that the right to use the logo is automatically granted to interoperating members to the CUP network.[599] For these reasons, we reject the United States' contention that CUP's control of the ownership and management rights of the *Yin Lian*/UnionPay logo enables it to prohibit other EPS suppliers from operating in China.

7.466 Accordingly, for the reasons set out above, we conclude that Document No. 76 does not establish CUP as the sole supplier of EPS for RMB-denominated transactions in China or otherwise prevent the use of EPS suppliers other than CUP.

*(xiv) Document No. 17*

7.467 The United States submits that Article 64 of Document No. 17 requires issuing banks to "implement technical standards prescribed by the State" when issuing bank cards.[600] The United

[595] See para. 7.291 above.
[596] See para. 7.278 above.
[597] China's comments on United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 67.
[598] Exhibit CHN-112.
[599] In respect of its claim that China limits EPS suppliers other than CUP from entering the Chinese market, the United States' asserts that CUP at times has not approved EPS suppliers' applications for new dual logo cards, as it argues is demonstrated in various press reports (Exhibits US-119, US-120, US-121, US-122, US-123). Without entering into a discussion of the evidentiary value of these press reports, as explained in paragraph 7.280, we do not understand how the United States' assertion that CUP undertakes approval of applications to issue dual logo cards can be reconciled with Article 4.3. Also, the United States has not explained to us how its allegation that CUP restrains the issuance of dual branded cards to a "certain threshold percentage (e.g. 80%)" (stated in response to Panel question No. 117, para. 114) supports the contention that CUP is therefore the "sole supplier" of EPS for RMB transactions. In addition, we note the United States' argument in response to Panel question No. 94 (para. 95) that CUP has the authority to deny or delay the issuance of BIN numbers to competing EPS suppliers, thereby preventing EPS suppliers from competing in the Chinese market. Like China, we note that the United States has not provided any specific reference in the instruments at issue to substantiate its assertion. We are therefore unable to agree that the above elements support the United States' claim that China limits EPS suppliers other than CUP from entering the Chinese market.
[600] United States' second written submission, para. 154.

States argues that "many" of the technical standards are developed by CUP, and as a result, the requirement to implement CUP standards "enhances CUP's position as sole supplier".[601]

7.468 China does not specifically address the provision identified by the United States. We recall that, in general, China maintains that a requirement to comply with one set of business rules and technical standards does not preclude a bank card issuer from issuing cards that also comply with other rules and standards, which would enable that card to operate over other networks.[602]

7.469 The Panel concluded in paragraph 7.286 above that Article 64, when read in conjunction with Document No. 76, requires issuers to implement business and technical standards when issuing bank cards that bear the *Yin Lian*/UnionPay logo.[603] It is not clear that "many" of the technical standards prescribed by the State are those standards developed by CUP. But even if it were, as we stated in respect of Document No. 17 above[604], and in respect of other instruments that impose interoperability requirements[605], we do not consider the requirement to comply with certain business and technical interoperability requirements alone precludes banks from issuing cards that meet other technical or business requirements that enable these cards to operate on another network. Given our conclusions, we do not consider that Article 64 individually could be considered to mandate the use of CUP or establish CUP as the sole supplier of EPS for all domestic transactions denominated and paid in RMB, and hence we do not agree with the United States that Article 64 results in "enhanc[ing] CUP's position as sole supplier".

*(xv) Document No. 142*

7.470 The United States argues that Article II.3 of Document No. 142 requires that issuers of bank cards prioritize issuance of cards that adopt the PBOC 2.0 Standards, a chip standard developed by the PBOC and CUP. It submits that China "intends to require that all cards comply with this standard.[606] The United States submits that this standard is China-specific and incompatible with the "EMV" chip standard used by non-Chinese EPS suppliers.[607] As a result, the United States argues that non-Chinese EPS suppliers have to redesign their chips to allow their cards to be used in China.[608] The United States considers that this requirement contributes to establishing CUP as a sole supplier in the processing of RMB bank card transactions. In addition, it notes that various provisions in Document No. 142 – notably Articles III, V and VI – designate CUP to participate with other Chinese institutions in an effort to enhance bank card security. The United States submits that, if suppliers other than CUP were permitted in the market, then all other EPS suppliers would similarly be subject to the requirements set out in Articles III, V and VI of Document No. 142. The fact that other suppliers are not so subject demonstrates that CUP is a monopoly, in its view.[609]

---

[601] United States' response to Panel question No. 71(a), para. 6.

[602] China's response to Panel question No. 22(c), para.18; comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 56.

[603] We concluded, however, that Article 64 does not require that all bank cards in China must bear the *Yin Lian*/UnionPay logo and that it does not require the use of the unified standards in all cases.

[604] See para. 7.299 above.

[605] See the Panel's discussion of Document Nos. 37, 57, 103, 149, 49, 129 and 76 in this section of the Report.

[606] United States' response to Panel question No. 94, para. 97.

[607] United States' response to Panel question No. 72, para. 17.

[608] United States' response to Panel question No. 94, para. 97 (citing Article 2.3 of Document No. 142); see also response to Panel question No. 88, para. 73.

[609] United States' second written submission, para. 168.

7.471 China contends that the United States provides no support for its assertion that EPS suppliers will need to significantly redesign their chip to be allowed to operate in the Chinese market.[610] Setting this aside, as noted above[611], China maintains that a requirement to comply with CUP's business rules and technical standards does not preclude bank card issuers from issuing cards that also comply with other rules and standards that enable that card to operate over other networks.

7.472 The Panel notes that Article II.3 directs card issuers to ensure that all cards issued meet the requirements of the "Bank Card Specifications (JR0052-2009)" and the "Technical Specifications on Bankcard Interoperability (JR-55-2009)". The United States suggests that this standard will be implemented at a future point in time.[612] Issuers are directed to give priority to the issuance of bank cards which adopt the "PBOC 2.0 Standards" to improve "the anti-counterfeiting ability of bank cards." Article II.5 and Articles III.7 and III.8 direct card issuers to submit risk information on bank cards to the bank card information sharing system of CUP to aid in preventing bank card fraud. Article V.15 directs CUP, *inter alia*, to improve its "bank card risk prevention and control system", including setting up a "uniform national merchant information registration and risk prevention and control system"; and to "work out the business rules and technical standards for inter-bank payment services … that are not specified in the current networking business standards".

7.473 We note the United States' assertion that the PBOC 2.0 standard is not compatible with the EMV chip standard used in other parts of the world, and that EPS suppliers will have to "significantly redesign their chips" to allow their cards to be used in China. Although stating that this redesign would be a "significant" one, the United States does not provide explanation or evidence about what would be involved in such redesign. Hence we have nothing on which to assess the significance, difficulty or otherwise of any redesign procedures.. Nor does the United States assert that a redesign to conform to the PBOC 2.0 standard would be so difficult such that EPS suppliers would opt not to enter the market. In the absence of any supporting evidence, we are unable to accept the United States' assertion that a requirement to comply with this standard in the future would ensure that CUP would remain in the market as a sole supplier. In addition, the United States does not assert that compliance with the PBOC 2.0 standard would preclude simultaneous compliance with the EMV or any other standard, such that we cannot conclude that a given card would be prevented from operating over more than one network.

7.474 We indicated above in respect of other instruments[613] that the requirement to comply with technical/interoperability requirements does not preclude banks from issuing cards that meet other technical requirements. Thus, we are not persuaded that the initiative set out in Article II.3 to require compliance with PBOC 2.0 standards prevents cards from complying with other standards such that they might operate over other networks. Accordingly, we are unable to conclude that a requirement to comply with PBOC 2.0 standards establishes or maintains CUP as a sole supplier.

7.475 We note, finally, the United States' argument that the designation of CUP in Articles III, V and VI in Document No. 142 to participate with other Chinese institutions in an effort to enhance bank card security demonstrates that CUP is a sole supplier. We concluded in paragraph 7.450 above that the mere fact that Document No. 129 designates card issuers or acquirers to work together with CUP, so as to develop error processing related to bank card transactions, does not by itself establish or

[610] China's comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 69.

[611] See, e.g. China's response to Panel question No. 22(c), para.18; comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 56.

[612] As we noted, the United States argues that "China intends to require that all cards comply with the new chip standard…" See United States' response to Panel question No. 94, para. 97.

[613] See the Panel's discussion of Document Nos. 37, 57, 103, 149, 49, 129, 76 and 17 above.

maintain CUP as a sole supplier.[614] We consider our conclusions in that context to be relevant here and conclude similarly. Document No. 142 entered into force in 2009. Given CUP's position in the Chinese marketplace, the fact that CUP is identified by name may simply reflect the prevailing market situation in China at that time. Hence, Document No. 129 designates CUP to participate in reducing bank card-related crimes. Apart from this specific role, there is no language in Document No. 142 that grants CUP the exclusive privilege to provide RMB inter-bank information exchange and processing on a continuing basis. In the absence of additional evidence, we are unable to conclude that references to CUP in Document No. 142 have the effect of mandating or establishing CUP as the sole supplier of EPS in respect of domestic transactions denominated or paid in RMB.

*(xvi) Conclusions on the instruments individually*

7.476 Based on the above analysis, the Panel concludes that none of the identified legal instruments considered individually mandates or establishes CUP as sole supplier of EPS in respect of domestic RMB bank card transactions or otherwise prohibits the use of EPS suppliers other than CUP.

7.477 Specifically, we concluded that certain provisions in Document Nos. 17, 37, 49, 57, 76, 129, 142, 149 and 153 require that all bank cards issued in China, including dual currency bank cards, for use in connection with domestic inter-bank transactions bear the *Yin Lian*/UnionPay logo. In various respects, these documents further require, *inter alia*, that terminal equipment operated by acquirers and merchant terminal equipment provided by acquirers be technically capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo. Finally, these documents require that acquirers themselves be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo. We found, however, that nothing in the cited provisions of these instruments precludes the issuance or acceptance of bank cards that would operate on any inter-bank networks other than that of CUP, or precludes the use, or the acceptance at terminals, of bank cards bearing logos of other EPS suppliers, so long as those cards also bear the *Yin Lian*/UnionPay logo and are also interoperable over the CUP network. Accordingly, we found that the cited provisions of these instruments do not establish or maintain CUP as the exclusive EPS supplier for all RMB bank card transactions, where a bank card is issued and used in China. We similarly concluded that Document No. 103 does not establish or maintain CUP as the sole supplier.

7.478 We further concluded that Document No. 153 does not grant CUP the exclusive privilege to provide EPS in relation to RMB bank card transactions taking place in China on the basis that it refers to CUP as the domestic clearing channel, or because it regulates third-party service providers. We similarly concluded that Document No. 53 does not require that CUP alone may serve as a domestic clearing channel to process RMB transactions.

7.479 Finally, in our analysis of Document Nos. 16, 8 and 254, we recalled our previous conclusions[615], that China requires that CUP and no other EPS supplier is to handle the clearing of certain RMB bank card transactions that involve either an RMB bank card issued in China and used in Hong Kong or Macao, or a bank card issued in Hong Kong or Macao that is used in either of these territories, or in China in an RMB transaction. We additionally recalled our conclusion that Document No. 219 does not establish or maintain CUP as sole EPS supplier for RMB transactions in respect of the clearing of these RMB card transactions in Hong Kong, Macao and China, specifically, or in relation to RMB transactions in China generally.[616]

[614] See also para. 7.440.
[615] See paras. 7.383-7.384 above.
[616] See paras. 7.372-7.377 and 7.402-7.404.

7.480 As we explained, Document Nos. 16, 8 and 254[617] establish CUP as the exclusive EPS provider for RMB bank card transactions concerning Chinese, Hong Kong or Macao nationals who travel in China, Hong Kong or Macao. In this section of the Report, we specifically address the question of whether legal instruments at issue in this dispute explicitly establish or maintain CUP as sole supplier in respect of *all* RMB bank card transactions in China. As Document Nos. 16, 8 and 254 are limited in scope to bank card transactions that involve bank cards issued in China and used in Hong Kong or Macao or, alternatively, payment cards issued in Hong Kong or Macao and used in China, we explained above that we do not see how any of these instruments establish CUP as sole supplier of EPS for *all* domestic transactions occurring throughout China that are denominated and paid in RMB. As these measures pertain to transactions concerning Chinese, Hong Kong or Macao nationals who travel in China, Hong Kong or Macao, we thus do not consider them as a direct indication of the establishment or maintenance of CUP as the sole supplier for *all* RMB transactions taking place in China.[618]

7.481 Therefore, in respect of the various instruments identified in connection with the alleged sole supplier requirements, we are unable to conclude that any of the legal instruments, when considered individually, maintains or establishes CUP as the exclusive EPS supplier for RMB bank card transactions, or otherwise prohibit the use of EPS suppliers other than CUP.

*(xvii) Collective assessment of the legal instruments at issue*

7.482 We recall that the United States has requested the Panel to consider the "measures" at issue in this dispute both individually and in combination with each other. It submits that these measures, or six requirements, reflected or embodied in the various legal instruments affect "every element of the electronic payment system and all of the key participants", including issuers, acquirers, merchants and EPS suppliers themselves.[619] In particular, it argues that all entities participating in the bank card business in China participate in the CUP network, process all RMB bank card transactions over the network, and process transactions according to uniform rules and procedures, including conforming to logo requirements.[620] The United States considers that the net effect of these measures is to "create a system in which CUP is the only entity that can supply EPS for RMB transactions", or that the measures "ensure and consolidate CUP's monopoly position"[621].

7.483 The United States maintains that the various legal instruments interact to establish and maintain CUP as the sole supplier in three principal ways: (i) certain instruments explicitly state that CUP must be used to process specific types of bank card transactions; (ii) certain instruments establish and/or require the use of business specifications and technical standards which mandate the use of CUP; and (iii) certain instruments implicitly recognize that CUP is the sole supplier of EPS services for RMB denominated transactions.[622] It argues that the various requirements "ensure CUP's privileged position", both "explicitly" and "effectively".[623]

7.484 The United States argues that no EPS supplier other than CUP benefits from issuer requirements, terminal equipment requirements and acquirer requirements. The United States argues that because of the need to fulfil these requirements, issuers and acquirers must have access to the

---

[617] The Panel specifically refers to Article 6 of Document No. 16, Article 6 of Document No. 8 and Articles 3, 4 and 17 of Document No. 254. See paras. 7.372-7.377 and 7.402-7.404 above.

[618] The Panel addresses below, at paras. 7.482 and 7.576, whether this requirement is inconsistent with Articles XVI and XVII of the GATS.

[619] United States' first written submission, para. 48.

[620] United States' response to Panel question No. 88(a), para. 72.

[621] United States' first written submission, para. 63; second written submission, paras. 153, 159, and 161.

[622] United States' second written submission, para. 144.

[623] United States' first written submission, para. 46

CUP system, and must pay for that access.[624] It contends that it is thus "economically unviable" for any foreign supplier of EPS to participate in the market.[625] The United States explains:

> Document Nos. 37, 57, 94, 272, 129, and 219 contain requirements that banks that issue payment cards in China must bear the CUP logo at a specified position, and that all ATMs and POS terminals must be capable of processing cards that bear the CUP logo. No foreign suppliers are eligible for this privilege. As banks and processing parties are already required to provide CUP such access (as well as pay for it), it makes no economic sense for such banks to pay for the additional privilege of using a foreign EPS. In other words, these types of privileges do not simply discriminate against foreign suppliers in the marketplace; they effectively deny them access altogether.[626]

7.485 The United States submits that the requirement to pay fees to join CUP's network "creates an unlevel playing field with other suppliers, even in those small areas where other suppliers are permitted to operate (e.g. dual currency cards)."[627] Elsewhere, the United States argues that each of the six requirements help "entrench CUP's position as the sole service supplier in the market".[628] It explains, "[t]hese requirements gave CUP automatic and universal acceptance of its RMB payment card products by banks and merchants in China and permitted and supported CUP becoming the sole supplier of EPS in China".[629]

7.486 As we noted above, China maintains that the six alleged requirements do not operate in such a way as to establish CUP as sole supplier for the clearing and settlement of all RMB domestic inter-bank bank card transactions.[630] Rather, China submits that the identified measures establish a common national network for processing RMB domestic inter-bank bank card transactions.[631] China further submits that the above instruments do not preclude adherence to other technical standards, such as the rules and operating procedures of other EPS suppliers. Similarly, it argues that issuer banks are not prevented from being members of other EPS suppliers' networks.[632] Thus, it maintains that there is nothing in any of these instruments that would prevent a foreign EPS supplier from establishing a domestic clearing channel in China.[633]

7.487 Taking into account the United States' arguments, we understand the United States considers that the six requirements, as reflected in the legal instruments at issue, operate together in several respects to establish and maintain CUP as the sole or exclusive EPS supplier.[634] First, the United States maintains that various legal instruments work together in ways to explicitly or implicitly restrict entry into the Chinese market. Second, the United States' arguments suggest that it considers that certain instruments work together in ways that impose technical barriers to entry. Third, the

---

[624] United States' first written submission, paras. 50-52.
[625] United States' first written submission, para. 66.
[626] United States' first written submission, para. 69.
[627] United States' response to Panel question No. 94, para. 96..
[628] United States' second written submission, paras. 173, 180, and 183; response to Panel question No. 86, para. 63; 92, para. 88.
[629] United States' second written submission, para. 190.
[630] China's second written submission, paras. 90-102.
[631] China's first written submission, para. 64; response to Panel question No. 121, para. 87.
[632] China's response to Panel question No. 22(c), paras. 17, 18.
[633] China's response to Panel question No. 103, para. 45.
[634] In this respect, we note that the European Payments Council, "SEPA Cards Framework," refers to "technical", "legal" and "commercial" barriers when discussing requirements or regulations governing co-branding or limiting international EPS suppliers to offering services only for transactions outside of the SEPA area. See United States' response to Panel question No. 73; European Payments Council, "SEPA Cards Framework," Version 2.1, 16 December 2009, Section 1.2, Exhibit US-110, page 4.

United States considers that the measures operate together in a way that makes it "economically unviable" to enter the market. We address each of these three arguments in turn.

7.488 As an initial matter, the parties dispute whether CUP is currently the only EPS supplier in the market. China contends that the Rural Credit Banks Funds Clearing Center (RCBFCC) operates throughout China as a second EPS supplier for RMB bank card transactions, and processes inter-bank bank card transactions independently of CUP.[635] In reference to the Center's website and related materials, the United States considers that the RCBFCC is a "clearing and settlement center used by rural commercial banks in China",[636] but that rural commercial banks using the RCBFCC "issue bank cards bearing the CUP logo and transactions using these cards are processed by CUP."[637] As bank cards issued by rural commercial banks for use on the RCBFCC network must carry the CUP logo, issuers of these cards must be members of CUP, which entails following all applicable CUP rules and regulations.

7.489 The website reference provided by the United States is entirely in Chinese. However, as the United States contends, the RCBFCC website contains a series of images of bank cards, each of which includes a depiction of the CUP logo. In this respect, it would appear that bank cards depicted on the RCBFCC website also conform to the issuer requirements at issue in this dispute. However, we cannot be sure of this as we have not been provided with evidence explaining the origin of this site, its date, or its contents. Nor are we able to verify China's assertion that the RCBFCC is a second EPS supplier operating in China because we do not have access to a version of the website in an official WTO language. Accordingly, we reach no findings in respect of the RCBFCC that would inform or alter our analysis.

Explicit and implicit legal operation of the instruments when considered collectively

7.490 As reflected in our discussion above, China's instruments affect all aspects of the market for bank card transactions and affect all entities in the process, including issuers, acquirers, merchants, EPS suppliers and potentially third parties involved in the handling of bank card transactions. Our analysis above also confirms that requirements imposed by the instruments are mandatory.

7.491 However, as we stated before, with the exception of RMB bank card transactions involving Hong Kong and Macao nationals that travel to China, and Chinese nationals that travel to Hong Kong or Macao, we found that the United States had failed to identify anything in the identified legal instruments that explicitly grants CUP the exclusive privilege to supply EPS in respect of all RMB bank card transactions taking place in China. In addition, the United States did not point to anything in the identified provisions of the instruments at issue that prevents issuers from incorporating logos of other EPS suppliers, in addition to the *Yin Lian*/UnionPay logo, or issuing cards that comply with the rules of other EPS suppliers, so long as those cards also bear the *Yin Lian*/UnionPay logo and are also interoperable with the CUP network. In this sense, despite the fact that the measures are mandatory and may lead to opportunities for CUP that other suppliers do not enjoy, we found that the United States did not identify anything on the face of these instruments that legally prohibits EPS suppliers other than CUP from operating in China's market.

7.492 The United States maintains that, in the event that the instruments individually do not demonstrate that CUP is a sole supplier, collectively, the instruments operate in this way. Primarily, the United States bases its collective assessment on references to the text of the instruments themselves. For instance, in response to question No. 87 from the Panel, the United States argues:

---

[635] China's response to Panel question No. 114, para. 75; comments on United States' response to Panel question Nos. 70-72, 86-96, 115-123, fn. 43.

[636] United States' response to Panel question No. 88(b), para. 79.

[637] Ibid.

> The logo requirements work in conjunction with one another and are reinforced and complemented by the mandate to conform to CUP's rules and procedures contained in Document No. 76. These requirements work together to reinforce CUP's monopoly over payment card transactions in China by ensuring that only CUP cards can be issued for RMB denominated accounts, that all merchants accept those cards when they are presented for purchases, and that the transactions will be processed in accordance with CUP's rules and procedures. Consequently, no other supplier of EPS may conduct domestic RMB transactions in China.[638]

7.493 As set out in our assessment of the instruments individually, we found that none of the instruments, such as Document No. 76, individually supports the proposition that "only CUP cards can be issued for RMB denominated accounts". Having concluded as such, we find no basis to conclude that merely reading the various instruments together, as the United States seems to suggest that we do, leads us to modify our conclusions regarding the United States' assertion. Beyond asserting that particular cited provisions of instruments or requirements "work together", we find no explanation that varies from that provided in the United States' assessment of the instruments individually.[639] In other words, in relying on the texts of the provisions and without more, the United States has not in our view established that the provisions taken together effectively create a monopoly in favour of CUP.

7.494 We recall the United States' view that the stated purpose set out in both CUP's Articles of Association[640] and in the Notification of Approval of CUP's Business Licence [641] "to set up and operate a single nationwide inter-bank card information switching network" and particularly the word "single", confirms that CUP alone may supply EPS services for RMB transactions in China for those cards issued in China. In view of the different meanings of "single" and its use in CUP's foundational documents, we concluded in paragraph 7.461 above that the references to the establishment of such a "single" network does not establish that CUP is the sole supplier of EPS services for RMB bank card transactions in China. Rather, we explained that this statement is consistent with the objective stated elsewhere in Document No. 76 to establish a "countrywide", "interoperable" bank card service in China.

7.495 We note as well that the United States has identified certain instruments that pertain to transactions involving Hong Kong and Macao, in arguing that the legal instruments at issue in this dispute explicitly establish or maintain CUP as a sole supplier in respect of *all* RMB bank card transactions. We explained in paragraph 7.473 above that these instruments do not establish CUP as the sole supplier of EPS for *all* domestic RMB bank card transactions occurring throughout China, since the measures are limited in scope to bank card transactions that involve bank cards issued in China and used in Hong Kong or Macao, or alternatively, bank cards issued in Hong Kong or Macao and used in China.

---

[638] United States' response to Panel question No. 87, para. 69.

[639] We note that, in response to question No. 115, the United States similarly argues the following:

> The requirement on issuing banks to issue only cards that carry the CUP logo, when combined with the requirements on acquiring banks to be capable of accepting CUP cards (as discussed in response to question No. 92), and the mandate to use CUP processing rules (as discussed in response to question No. 86) establishes CUP's monopoly over RMB denominated cards. No other EPS supplier can establish a competing interoperative bank card network.

United States' response to Panel question No. 115, para. 107. Again, in a statement such as this, which serves as a mere recitation of the requirements individually, we find no support for the conclusion that no other EPS supplier can establish itself in China.

[640] See CUP's Articles of Association, Articles 11 and 12, Exhibit US-20.

[641] Notification of Approval of CUP's Business Licence, Exhibit US-29.

7.496 Finally, we note the United States' refrain that its interpretation of various provisions is "consistent" with the fact that CUP's network is the exclusive network for all RMB bank card transactions. In support of this view, the United States has referred to the fact that certain provisions at issue refer singularly to CUP. For instance, it asserts that Article 5 of Document No. 153 expressly authorizes CUP to establish branches in certain areas of China "in accordance with the company's overall plan to provide bank card information exchange and clearance services". It submits that Article 3.4 of Document No. 129 requires commercial banks to work with CUP to "improve procedures for dealing with errors". It also considers that Articles III, V and VI of Document No. 142 direct CUP to participate with other Chinese institutions in an effort to enhance bank card security. In respect of instances such as these, in our assessment above, we stated how references to CUP, or recognition of CUP's role, do not necessarily confirm that CUP operates exclusively in China. Rather, we indicated that these references may inform a different interpretation. In the absence of further evidence that would eliminate reasonable alternative interpretations, we consider the United States has not met its burden to establish that the instruments operate collectively in this way, so that we should conclude in favour of the United States' interpretation. The Appellate Body in *US – Carbon Steel* has explained:

> The party asserting that another party's municipal law, as such, is inconsistent with relevant treaty obligations bears the burden of introducing evidence as to the scope and meaning of such law to substantiate that assertion. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars. The nature and extent of the evidence required to satisfy the burden of proof will vary from case to case.[642]

7.497 In the absence of evidence other than the texts of the instruments, such as on how the relevant provisions have been applied or opinions of legal experts, we consider the United States has not met its burden to establish that the net, or combined, legal effect of these instruments is to preclude EPS suppliers other than CUP from operating in China's market for RMB bank card transactions.

Technical barriers imposed through the instruments

7.498 The United States has also alleged that the rules and standards imposed under certain of the instruments at issue make it technically difficult for foreign EPS suppliers to operate in the market, thereby effectively "entrenching" CUP as the sole supplier.[643] We explained in paragraph 7.477 above that nothing in the identified provisions in Document Nos. 17, 37, 49, 57, 76, 129, 142, 149 and 153 impose technical barriers that cannot be met by EPS suppliers other than CUP so as to completely prevent those EPS suppliers from entering and operating in the market for RMB bank card transactions in China. In particular, we found that nothing in the identified provisions of the instruments at issue prevents issuers from issuing cards that comply with the rules of other EPS suppliers, so long as those cards are also interoperable with the CUP network.

7.499 In addition to the requirements just mentioned, the United States, asserts that Document No 142 requires that all RMB bank cards incorporate the PBOC 2.0 standard which, in the United States' view, would force EPS suppliers to significantly redesign their chips in order to allow their cards to be used in China. Allegedly, this is because the PBOC 2.0 and EMV chip standards are incompatible.[644]

---

[642] Appellate Body Report, *US – Carbon Steel*, para. 157.

[643] See, e.g. United States' second written submission, paras. 153-165; response to Panel question No. 106, para. 47.

[644] United States' response to Panel question No. 94, para. 97.

As we noted in paragraph 7.473 above, the United States does not provide any evidence to indicate that the redesign would be so "significant" so as to effectively "lock" EPS suppliers out of the market entirely.[645] Accordingly, in the absence of any evidence that an EPS supplier would not be able to take such steps to make its cards compatible with this standard due to costs or other reasons, or that competing standards are inherently incompatible, we consider that the United States has failed to establish that the need to comply with this standard would ensure that CUP is the sole supplier. We consider this to be the case even when we assess this, in the light of current evidence, together with other elements identified in the instruments.

Economic barriers imposed by the instruments

7.500 Lastly, we address the United States' contention that the instruments in question make it "economically unviable" for any foreign EPS supplier to participate in that market, thereby entrenching CUP as the sole supplier in the market for RMB bank card transactions. The United States argues that, because issuers and acquirers are required to join the CUP network, and pay for that access, it makes "no economic sense" for these entities to additionally pay to use the services of a foreign EPS supplier. In other words, we understand the United States to argue that foreign EPS suppliers have no incentive to enter the market because potential customers (i.e. issuers and acquirers) would not demand their services since they are obliged already to pay for the services of CUP.

7.501 In response to questions from the Panel following the second substantive meeting[646], the United States referred to the text of CUP's Operating Regulations, which set out one-time membership fees and testing fees. We explained in paragraph 7.291 that CUP's Operating Regulations were not identified in the United States' panel request and do not constitute measures at issue in this dispute. We further explained that the United States failed to establish a link between these regulations and any of the legal instruments under discussion. That concern aside, we observe that the cited provisions of CUP's Operating Regulations provide insufficient information on membership fees and testing fees to enable us to ascertain the additional costs or indeed the total costs that would be incurred by an issuer seeking services from particular EPS suppliers. Even if there are no additional costs, we do not have information on how significant any CUP fees are relative to the profits that issuers and acquirers may earn in the marketplace. Nor has the United States explained what fees participating institutions would incur if they wished to join the networks of other EPS suppliers. In the absence of such evidence, we are unable to gauge whether those costs are significant enough to discourage issuers. Despite asserting that the membership and testing fees have this "discouraging" effect, the United States has not provided evidence that issuers, acquirers or merchants are or would in fact be unwilling to join the network of other EPS suppliers and pay additional fees required for such access. Due to the variety of factors that might influence the decision of an EPS supplier to enter the market for RMB payment transactions, we cannot merely accept the assertion that the mere imposition of the fees in question has had or will have the effect of preventing foreign EPS suppliers from entering and establishing themselves in China. We also note that there is evidence on record that a number of "dual-branded, dual logo" cards exist in the Chinese market, as noted by China[647], which suggests that EPS suppliers have in fact been willing to enter the market in some form. In the absence of other evidence, the fact that these cards exist in the market suggests that the fees have not dissuaded issuers or acquirers from seeking the services of other EPS suppliers.

7.502 We additionally note that, while it is foreseeable that there may be a cost associated with complying with the technical and business standards imposed by Document Nos. 17, 37, 49, 57, 76, 129, 142, 149 and 153, the United States has not provided evidence of the costs of compliance,

[645] Ibid.
[646] See United States' response to Panel question Nos. 86, 94 and 117.
[647] Exhibit CHN-112. See China's comments on the United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 67 and fn. 38; Exhibit CHN-112.

beyond suggesting that compliance might prove difficult or burdensome. In the absence of concrete evidence, we are again not persuaded that the cost associated with these or other business or technical requirements has dissuaded or would in the future dissuade issuers or acquirers from seeking the services of other EPS suppliers, thereby effectively establishing or maintaining CUP as the only supplier in the market.

7.503 We have pointed out that the instruments in question place CUP in a unique position in the Chinese EPS market. Through the issuer requirements, CUP is effectively assured that every card that might be issued by an EPS supplier other than CUP is effectively a "CUP" card, i.e. a card that is capable of operating over the CUP network. In other words, only dual-logo cards that bear the *Yin Lian*/UnionPay logo in addition to the logo of another EPS supplier may be issued. At the same time, the acquirer requirements oblige all acquiring institutions to be capable of acquiring transactions from cards bearing the *Yin Lian*/UnionPay logo, and terminal equipment requirements mandate that all merchants be capable of accepting these cards. Even though the relevant instruments would not prevent acquirers or merchants from accepting other cards, CUP has a significant foothold in the market. The fact that CUP does not have to invest in promoting its brand to issuing institutions (because issuer requirements are mandatory), and does not have to invest in persuading banks to acquire transactions for the CUP brand (because acquirer requirements are also mandatory) further solidifies CUP's privileged position.

7.504 Nevertheless, in the absence of specific legal provisions designating a company as the single supplier in a market, the United States in our view needs to provide evidence to sustain the assertion that the instruments produce economic effects that are so significant that they preclude other EPS suppliers from operating in the market.[648] In the present case, we have no evidence, e.g. economic analyses of profitability, price-cost margins, or demand elasticity, including in comparison with other markets, that would allow us to assess whether indeed the instruments at issue make it economically unviable for other EPS suppliers to establish themselves and operate in China. We note that parties in previous disputes have submitted economic analyses and econometric studies when alleging actual economic and trade effects of particular measures, and to support allegations that those effects are attributable to the measures.[649] Additional information on the conduct of CUP (e.g. price discrimination or evidence that CUP charges different customers different prices for the same service) could have assisted us in our analysis, but no such information was submitted. We are aware that relevant data may be difficult to obtain. However, given the lack of concrete evidence, we are unable to conclude that CUP is the sole supplier. Assertion without more is simply not enough.

Conclusions on collective assessment

7.505 Accordingly, for the reasons set out here and above, we find that the United States has not substantiated its claim that the instruments at issue collectively mandate the use of CUP or establish CUP as the sole supplier of EPS for all domestic RMB bank card transactions. The United States carries the burden to demonstrate that the measures operate together to establish or maintain CUP as

[648] In competition policy enquiries, for instance, monopoly power is found to exist if (i) the firm has a high share of a relevant market and (ii) there are entry barriers – perhaps ones created by the company's conduct itself – that allow the company to exercise substantial market power for an appreciable period of time. See U.S. Department of Justice (2008) "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act". In assessing the existence of a monopoly, competition authorities typically evaluate a company's market share and the durability of market power, i.e. the ability to price substantially above the competitive level for a significant period of time without erosion of the position by new entrants.

[649] For instance, the panel in *US – COOL* noted in this respect that the function of panels does not exclude, but may in fact require, the review of economic and econometric evidence and arguments. See Panel Reports, *US – COOL*, para. 7.452 and paras. 7.507-7.546. See also *Thailand – Cigarettes (Philippines)*, paras. 136-138; and *Philippines – Distilled Spirits*, para. 7.55, 7.109-7.113; and Appellate Body Report, *Thailand – Cigarettes (Philippines)*, paras. 136-138.

the exclusive supplier. That is, the United States must demonstrate that CUP is the only supplier permitted to operate in the Chinese market. It is not clear to us, in the absence of any concrete evidence, that the consequence of the instruments in question is to reduce the number of suppliers in the market to one. As we explained, in our view, the United States has failed to demonstrate that the instruments impose a legal barrier to entry, explicit or otherwise. We also found that the United States has failed to demonstrate that the technical requirements that must be met to operate in China preclude other EPS suppliers from operating in the market. Finally, we explained that we did not have sufficient evidence before us to accept the United States' allegation that the operation of the instruments makes it "economically unviable" to enter the market, such that no other EPS supplier would be willing to enter the market.

7.506 In reaching this conclusion, we are uncertain whether CUP currently operates in the market as the sole supplier for RMB bank card transactions. Although it is possible that this is the case, including for reasons unrelated to the instruments we have addressed above, we are not persuaded based on the arguments of the United States and the evidence before the Panel that the instruments in question establish or maintain CUP as the only EPS supplier in the market.

(f) Overall conclusions on the evaluation of the existence of the measures at issue

7.507 The Panel concluded above, as reflected in various legal instruments, as follows that:

(a) China, through Document Nos. 37, 57 and 129, imposes requirements on issuers that bank cards issued in China bear the *Yin Lian*/UnionPay logo, and furthermore, China, through Document Nos. 17, 37, 57, 76 and 129, requires that issuers become members of the CUP network, and that the bank cards they issue in China meet certain uniform business specifications and technical standards;

(b) China, through Document Nos. 37 and 153, imposes requirements that all terminals (ATMs, merchant processing devices and POS terminals) in China that are part of the national bank card inter-bank processing network be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo;

(c) China, through Document No. 153, imposes requirements on acquirers to post the *Yin Lian*/UnionPay logo and furthermore, China, through Document Nos. 37, 76 and 153, imposes requirements that acquirers join the CUP network and comply with uniform business standards and technical specifications of inter-bank interoperability, and that terminal equipment operated or provided by acquirers be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo;

(d) China, through Document Nos. 16, 8 and 254, imposes requirements that CUP and no other EPS supplier handle the clearing of certain RMB bank card transactions that involve either an RMB bank card issued in China and used in Hong Kong or Macao, or an RMB bank card issued in Hong Kong or Macao that is used in China in an RMB-denominated transaction;

(e) The United States failed to establish that China, through Document Nos. 37, 57, 16, 8, 219, 254, 103, 153, 149, 53, 49, 129, 76, 17 and/or 142, imposes requirements that mandate the use of CUP or establish CUP as the sole supplier of EPS for all domestic transactions denominated and paid in RMB; and

(f) Having regard to our assessment of the instruments in connection with the sole supplier requirement, the United States failed to establish that China, through

> Document Nos. 37, 57, 153, 219 and/or 76, imposes broad prohibitions on the use of "non-CUP" cards for cross-region or inter-bank transactions.

## F. THE UNITED STATES' CLAIMS UNDER ARTICLE XVI OF THE GATS

7.508 The United States argues that the six alleged requirements imposed by China on the supply of EPS are inconsistent with Article XVI of the GATS. The United States submits that China made mode 1 and mode 3[650] commitments in its Schedule covering the supply of EPS, wherein China committed not to maintain any limitations on the number of foreign EPS suppliers. Through the imposition of these six requirements, the United States asserts, China established and maintains a monopoly structure to ensure that CUP is the exclusive supplier of EPS for all RMB bank card transactions in China whenever a bank card is issued in China and used in China.[651] It further argues that the measures are not justified by any limitations, conditions or qualifications on market access in China's Schedule. As a result of this, the United States considers that the measures at issue are inconsistent with China's obligations under Articles XVI:1 and XVI:2(a) of the GATS.[652]

7.509 China argues that the United States has failed to prove that China made relevant market access and national treatment commitments under subsector (d) in relation to mode 1 and mode 3, and therefore requests the Panel to dismiss the United States' claims. According to China, claims under Article XVI are limited to the sectors and subsectors in which the responding Member has made market access commitments.[653] Even if the Panel were to conclude that China made specific commitments in respect of the particular services and suppliers at issue, China contends that the United States has failed to demonstrate that the alleged measures maintain or adopt limitations on the number of service suppliers in the form of monopolies or exclusive service suppliers to prove its claim under Article XVI of the GATS.[654]

7.510 Article XVI of the GATS, entitled "Market Access", provides in relevant part:

> 1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.
>
> 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
>
> > (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test

7.511 The Panel recalls that in the United States' view, the measures at issue are inconsistent with Articles XVI:1 and XVI:2(a) of the GATS. In the specific context of Article XVI:2(a), the Appellate

---

[650] The Panel will use the term "mode 3" to refer to the supply of a service that is "by a service supplier of one Member, through commercial presence in the territory of any other Member", as provided for in Article I:2(c) of the GATS.

[651] United States' second written submission, paras. 137-143; see also response to China's request for a preliminary ruling, Sections V.B to V.I; first written submission, paras. 12, 31, 37-72, and 79-92; opening statement at the first meeting of the Panel, para. 43; response to Panel question Nos. 4, 6, 17 and 23.

[652] See, e.g. United States' first written submission, paras. 37-40 and 70-72.

[653] China's first written submission, paras. 123 and 124; second written submission, para. 81.

[654] China's second written submission, paras. 90-102.

Body in *US – Gambling* explained that a complaining party must do two things to establish a *prima facie* case of violation. First, it must establish that a responding party has undertaken relevant market access commitments in its GATS Schedule and thereafter, it must "identify[] with supporting evidence, how the challenged laws constitute impermissible 'limitations'" falling within the meaning of one of the subparagraphs of Article XVI:2.[655] This same approach was followed by the panel in *China – Publications and Audiovisual Products*.[656]

7.512 We see no reason to depart from this approach and therefore, we begin by addressing whether China made market access commitments under mode 1 or mode 3 in respect of the services at issue. Only if we determine that China has made a commitment will we consider whether the requirements at issue impose limitations that are inconsistent with Article XVI of the GATS.

## 1. Whether China has made mode 1 or mode 3 market access commitments covering the supply of EPS

7.513 Consistent with Appellate Body guidance, we begin our analysis under Article XVI by determining whether China has undertaken relevant market access commitments in its GATS Schedule for subsector (d) and the two modes of supply relied on by the United States, i.e. modes 1 and 3. As China's Schedule contains different entries for these two modes, we first address China's mode 1 market access entry.

### (a) Mode 1 commitments

7.514 The United States argues that China has undertaken mode 1 market access commitments with respect to subsector (d) in its Schedule. Under mode 1, the word "Unbound" is followed by the qualifying phrase "except for the following," which in turn is further elaborated by two sentences that describe elements of the services within subsector (d). According to the United States, China's mode 1 commitment must be understood as recognizing that "payment and money transmission" services include aspects of "provision and transfer of financial information" and "advisory, intermediation and other auxiliary services" to the extent that such aspects are integral to the core service, and that such aspects are properly classified within "payment and money transmission" services and not in subsector (k) or (l). In the United States' view, the fact that there are elements of "provision and transfer of financial information, and financial data processing" and "auxiliary, intermediation, and advisory services" embedded in the core "payment and money transmission" services is not inconsistent with the principle that sectors must be scheduled in a mutually exclusive manner.[657]

7.515 China recalls its view that the services at issue are not properly classifiable under subsector (d) of its Schedule. China submits that its market access entry for subsectors (a) through (f) repeats, verbatim, the descriptions of subsectors (k) and (l), which appear under the heading of "[o]ther financial services as listed below".[658] In China's view, the identical language in the same Schedule cannot have two different meanings. The meaning of this portion of China's Schedule is that

[655] Appellate Body Report, *US – Gambling*, para. 143.
[656] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1354.
[657] United States' first written submission, para. 41; and response to Panel question Nos. 45, para. 118 and 46(b), para. 127.
[658] China notes that there is a minor difference consisting of a plural form in the mode 1 entry, which refers to "supplierS of other financial services" while subsector (k) states "by supplier of other financial services". In China's view, the latter appears to be a typographical error. China's response to Panel question No. 50, fn. 50.

China undertook no market access commitments under mode 1 with respect to subsectors (a) through (f), including subsector (d).[659]

7.516 China states that there are two possible ways of reading the "except" language in the mode 1 market access entry. The first is as a cross-reference to China's mode 1 market access commitment for subsectors (k) and (l). The second is as a description of the exception to China's unbound market access entry for subsectors (a) through (f) in mode 1. According to China, the "embedded services" theory proposed by the United States is contrary to the principle of mutual exclusivity and runs afoul of the principle of effective treaty interpretation. China argues that, in order to give effect to its unbound market access entry for subsectors (a) through (f), it is critically important to distinguish between those activities that are unbound in mode 1 and those activities that fall within the exception. If the United States has met its burden of proving that the services at issue in this dispute are classifiable under subsector (d), then, in China's view, the United States cannot simultaneously maintain that China undertook mode 1 market access commitments in respect of those services. For China, the services at issue cannot be covered in subsector (d), and also in subsectors (k) and (l).[660]

7.517 Australia submits that the commitment at issue is unclear, but is not unbound.[661] According to the European Union, China is unbound under mode 1 for subsectors (a) to (f), except for parts of the subsectors described in the two hyphens; China has then committed the actual service of "provision and transfer of financial information" and "advisory, intermediation and other auxiliary services" as stand-alone services under subsectors (k) and (l). The European Union is of the view that, if China had intended this entry to be a cross-reference, it should have been explicitly set out in the Schedule.[662] Guatemala submits that the two subsectors listed, respectively, under the mode 1 entry at issue and under subsectors (k) and (l) cover the same services, but refer to different commitments. According to Guatemala, there is no cross-reference among the subsectors.[663] Japan is of the view that, by inscribing "unbound except for the following", China intended to make no commitment and that the question to be addressed is whether EPS correspond to "provision and transfer of financial information […]".[664] Korea submits that the two subsectors committed under mode 1 of subsector (d) relate only to the services described under the latter subsector. In contrast, subsectors (k) and (l) are separate and distinct subsectors which are not confined to subsector (d). For Korea, China's cross-reference argument is misplaced because subsectors (a) to (f) on the one hand and subsectors (k) and (l) on the other are found under different subheadings.[665]

[659] China's first written submission, paras. 126 and 127.
[660] China's response to Panel question No. 50(a), para. 76; and second written submission, paras. 58-62.
[661] Australia's third-party response to Panel question No. 11.
[662] European Union's third-party response to Panel question No. 4, para. 13; and third-party response to Panel question No. 11, para. 34.
[663] Guatemala's third-party response to Panel question No. 4, para. 20; and third-party response to Panel question No. 11, para. 36.
[664] Japan's third-party response to Panel question No. 23, para. 3.
[665] Korea's third-party response to Panel question No. 4; and third-party response to Panel question No. 11.

7.518 The relevant section of China's Schedule is reproduced below (emphasis added):

| | |
|---|---|
| […]<br><br>B. Banking and Other Financial Services (excluding insurance and securities)<br><br>Banking services as listed below:<br><br>(a) …<br>(b) …<br>(c) …<br><br>*(d) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts(including import and export settlement);*<br>(e) …<br>(f) … | *(1) Unbound except for the following:*<br>- *Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;*<br>- *Advisory, intermediation and other auxiliary financial services on all activities listed in subparagraphs (a) through (k), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.*<br>(2) [...]<br>(3) […]<br><br>4) […] |
| - Motor vehicle financing by non-bank financial institutions | 1) Unbound except for the following:<br>- Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;<br>- Advisory, intermediation and other auxiliary financial services on all activities listed in subparagraphs (a) through (k), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.<br>(2) […]<br>(3) […]<br>(4) […] |

| | |
|---|---|
| - Other financial services as listed below: | |
| *(k) Provision and transfer of financial information, and financial data processing and related software by supplier of other financial services;*<br>*(l) Advisory, intermediation and other auxiliary financial services on all activities listed in subparagraphs (a) through (k), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.* | (1) *None*<br>(2) […]<br>(3) […]<br>(4) […] |
| - Securities | (1) […]<br>(2) […]<br>(3) […]<br>(4) […] |

7.519 The Panel notes that the market access entry under mode 1 contains the term "Unbound", which is qualified by the words "except for the following". In GATS schedules, the term "Unbound" means that, for a given sector and mode of supply, a Member undertakes no commitment.[666] The qualifying phrase "except for the following" suggests that there follows an exception to the general "Unbound" entry. The expression "Unbound except for the following" is then followed by the descriptions of two services listed in the two hyphens. These services are (i) "[p]rovision and transfer of financial information, and financial data processing and related software by suppliers of other financial services"; and (ii) "[a]dvisory, intermediation and other auxiliary financial services on all activities listed in subparagraphs (a) through (k), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy". The descriptions of these two services are nearly identical to the descriptions of subsectors (k) and (l) that, in the case of China's Schedule, appear under the subheading "[o]ther financial services as listed below"; the only difference is that the description in the first hyphen under the mode 1 entry at issue refers to "suppliers" in the plural, whereas the description in subsector (k) uses the singular form of the same term.[667] The mode 1 market access commitment assumed by China for subsectors (k) and (l) is full ("None").

[666] Paragraph 46 of the 2001 Scheduling Guidelines stipulates: "…, the Member remains free in a given sector and mode of supply to introduce or maintain measures inconsistent with market access or national treatment. In this situation, the Member must record in the appropriate column the word: UNBOUND. […]." See also paragraph 27 of the 1993 Scheduling Guidelines. Moreover, in *US – Gambling*, the Appellate Body, when examining the term "None" scheduled in the entry at issue in that dispute, found that "[t]his notation is the opposite of the notation 'Unbound', which means that a Member undertakes *no* specific commitment." Appellate Body Report, *US – Gambling*, fn. 257 (emphasis original).

[667] We agree with China that the singular form of the term "supplier" in subsector (k) appears to be a typographical error (see fn. 658 above). We note, first, that this singular form results in a grammatically incorrect phrase. In addition, subsector (xv) of the GATS Annex on Financial Services, on which China said its Schedule is based (China's first written submission, para. 80), refers to "suppliers" in the plural. The French and Spanish versions of subsector (xv) of the Annex on Financial Services also use the plural form for this particular term, as do the French and Spanish versions of China's Schedule.

7.520 The Panel observes that WTO Members commonly use the inscription "Unbound except for" in their GATS schedules. China has made use of it in other sectors listed in its Schedule.[668] Moreover, China employs this inscription for its mode 4 commitments as well, as have most other WTO Members.[669] What is particular about and sets apart the mode 1 entry in question, however, is the fact that the two services referred to are textually nearly identical to subsectors (k) and (l) for which China has undertaken specific commitments. Pursuant to Article 31 of the Vienna Convention, the Panel will examine the ordinary meaning of the text of the relevant mode 1 entry in its context and in the light of the object and purpose of the GATS and the WTO Agreement.

7.521 We turn first to an examination of the ordinary meaning of the terms used to describe the services that fall within the first hyphen. The description reads: "[p]rovision and transfer of financial information, and financial data processing and related software *by suppliers of other financial services*" (emphasis added). As there is no comma after "related software", the question arises whether the phrase "by suppliers of other financial services" relates only to the phrase "financial data processing and related software" which immediately precedes the reference to suppliers of other financial services, or whether that reference also qualifies the phrase "provision and transfer of financial information". In addressing this question, we note that the description of subsector (xv) of the GATS Annex , on which China's Schedule is based, does not contain a comma after the equivalent of "related software". However, the equally authentic French and Spanish versions of subsector (xv) of the Annex, which are relevant context for interpreting China's Schedule, shed useful light on this issue. In both of these versions, a comma has been added after the phrase "related software".[670] The French and Spanish versions of China's Schedule also include that comma. Moreover, we fail to discern a plausible rationale for why the services described as "financial data processing and related software" would warrant a reference to the suppliers of such services that was not equally warranted in the case of the services described as "provision and transfer of financial information". For these reasons, we consider that the phrase "by suppliers of other financial services" in the mode 1 entry at issue qualifies both the phrase "financial data processing and related software" and the phrase "provision and transfer of financial information".

7.522 We turn now to the word "other" in the phrase "by suppliers of other financial services". The ordinary meaning of the word "other" suggests that the services provided by the relevant suppliers are different from the services listed in the sectoral column with respect to subsectors (a) to (f).[671] In other words, a distinction appears to be made between two different categories of financial services suppliers: (i) the suppliers of financial services listed under subsectors (a) to (f) in the sectoral column of the Schedule, and (ii) the suppliers of "other financial services" which undertake the "provision and transfer of financial information, and financial data processing and related software" to other suppliers of financial services. If the phrase "provision and transfer of financial information […]" concerned suppliers providing the financial services at issue in subsectors (a) to (f), or components thereof, it would be incongruous to refer to a category of suppliers supplying "other" financial services. Conversely, if there were an intention to refer to services other than those classifiable under subsectors (a) to (f), it would be necessary to make this intention clear, and the word "other" would serve that purpose. In our view, therefore, a textual analysis of the entry in the first hyphen supports

[668] See, for instance, China's mode 1 commitments with respect to "Retailing services (excluding tobacco)" ("Unbound except for mail order") and "Environmental services" ("Unbound except for environmental consultation services").

[669] We also recall in this regard paragraph 45 of the 2001 Scheduling Guidelines and paragraph 26 of the 1993 Scheduling Guidelines.

[670] The French version reads "[f]ourniture et transfert d'informations financières, et traitement de données financières et logiciels y relatifs, par les fournisseurs d'autres services financiers", and the Spanish version "[s]uministro y transferencia de información financiera, y procesamiento de datos financieros y soporte lógico con ellos relacionado, por proveedores de otros servicios financieros".

[671] "Other" is defined, *inter alia*, as "[e]xisting besides or distinct from that or those already specified or implied; further, additional. […]", *Shorter Oxford English Dictionary*, Vol. 2, p. 2035.

the view that "suppliers of other financial services" supply services that are not simply integral components of the services listed in the sectoral column (or, to use the United States' terms, an element "embedded" in a "core" service), but rather services that are separate and distinct from the services classifiable in subsectors (a) to (f).

7.523 We now examine the ordinary meaning of the terms used to describe the services that fall within the second hyphen, "[a]dvisory, intermediation *and other auxiliary financial services on all activities listed in subparagraphs (a) through (k)*, including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy" (emphasis added). First, that the reference to "and other auxiliary … services" suggests to us that the services covered in this hyphen are considered "auxiliary". The ordinary meaning of the word "auxiliary"[672] indicates that these services are separate and different from the services falling within subsectors (a) to (f), rather than "embedded"[673] in them. Furthermore, the second hyphen uses the phrase "auxiliary financial services *on all activities listed in subparagraphs (a) through (k)*" (emphasis added). This clear textual distinction between, on the one hand, the services listed in the sectoral column and, on the other hand, services that are "auxiliary" to them reinforces our view that auxiliary services cannot properly be considered to be the same as the services described in the sectoral column under subsectors (a) to (f), or integral components thereof. As an additional matter, it is noteworthy that the second hyphen refers to services which are "auxiliary" to all activities "listed in subparagraphs *(a) through (k)*" (emphasis added). China's sectoral column concerning "banking services" lists only subsectors (a) through (f), not (a) through (k). If the second hyphen were intended to set out services that are "embedded" in their entirety in services listed in the sectoral column with respect to subsectors (a) to (f), it would have referred to "activities listed in subparagraphs (a) through (f)", for China has not listed any other subsectors under "[b]anking services".[674]

7.524 Therefore, our analysis of the ordinary meaning of the terms used to describe the services under the mode 1 entry at issue does not allow us to conclude that these services are "elements" of "all payment and money transmission services" in subsector (d), as contended by the United States. It suggests, to the contrary, that these services are separate and distinct from the services listed in the sectoral column with respect to subsectors (a) to (f). To that extent, the text in the two hyphens is consistent with the view that this entry refers to the full market access commitment on mode 1 for subsectors (k) and (l).[675]

7.525 We turn now to an examination of relevant contextual elements, which include the remainder of China's Schedule and the Annex. The first element we take note of is China's sectoral commitments under mode 4, which generally read "[u]nbound, except as indicated in horizontal commitments". These inscriptions are found under both the market access and national treatment columns, and refer to the horizontal section of China's Schedule where the scope of China's mode 4 commitments is defined.[676] Hence, these mode 4 entries tell us that, as a general matter, China's Schedule does contain cross-references to another part of the same Schedule. We recognize, however,

[672] "Auxiliary" is defined, *inter alia*, as "[h]elpful; giving support or succour; […] Subsidiary, additional, ancillary; […]", *Shorter Oxford English Dictionary*, Vol, 1, p. 158.

[673] "Embed" (verb), is defined, *inter alia*, as "[p]lace or secure within something else, esp. within a larger or firmer entity; cause to be wholly contained within." Ibid. p. 816.

[674] While the reference to "subparagraphs (a) through (k)" may reflect an error, we must not lightly assume that this is the case. Neither party has suggested that the second hyphen contains an error.

[675] China's response to Panel question No. 50(a), para. 76.

[676] As noted above, the technique of cross-referencing mode 4 commitments is acknowledged in the 2001 Scheduling Guidelines. See fn. 669 above.

that the mode 1 entry at issue does not specifically refer to commitments undertaken under subsectors (k) and (l).[677]

7.526 Continuing our contextual analysis, we note the United States' argument that the limitations inscribed in the market access and national treatment columns "cannot change the scope of the sector description itself".[678] Hence, according to the United States:

> China's mode 1 commitment must be understood as recognizing that 'payment and money transmission' services include aspects of 'provision and transfer of financial information' and 'advisory, intermediation and other auxiliary services' to the extent that such aspects are integral to the core service, and that such aspects are properly classified within 'payment and money transmission' services and not in subsector (k) or (l).[679]

7.527 The Panel observes that subsectors (k) and (l) in China's Schedule are relevant contextual elements for the interpretation of the mode 1 entry at issue. As noted above, the descriptions of these two subsectors are almost identical to the descriptions of the services in the two hyphens. Thus, although the United States submits that limitations in the market access and national treatment columns cannot modify the scope of the sector description, it appears to us that the United States' proposed approach to interpreting the excepted language in the mode 1 entry at issue would do precisely that. By carving out elements of the services listed in the two hyphens on the grounds that these elements are "aspects" of the services described under subsector (d), the United States' approach would correspondingly remove these same elements from subsectors (k) and (l) which are committed in the sectoral column of China's Schedule.

7.528 We now consider the United States' view that there are "elements" of the services listed in the two hyphens that are "embedded" in the "core" "payment and money transmission services". In considering this argument, we determine first whether it is possible to identify clearly, on the one hand, the "core" service and, on the other hand, the "elements" of, respectively, "provision and transfer of financial information" and "advisory, intermediation and other auxiliary services" that, according to the United States, are included in the "core" service under subsector (d). We note that, in a response to a question by the Panel, the United States provided a chart illustrating, for each of the five components referred to in its panel request, the "aspects of EPS" which, according to the United States, are covered by the mode 1 market access commitment.[680] In the United States' view, these "aspects" include such elements as the provision of the underlying physical network and wiring; fraud protection; authorization routing, authorization decision solutions, global clearing management, exception handling solutions, automated calculation of the net financial position of a sender/receiver of financial transactions based on the desired currency and settlement service option selected by each party; and, the creation and execution of the transfer order for each financial institution participating in the value day payment activity. Moreover, when asked by the Panel to indicate those services that would fall within subsector (d), but would fall *outside* the mode 1 commitment, the United States cited the establishment of settlement accounts as "an example of an aspect of the service at the 'back end' of EPS processing … that falls outside China's mode 1 commitment".[681] As evidenced by this response, the United States was able to provide one example of what it considers to be a "core"

---

[677] We note, however, that the services described in the second hyphen reference "activities listed in subparagraphs (a) through (k)".

[678] United States' response to Panel question No. 45, para. 118; second written submission para. 107.

[679] United States' response to Panel question No. 45, para. 118. Therefore, according to the United States, the services in the two hyphens are "an integral part" of the provision of "payment and money transmission services", while subsectors (k) and (l) encompass services "that facilitate but are not integral to" the provision of "payment and money transmission services". Ibid. paras. 118 and 119.

[680] United States' response to Panel question No. 46(a), para. 121.

[681] United States' response to Panel question No. 77, para. 43.

service that falls within subsector (d), but falls outside of the two services described under mode 1. This contrasts with its detailed description of the "elements" of the two services that, according to the United States, are "embedded" in the "core" service.

7.529 In the Panel's view, these responses by the United States reveal the difficulty entailed by the United States' approach. It is rather counter-intuitive that, under the taxonomy provided by the United States, the "core" appears largely to coincide with the "embedded elements". In other words, were we to accept the United States' position, subsector (d) would appear to be composed overwhelmingly of the services described in subsectors (k) and (l).[682] Moreover, in the case of subsector (d), these services would be "integral to a core service", while, in the case of subsectors (k) and (l), the same services would be supplied "independently", as the United States put it.[683] In our view, the result of the approach proposed by the United States is difficult to reconcile with the Appellate Body's clarification that a specific service cannot fall within two different sectors or subsectors.[684]

7.530 Furthermore, in response to a question from the Panel, the United States submits that the GATS framework itself recognizes the interrelated nature of financial services. According to the United States, this "interrelated nature" is illustrated by the fact that the GATS Annex on Financial Services covers (i) services that are "auxiliary" to "the activities listed in subparagraphs (v) through (xv)" in subsector (xvi), as well as (ii) "provision and transfer of financial information" provided by suppliers of "other financial services" in subsector (xv).[685] In the United States' view, "whether an aspect of a service falls into one of these separate subsectors as an independent service or whether it falls into one of the other subsectors depends on how central that aspect is to the provision of the service described".[686]

7.531 We recall that the Annex is relevant context for the interpretation of China's Schedule and that subsectors (xv) and (xvi) of the Annex correspond to, respectively, subsectors (k) and (l) in China's Schedule. We agree that various financial services subsectors listed in the Annex may be "interrelated" in practice. As we have said, the reading proposed by the United States is in our view difficult to reconcile with the principle that sectors and subsectors must be mutually exclusive. In view of this principle, the fact that the financial services described in subsectors (xv) and (xvi) of the Annex may be "interrelated" with other financial services in the Annex does not mean that they can be properly classified as those other services. By the same token, it may well be that the services in subsectors (k) and (l) in China's Schedule are "interrelated" with the services committed under subsectors (a) to (f). However, this does not mean that the services in subsectors (k) and (l) – or aspects thereof – are classifiable under subsectors (a) to (f). Furthermore, the United States has not provided a principled basis for evaluating how "central" an aspect of a service is to the provision of a

[682] We recall that the United States' panel request (WT/DS413/2) also referred to subsectors (k) and (l) of China's Schedule. However, in the course of these proceedings, the United States did not put forward any claims on the basis of commitments in these subsectors.

[683] As we explained above in Section VII.D, paragraph 7.188, the mere fact that separate suppliers provide one particular component of an integrated service does not in itself imply that that component should be classified as a distinct service. While in our view a composite service may consist of component services supplied by one or more supplier(s), all these components belong to the "integrated" service and are classified as such. To that extent, those same component services are not classifiable under other subsectors even when supplied "independently".

[684] The Appellate Body found that "[b]ecause a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or subsector within which that service falls, a specific service cannot fall within two different sectors or Subsectors. In other words, *the sectors and subsectors in a Member's Schedule must be mutually exclusive*." Appellate Body Report, *US – Gambling*, para. 180 (emphasis added).

[685] United States' response to Panel question No. 46(b), para. 128.

[686] Ibid.

particular service described in a schedule, nor has it explained what degree of centrality would warrant classifying that aspect as one or other service.

7.532 The United States additionally refers to paragraph 8 of the Understanding on Commitments in Financial Services in support of its view that a service may include elements of "provision and transfer of financial information, and financial data processing". [687] According to the United States, this provision means that "the provision and transfer of financial information and data processing is central to the supply of many different financial services, and, according to the Understanding, signatory WTO Members cannot frustrate their commitments by, for example, blocking the ability to communicate and process information."[688] We observe, first, that, as acknowledged by the United States, China is not a party to the Understanding.[689] Hence, paragraph 8 of the Understanding is not applicable to China. Second, we do not question that, in many, if not most cases, "transfers of information or the processing of financial information, including transfers of data by electronic means" may be an important part in the provision of financial services. However, even if paragraph 8 of the Understanding on Financial Services were relevant to this dispute, we do not see how this provision could detract from our interpretation, which is based on the text of the entry in the first hyphen and which led us to the conclusion that "suppliers of other financial services" supply services that are separate and distinct from the services classifiable in subsectors (a)-(f).

7.533 To sum up our analysis so far, we note that, unlike China's mode 4 commitments, the mode 1 commitment at issue does not refer explicitly to another section of China's Schedule. Our textual analysis led us to the view that the services described in the two hyphens are distinct from the services listed in the sectoral column under subsector (a) through (f), and that they involve different suppliers. Therefore, the services referred to in the two hyphens cannot constitute "elements" of the services encompassed under subsector (d). Furthermore, the interpretation proposed by the United States is difficult to reconcile with the principle that a specific service must not fall within two different sectors or subsectors.

7.534 Based on the preceding analysis, we consider that the mode 1 entry at issue does not result in a market access commitment under mode 1 for "all payment and money transmission services". In our assessment, China's mode 1 market access entry concerning subsectors (a) to (f) should be understood instead as referencing China's mode 1 market access commitment for subsectors (k) and (l), which, as noted above, is fully bound. To our minds, the meaning and effect of this entry is to indicate that, although there are no mode 1 commitments for subsectors (a) to (f), there are commitments under mode 1 for services falling within subsectors (k) and (l), which services are often provided in connection with services classified under subsectors (a) to (f). In other words, it is our view that in this particular instance, the phrase "except for the following" has not been used to undertake a market access commitment under mode 1 for subsectors (a) to (f). Rather, it serves to alert the reader to other relevant content in China's Schedule – in this case, the full mode 1 commitment undertaken by China under subsectors (k) and (l) of its Schedule.

7.535 Our interpretation of the mode 1 entry at issue must also be considered in the light of the object and purpose of the GATS and the WTO Agreement. We identified the relevant object and purpose of the agreements in Section VII.D.2(c) above. We consider that our conclusion that the

[687] Paragraph 8 of the Understanding on Commitment in Financial Services stipulates: "No Member shall take measures that prevent transfers of information or the processing of financial information, including transfers of data by electronic means, or that, subject to importation rules consistent with international agreements, prevent transfers of equipment, where such transfers of information, processing of financial information or transfers of equipment are necessary for the conduct of the ordinary business of a financial service supplier".

[688] United States response to Panel question No. 46(b), para. 131; and second written submission, paras. 114 and 115.

[689] Ibid.

entry at issue references China's market access entry commitments for subsectors (k) and (l) is not inconsistent with the object and purpose of those two agreements. In giving the words contained in the two hyphens the meaning they can be reasonably understood to bear in their context, our interpretation ensures security and predictability of specific commitments.

7.536 From a strictly legal perspective, it may seem unusual to reference services classifiable under subsectors (k) and (l) in an entry that concerns subsectors (a) to (f). However, as explained above, we do find it difficult to read the mode 1 entry at issue as creating a market access commitment for subsector (d). We consider that, on balance, our reading is the better reading of this particular entry. As we have said, the services listed in the two hyphens are often supplied in connection with services listed under subsectors (a) to (f). To that extent and taking a broader perspective, it is not unreasonable to read in the words used in their context a desire on the part of the negotiators to clarify that, although China was not prepared to make any mode 1 market access commitments for services classifiable under subsectors (a) to (f), it did make unqualified market access commitments for other relevant services.

7.537 We consider that our interpretation of the mode 1 entry at issue pursuant to Article 31 of the Vienna Convention does not leave the meaning ambiguous or obscure, nor does it lead to a result which is manifestly absurd or unreasonable. Accordingly, we do not find it necessary to resort to supplementary means of interpretation under Article 32 of the Vienna Convention. We also note that the parties did not provide any evidence of the negotiating history that could help to confirm our interpretation of this entry.[690]

7.538 Based on the above considerations, we conclude that China has no market access commitments under mode 1 with respect to the services encompassed under subsector (d) of its Schedule.

(b) Mode 3 commitments

7.539 The Panel now examines what market access commitments China has undertaken in subsector (d) and mode 3, and if so, whether these commitments apply to EPS suppliers of other WTO Members. The Panel notes that China's Schedule contains a relevant entry in the column entitled "Limitations on market access".[691]

7.540 The United States argues that under the market access commitments for mode 3, China scheduled certain limitations regarding geographic coverage, potential clients, and licensing, all of which were to be eliminated within five years after China's accession, i.e. in December 2006. Therefore, since December 2006, China's Schedule provides no market access limitations under mode 3 with respect to EPS.[692]

7.541 China argues that its market access commitments for subsector (d) and mode 3 are limited to foreign financial institutions (FFIs) and did not expire five years after China's accession. As regards the heading "clients" in its mode 3 market access entry, China submits that no limitations expired in December 2006. Rather, it is on that date that China's commitment became effective. China argues that as of that date, FFIs were to "be permitted" to provide relevant services "to all Chinese clients". China made no commitment to permit entities that are not FFIs to provide these services, at any point in time. Referring to another heading in its mode 3 entry concerning "licensing", China observes that its commitment to eliminate existing non-prudential measures was similarly limited to FFIs. And with regard to the qualifications for engaging in local currency business that are also specified under

[690] See notably China's response to Panel question No. 50(b), para. 79.
[691] For the text of the entry, see Annex G to this Report.
[692] United States' first written submission, para. 19.

the heading "licensing", China intended that only FFIs meeting these qualifications would engage in local currency business.[693]

7.542 China notes that the term "financial institutions" has been widely used by various WTO Members in their Schedules, without a definition of the term.[694] China further points out that its mode 3 market access entry pervasively refers to FFIs, and that it does not refer to "financial service suppliers" or "foreign service suppliers".[695] China submits that consistent with the principle of effective treaty interpretation, this difference in terminology must be given effect. According to China, the ordinary meaning of the term "FFIs" is narrower than the term "financial service suppliers". In China's view, financial institutions are banks and other types of regulated financial institutions. According to China, dictionary definitions reflect that there are two essential attributes of a financial institution: (1) that it collects funds from the public (whether as deposits or investments), and (2) that it is subject to some type of regulation or supervision.[696] China observes that this general definition is consistent, *inter alia*, with the definition given to the term "foreign financial institutions" in its own domestic financial service regulations.[697] China considers that in the particular context of China's Schedule, the term "FFIs" refers to foreign banks and finance companies.[698]

7.543 China additionally points out that limiting its commitments to FFIs is consistent with the fact that the services classifiable under subsectors (a) to (f) are core banking and finance services provided by regulated financial institutions. China adds that the United States' position on FFIs would have absurd consequences. For example, it would mean that non-bank foreign service suppliers could enter the Chinese market and begin accepting deposits or making loans, while foreign banks – the types of entities that actually supply these services – would need to establish a branch or subsidiary in China and engage in foreign currency business for three years before obtaining a bank licence. Also, non-FFIs would then have had a right of market access since 2001, which is the date of China's accession to the WTO. China observes that like other WTO Members, it plainly did not intend entities that are not financial institutions subject to comprehensive supervision by their home countries to enter the Chinese market to provide these types of banking services.[699]

7.544 China argues, lastly, that the United States failed to demonstrate that EPS suppliers of other WTO Members are FFIs. China contends that they are not FFIs under any understanding of the term and notes that they go out of their way to disavow any such status.[700] China considers that the United States has therefore failed to demonstrate that China's commitments are relevant to the services and service suppliers at issue.[701]

7.545 The United States responds that China's mode 3 market access commitments are not limited to FFIs. Although China includes certain limitations with regard to FFIs, this does not mean that its commitments are limited to FFIs. It would have been necessary to impose such a limitation explicitly

---

[693] China's first written submission, paras. 134-136.

[694] China provides relevant excerpts from the Schedules of Angola, Australia, Côte d'Ivoire, El Salvador, Guatemala, Honduras, Korea, Malta and Singapore in Exhibit CHN-85.

[695] China notes, however, that the term "foreign service supplier" appears approximately thirty different times throughout China's Schedule. China's response to Panel question No. 63, para. 116.

[696] China's first written submission, paras. 140-142; response to Panel question Nos. 49, para. 71; 51, para. 80; and 52(a), para. 82.

[697] China refers to the Regulations of the People's Republic of China on Administration of Foreign-Funded Banks of 2006, Exhibit CHN-45.

[698] China's response to Panel question No. 49, para. 72.

[699] China's first written submission, para. 143; second written submission, paras. 71-73.

[700] China refers e.g. to MasterCard Worldwide Terms of Use and to Visa Gift Card Holiday Guide, Exhibit CHN-84. See China's response to Panel question No. 49, para. 72.

[701] China's first written submission, paras. 145 and 146; response to Panel question Nos. 49, para. 72; and 53, para. 95.

by prefacing the commitments with language like "unbound except" or "the service may only be supplied by ...". The United States argues that the only limitations China may impose are prudential authorization criteria and the now defunct restrictions on geographic scope and use of domestic currency as well as on-going requirements applicable to banks. Nothing in China's Schedule supports the view that China may condition the supply of a service on the aforementioned criteria and restrictions listed in the market access column *and* in addition require that another Member's service supplier meet unspecified criteria to be recognized as a "financial institution".[702]

7.546 The United States further argues that even if China's commitments were somehow limited to FFIs, the definition of that term offered by China is much too narrow. The United States notes that many dictionary definitions of the term "financial institutions" are much broader. In the United States' view, EPS suppliers of other WTO Members would qualify as financial institutions.[703] The United States also points out that in 2002 CUP was referred to by the PBOC as a joint-stock "financial institution" that provides an inter-bank bank card information switching network and associated specialized services.[704] The United States further notes that a CUP executive during a press event similarly referred to CUP as a "financial institution for offering cross-bank information exchange network and specialized services for bankcards".[705]

7.547 Australia submits that, although China included certain limitations with respect to foreign financial institutions, this does not mean that its commitments are limited to foreign financial institutions. If this were the case, China would have included the words "unbound except", or "otherwise unbound" in its Schedule, as it has with respect to mode 1. According to Australia, a Member wishing to limit the service suppliers that are permitted to provide a particular service must explicitly inscribe such a limitation in its schedule.[706] The European Union argues that there is no "*chapeau*" along the lines of "unbound except for the following" preceding the limitations listed under subsector (d), mode 3 in China's Schedule. This is different from the text preceding the limitations on market access for modes 1 and 4, which clearly state "Unbound except …". In the European Union's view, therefore, anything that is not explicitly included in the scheduled limitation (which has already run its course), would fall under China's commitment to provide market access.[707] Japan submits that the absence of any "Unbound except …" or similar language with respect to the market access and national treatment commitments under mode 3 strongly indicates that China's commitments are not limited to "financial institutions".[708]

7.548 The Panel notes that both parties agree that China has market access commitments in subsector (d) and mode 3 that apply to FFIs. The parties disagree, however, on whether these commitments are limited to FFIs and on whether EPS suppliers are FFIs. As it is common ground (and we agree with the parties on this) that China has commitments that apply to FFIs, we first determine whether, for the purposes of China's commitments concerning subsector (d) and mode 3, EPS suppliers of other WTO Members are FFIs. The first point to be noted is that the term "FFIs" is not defined in China's Schedule. Nor is it defined in the GATS or any of its annexes. However, section C of the relevant mode 3 market access entry in China's Schedule makes it clear, in our view, that the term includes, at a minimum, foreign banks and foreign finance companies. Section C is entitled "Licensing" and specifies that FFIs that meet certain conditions "are permitted to establish a subsidiary of a foreign bank or a foreign finance company in China". This implies that foreign banks

[702] United States' second written submission, paras. 116 and 121-123.
[703] United States' second written submission, paras. 117 and 124.
[704] Paragraph 2 of the Reply of PBOC on the Opening of CUP, Exhibit US-27.
[705] "China Unionpay Executive Met the Press", Answer to Question 5 of 26 March 2002, Exhibit US-101.
[706] Australia's third-party submission, para. 24-25; third-party statement, para. 10.
[707] European Union's third-party submission, para. 36.
[708] Japan's third-party statement, para. 9; response to Panel question No. 23(b), para. 4.

and finance companies are considered FFIs for the purposes of China's Schedule. If a foreign finance company were not an FFI, it could not "establish a subsidiary of ... a foreign finance company in China". Finance companies are defined as "non-bank financial institution[s] that provide[] credit to customers that are either purchasing or leasing a product".[709] We thus deduce from the relevant mode 3 entry itself that, for purposes of China's Schedule, FFIs include at least foreign banks and foreign finance companies. We also understand that the latter are a type of non-bank financial institution.

7.549 To determine whether EPS suppliers of other WTO Members constitute non-bank FFIs, we must first ascertain the ordinary meaning of the term "FFIs". We note that the parties have submitted several dictionary definitions of the term "financial institutions". It emerges from these materials that the term "institutions" refers to organizations, companies or other entities.[710] The definitions provided to us also confirm that banks and finance companies are financial institutions.[711] We further observe that some of the definitions before us are quite narrowly drawn, e.g. one dictionary describes a financial institution as any organization "… that collects funds ... and invests these funds or lends them on to borrowers".[712] Other dictionaries or reference sources define the covered activities more broadly and suggest that the term is not limited to banks and finance companies. Specifically, these sources state that a financial institution is (a) "[a]n organization whose core activity is to provide financial services or advice in relation to financial products"[713]; (b) "[a] firm that handles financial transactions or gives financial advice" or "[a]n establishment responsible for … facilitating transmission of funds"[714]; or (c) "[a] business organization[] that offer[s] a broad base of financial services or specialize[s] in specific functions, products or services, e.g., commercial banks, … and others that deal in money or equivalents".[715]

7.550 We find that some of the above-quoted dictionary definitions are sufficiently broad to capture EPS suppliers. Indeed, looking at these particular definitions, we consider that EPS suppliers can be reasonably described as (a) organizations whose core activity is to provide specific financial services; (b) establishments that handle financial transactions and facilitate the transmission of funds; or (c) business organizations that specialize in specific financial service functions or financial services, or that deal in money equivalents (electronic retail payment instruments).

7.551 As always, the ordinary meaning to be given to a treaty term must fit the specific context within which that term appears. We recall in this respect that the term "FFIs" appears in an entry that relates to China's commitments concerning certain financial services, specifically those classified under subsectors (a) to (f). This fact, together with the aforementioned dictionary definitions,

---

[709] *The Palgrave Macmillan Dictionary of Finance, Investment and Banking*, Exhibit CHN-88, p.206. This dictionary also states that finance companies "generate[] revenues based on the differential between [their] own rate of borrowing and the rate at which [they] lend to customers". China further explains that the principal difference between a bank and a finance company is that a bank has a licence to borrow money in the form of demand deposits and other repayable funds from the public, while a finance company borrows money from other sources. China's response to Panel question No. 53, fn. 58.

[710] E.g. Oxford Dictionary of Finance and Banking, Exhibit US-76; Webster's New World, Finance and Investment Dictionary, Exhibit CHN-90; Black's Law Dictionary, 9th Edition, (West Publishing 2010) (Black's Law Dictionary), Exhibit CHN-91.

[711] E.g. *A Dictionary of Finance*, Exhibit CHN-48, which refers to banks and finance houses. A "finance company" is defined as "a non-bank financial institution […]", *The Palgrave Macmillan Dictionary of Finance, Investment and Banking*, Exhibit CHN-88.

[712] *A Dictionary of Finance*, Exhibit CHN-48. Similar definitions are provided in Barron's Dictionary of Finance and Investment Terms, Exhibit CHN-49; and Webster's Finance and Investment Dictionary, Exhibit CHN-90.

[713] Oxford Dictionary of Finance and Banking, Exhibit US-76.

[714] *Banking Terminology*, Exhibit US-113.

[715] The Dictionary of Banking, Exhibit US-114.

suggests to us that in the specific context of China's Schedule, "FFIs" are any foreign organizations, companies or other business entities that provide financial services classified under subsectors (a) to (f).

7.552 China argues that financial institutions are, in addition, regulated, or supervised, organizations.[716] In support of this assertion, China submitted a dictionary definition and legal definitions contained in certain free trade agreements to which the United States is a party, e.g. the North American Free Trade Agreement (NAFTA).[717] Regarding the definitions provided in free trade agreements, we note that they are not applicable to all WTO Members or even the two parties to the present dispute. Moreover, they are definitions that were agreed on by the parties to that agreement. The parties' agreement need not necessarily accord with the ordinary meaning of the term "financial institutions". As concerns the dictionary definition[718], we note that other definitions provided to us do not suggest that financial institutions are by definition regulated organizations. We do not dispute that financial institutions are commonly subject to some domestic regulation or supervision. We understand that the extent to which this is the case varies depending on the country and the type of financial institution and may even vary over time for a given country and type of financial institution. In our view, the existence, nature and extent of any regulation and supervision reflect policy choices, and we do not consider that regulation or supervision is a defining characteristic of financial institutions. We are therefore unable to accept China's argument on this point.

7.553 Other evidence placed on the record includes US and Chinese domestic legal documents. The United States submitted a law of the United States, Section 5312(a)(2)(L) of the United States' Code.[719] That section, which relates to reporting requirements on monetary transactions, bank secrecy and money laundering, provides a legal definition of the term "financial institution". Among the entities listed is "an operator of a credit card system". Thus, Section 5312(a)(2)(L) characterizes EPS suppliers that process credit card transactions as "financial institutions". China has pointed out, however, that another United States law, the Hiring Incentives to Restore Employment Act, defines "financial institutions" more narrowly as including essentially all entities accepting deposits, holding financial assets for the account of others or engaged in the business of investing or trading in securities.[720]

7.554 China also refers the Panel to documents issued by the China Banking Regulatory Commission (CBRC) in 2003, i.e. after China's accession to the WTO.[721] The documents indicate that CBRC rescinded the "financial institution" licence that had been issued to CUP when it was

[716] China's first written submission, para. 140.

[717] *The Palgrave Macmillan Dictionary of Finance, Investment and Banking*, Exhibit CHN-46. The free trade agreements cited by China are: the North American Free Trade Agreement, Exhibit CHN-50; the United States – Australia Free Trade Agreement, Exhibit CHN-51; and the Korea – United States Free Trade Agreement, Exhibit CHN-52. According to China, a standard definition of "financial institution" found in these agreements is a "financial intermediary or other enterprise that is authorized to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located". China's first written submission, fn 82.

[718] *The Palgrave Macmillan Dictionary of Finance, Investment and Banking*, Exhibit CHN-46, defines "financial institution" as "[a] regulated organization that provides a range of banking and investment services" (Exhibit CHN-46, p. 207).

[719] 31 U.S.C. 5312(a)(2)(L), Exhibit US-102.

[720] United States Hiring Incentives to Restore Employment Act, H.R. 2847, 111th Congress §1471 (2010), Exhibit CHN-94.

[721] Transfer of Regulatory Function with Respect to China UnionPay (2003), Exhibit CHN-97, and Notice regarding relevant issues on the transfer of the regulatory responsibilities of China UnionPay Co., Ltd. (2003), Exhibit CHN-97.

established in 2002.[722] The regulatory responsibility over CUP was to be transferred in December 2003 from the "non-bank financial institution regulatory department" of CBRC to PBOC. The reason provided for this transfer of regulatory functions was that the business scope of CUP "does not include financial services" and that it "therefore is not a financial institution".[723] We note as an initial matter that these documents concern CUP, not EPS suppliers of other WTO Members.[724] Furthermore, they suggest that CUP *was* considered, and authorized as, a non-bank financial institution before its financial institution licence was revoked in 2003. Finally, we recall that the basis for rescinding CUP's licence as a financial institution was the CBRC's view that CUP did not provide the specific financial services that are regulated and supervised by the CBRC, i.e. China's banking regulator.[725]

7.555 China further draws the Panel's attention to its Regulations on Administration of Foreign-Funded Banks which define a "foreign financial institution" as "a financial institution that is registered outside the People's Republic of China and approved or licensed by the financial regulatory authorities of the country or region where it originated".[726] This definition is provided for the purposes of these particular Regulations, and the Regulations talk about FFIs in the specific context of establishment of foreign-funded banks.[727]

7.556 In considering the above-mentioned United States and Chinese legal documents, we observe that they emanate from, and reflect the particular objectives and needs of, the domestic legal systems of the United States and China. It is therefore important to be cautious when interpreting the treaty term "FFIs" that we do not attribute undue weight to these documents for the purposes of our interpretative task. In particular, as regards the legal definitions provided in some of these documents, we consider that it would be inappropriate to draw, from these context-specific definitions, general conclusions as to the meaning and scope of the term "FFIs" as it appears in China's Schedule. At any rate, these various documents do not suggest to us that there is anything inherently questionable about conceiving of EPS suppliers as non-bank financial institutions.

7.557 Evidence submitted by the parties shows that certain EPS suppliers – specifically those that have adopted a four-party business model – refer to their clients as financial institutions.[728] This is not surprising, as issuers and acquirers are often banks. In contrast, these EPS suppliers do not appear to refer to themselves as financial institutions.[729] We have said above that industry sources may

[722] Regarding the "financial institution" licence from 2002, we note paragraph 2 of the Reply of PBOC on the Opening of CUP, Exhibit US-27. It provides that "China UnionPay Co., Ltd. is a joint-stock financial institution that provides an inter-bank bankcard information switching network and specialized services in connection therewith".

[723] It remains unclear on what definition of "financial services" the CBRC based this assessment.

[724] Nonetheless, as we have explained above in Section VII.E of this Report, CUP in our view is an EPS supplier.

[725] We understand that CUP is now subject to the supervision and regulation of another financial agency, the PBOC. We also recall that we have found above in Section VII.D that, for the purposes of China's GATS Schedule, the services provided by EPS suppliers *are* financial services and are properly classified under subsector (d) of that Schedule.

[726] Article 3 of the Regulations of the People's Republic of China on Administration of Foreign-Funded Banks, Exhibit CHN-45.

[727] See Article 2 of the Regulations of the People's Republic of China on Administration of Foreign-Funded Banks. Article 3, which sets out the definition, opens with the phrase: "A foreign financial institution referred to in these Regulations shall mean …". Also, Article 3 provides exactly the same definition for "foreign banks", except that it defines these as commercial banks rather than financial institutions.

[728] See, e.g. Visa 2008 IPO Prospectus, Exhibit US-3, pp. 128-129; MasterCard 2010 Annual Report, Exhibit US-6, p. 4; MasterCard Worldwide Terms of Use and Visa Gift Card Holiday Guide, Exhibit CHN-84.

[729] China has submitted print-outs from the websites of two EPS suppliers of the United States that have adopted the four-party model (Exhibit CHN-84). In these print-outs, the EPS suppliers state that they are

sometimes shed useful light on the ordinary meaning of terms.[730] In this instance, we do not consider that much weight can be attributed to the EPS industry's usage of the term "financial institutions". We would not find it unusual if companies in a given industry did not claim to be subject to what often amounts to burdensome regulation as financial institutions, unless it is important for business reasons to be considered a financial institution (as in the case of banks, for instance). Moreover, what ultimately matters are the views of regulators. Hence, it was open to the drafters of China's Schedule to bring EPS suppliers of other WTO Members within the ambit of the Schedule term "FFIs" even if EPS suppliers did not refer to themselves as financial institutions. For these reasons, we consider that the EPS industry's usage of the term "financial institutions" does not demonstrate that, despite the broad ordinary meaning of the term "FFIs", EPS suppliers of other WTO Members are not FFIs for the purposes of China's mode 3 entry.

7.558 At the end of our analysis of the ordinary meaning of the term "FFIs", we thus remain of the view that the term "FFIs" as it appears in China's Schedule is reasonably susceptible of meaning any foreign institutions that provide financial services classifiable under subsectors (a) to (f). This would notably include EPS suppliers of other WTO Members. But our analysis so far has shown that the term "FFIs" likewise bears the narrower meaning argued for by China, according to which the term covers only foreign banks and finance companies providing these services.

7.559 We therefore need to examine further and in more detail whether the relevant context confirms or puts in doubt either of the above-noted ordinary meanings. We begin this task by noting that the relevant mode 3 entry lists temporary or permanent (i) geographic restrictions (section A), (ii) client limitations on local currency business (section B), and (iii) licensing requirements, including general authorization criteria[731] and qualifications for engaging in local currency business (section C). These elements are applicable to all FFIs. We perceive no basis to conclude that it would be unreasonable to impose these limitations on EPS suppliers of other WTO Members.

7.560 Additionally, we note that the licensing requirements in section C include minimum asset requirements. They apply to FFIs wishing to establish "a subsidiary of a foreign bank or a foreign finance company in China", "a branch of a foreign bank in China" or "a Chinese-foreign joint bank or a Chinese-foreign joint finance company in China". Or, to put it differently, these requirements apply to foreign banks or finance companies that wish to establish in China in one of the specified forms of commercial presence.[732] As noted above, these requirements confirm that foreign banks and finance companies are FFIs. But if the term "FFIs" encompassed solely foreign banks and finance companies, it would have been simpler and more natural, in our view, for section C to refer to FFIs wishing to establish a "subsidiary in China" rather than "a subsidiary of a foreign bank or a foreign finance company in China", and to "a Chinese-foreign joint venture enterprise in China" rather than "a Chinese-foreign joint bank or a Chinese-foreign joint finance company in China". Conversely, if the term "FFIs" included, but was not limited to, foreign banks and finance companies, it would have been necessary to specify to which type of FFI the relevant asset requirements applied. For this reason, we consider, first, that the asset requirements support the view that foreign banks and finance companies are not the only institutions covered by the term "FFIs". Secondly, and contrary to China's contention, the asset requirements do not indicate, in our view, that only foreign banks and finance

---

not financial institutions and do not issue payment cards. China further provided a submission by one of these suppliers to Canada's Competition Tribunal in which a similar statement is made (Exhibit CHN-84, para. 11).

[730] See para. 7.89 above.

[731] Among these are prudential authorization criteria. China has stated that the term "prudential regulation" is generally understood to relate only to the regulation of deposit-taking financial institutions (e.g. to capital adequacy requirements). China's response to Panel question No. 55, para. 100.

[732] It appears to us that in order to establish a subsidiary "of a foreign bank", for instance, the FFI must be a foreign bank.

companies may establish a commercial presence in China to provide the services under subsectors (a) to (f).[733]

7.561 It should also be recalled that China's mode 3 market access entry relates to services that appear under the subheading "Banking services...". As we have determined in Section VII.D above that subsector (d) covers EPS, the subheading "Banking services" in our view does not support China's contention that the term "FFIs" covers foreign banks and finance companies, but not EPS suppliers of other WTO Members.

7.562 We also note that China's Schedule under "Banking and Other Financial Services" contains a separate subsectoral description which reads "motor vehicle financing by non-bank financial institutions". The parties agree that the non-bank financial institutions referred to in this description cover finance companies and/or other types of non-bank financial institutions.[734] China has explained that scheduling this commitment separately ensured that non-bank financial institutions would be able to provide motor vehicle financing immediately upon China's accession to the WTO in December 2001, without the limitations on market access inscribed for subsectors (a) to (f).[735] In our view, China's explanation concerning the separate commitment relating to motor vehicle financing by non-bank financial institutions is consistent with the view that FFIs include non-bank financial institutions. China's explanation would appear to imply that if China had wished to subject motor vehicle financing by non-bank financial institutions to the limitations inscribed for subsectors (a) to (f), China would have classified it under "Banking services" (subsectors (a) to (f)). We recall in this respect that China's mode 3 commitments concerning subsectors (a) to (f) apply to FFIs.

7.563 We further find relevant China's mode 3 market access entry concerning subsectors (k) and (l). This entry is also part of the commitments concerning "Banking and Other Financial Services". It specifies that "[b]ranches of foreign institutions are permitted". While this entry refers to "foreign institutions", thus omitting the word "financial", we attach no particular significance to this omission as the entry relates to subsectors listed under the heading "other financial services". We recognize that some of the services falling within subsectors (k) and (l) are provided by e.g. banks – such as advice on acquisitions and on corporate restructuring. But we do not consider that the services described in subsectors (k) and (l) are exclusively provided by banks and/or finance companies. For instance, the United States has noted that subsector (k) includes such information services supplied by financial news providers like Reuters and Bloomberg.[736] Similarly, subsector (l) includes the services provided by what are known as credit rating agencies.[737]

7.564 Also worthy of note are China's financial services commitments in the subsectors concerning insurance and securities services. The relevant entries use the terms "foreign insurance institutions" and "foreign securities institutions", respectively. Accordingly, the reference to foreign "institutions" is not unique to China's commitments in the subsector concerning banking services. China's Schedule does not provide much guidance as to the meaning and coverage of the term "foreign securities institutions". In contrast, it is clear from the Schedule that the term "foreign insurance institutions" is used broadly to cover not just foreign life and non-life insurers, but also insurance brokers.[738] Moreover, whereas outside the context of China's Schedule the term "financial institutions" is often

[733] China's response to Panel question Nos. 52(a), para. 87, and 80, para. 16.

[734] United States' response to Panel question No. 84(a), para. 59; China's response to Panel question No. 84(a), para. 32.

[735] China's response to Panel question No. 84(b), para. 33.

[736] United States' response to Panel question No. 45, para. 119. Subsector (k) refers *inter alia* to "[p]rovision and transfer of financial information".

[737] Subsector (l) refers *inter alia* to "credit reference and analysis, investment and portfolio research and advice".

[738] See notably section D of China's mode 3 market access entry concerning insurance and insurance-related services.

used to refer narrowly to banks and finance companies (as some of the dictionary meanings indicate), the terms "insurance institutions" and "securities institutions" to our knowledge are less commonly encountered. They do not suggest a narrow meaning.[739] To us, the use of parallel terms – financial institutions, insurance institutions and securities institutions, respectively – in China's financial services commitments provides further support for the view that the word "institution" may be understood to refer notably to companies that provide the relevant services.[740] We note that the EPS suppliers of other WTO Members to which the parties have referred in these proceedings are all companies.

7.565 Finally, China refers the Panel to the GATS Schedules of eight other WTO Members.[741] As they are all integral parts of the GATS, they also form part of the relevant context. The excerpts from other WTO Members' Schedules that China has provided to us use the term "foreign financial institutions" or "financial institutions", and do not offer a formal definition of either term. Several Schedules provide confirmation that banks and finance companies would be considered financial institutions for the purposes of these Schedules. We note, though, that the excerpts provided do not specifically indicate that EPS suppliers are financial institutions, or that they are not.[742] In the light of this, we do not find these other Schedules to be particularly instructive. As we have explained, the term "FFIs" in our view can refer to a variety of foreign institutions, including, but not limited to, banks and finance companies. Therefore, the fact that in some WTO Members' Schedules this term might possibly have been used in a narrower sense does not demonstrate that it would be improper, in the context of China's Schedule, to give it the meaning its words are capable of bearing. As the Appellate Body has observed, each Schedule has "its own intrinsic logic" and must be interpreted on its own merits.[743]

7.566 To sum up, the preceding contextual considerations either support or do not contradict the view that the term "FFIs" covers any foreign institutions that provide financial services classifiable under subsectors (a) to (f). Thus, on the basis of the ordinary meaning of the term "FFIs" read in the specific context provided by China's Schedule, we see no reason to construe that term in such a way that it would exclude EPS suppliers of other WTO Members.

---

[739] We note that while e.g. the above-mentioned *Oxford Dictionary of Finance and Banking*, Exhibit US-76, and the *Barron's Dictionary of Finance and Investment Terms*, Exhibit CHN-49, contain an entry for "financial institution", they do not contain entries for either "insurance institution" or "securities institution".

[740] It is pertinent to note that section D of China's mode 3 market access commitments concerning insurance services specifically states that the qualifications for establishing a "foreign insurance institution" include the requirement that the investor be a foreign insurance company with 30 years of establishment experience in a WTO Member. Thus, this particular entry appears to indicate that only companies can be foreign insurance institutions. We further note that one of the dictionaries that has been referred to by China has an entry concerning "insurance company" that says "[s]ee insurer". The word "insurer" is in turn defined as "[a] regulated institution that accepts the risks of insureds or cedants through the insurance mechanism …". See *The Palgrave Macmillan Dictionary of Finance, Investment and Banking*, pp. 272-273.

[741] "Use of the term 'financial institution" in other WTO Members' Schedules" (Exhibit CHN-85). The eight WTO Members are: Angola, Australia, Côte d'Ivoire, Honduras, Korea, Malta, Singapore and Venezuela.

[742] In contrast, Brazil's Schedule, which was not provided to us by China, contains the following definition: "Financial institutions subject to this commitment are classified as commercial bank, investment bank, consumer finance company, financial leasing company, brokers and dealers". See the horizontal note on financial services of Brazil's Schedule (GATS/SC/13). This definition appears to imply that EPS suppliers are not financial institutions for the purposes of Brazil's Schedule. We note, however, that unlike Brazil, China has not included a definition of the term "FFIs" in its Schedule. China itself has stated that in the absence of an explicit definition in its Schedule, treaty terms must be interpreted in accordance with customary rules of interpretation of public international law. China's response to Panel question No. 54, para. 97.

[743] Appellate Body Report, *US – Gambling*, para. 182.

7.567 The result of our interpretative analysis so far needs to be considered also in the light of the object and purpose of the GATS and the *WTO Agreement*. We have previously identified relevant objects and purposes of these two agreements.[744] With specific reference to the term "FFIs", we do not consider that interpreting that term so as to include EPS suppliers of other WTO Members would be at variance with the object and purpose of either the GATS or the *WTO Agreement*. In our view, the purpose of ensuring the security and predictability of commitments is served by giving the words used in China's Schedule the meaning that they are fairly capable of bearing in their context.

7.568 As an additional matter, we note that China has adverted to the importance of avoiding any interpretation of its mode 3 market access entry that would produce what it considers unreasonable results. Essentially, China submits that any interpretation of the entry in question must take full account of the fact that China was allowed to maintain geographic, client and non-prudential limitations for the first five years after its accession to the WTO, and that it is still allowed to impose prudential authorization criteria and qualifications requirements for engaging in local currency business. Under our interpretation of the term "FFIs", foreign non-bank financial institutions other than finance companies were, and are, subject to the same limitations as foreign banks and finance companies (which China accepts are FFIs). Our interpretation therefore steers clear of a result whereby, e.g. for the first five years, non-bank financial institutions other than finance companies could enter China's market without being subjected to the aforementioned limitations, while foreign banks and finance companies would have faced these limitations.

7.569 China further appears to suggest that any interpretation of the term "FFIs" that would cover institutions other than foreign banks and finance companies would mean that non-bank foreign service suppliers with little industry experience could enter the Chinese market and begin accepting deposits or making loans. That is not the case, however. As indicated above, in accordance with section C of China's mode 3 market access entry, China may impose prudential authorization criteria. Additionally, as confirmed by the preamble to the GATS, China retains the right to regulate, and to introduce new regulations on the supply of services to meet domestic policy objectives. Articles VI:1 and VI:5 of the GATS further confirm that even in sectors in which a WTO Member has undertaken specific commitments, that WTO Member may, subject to certain disciplines, apply measures of general application affecting trade in services, including e.g. non-discriminatory licensing, qualification and technical requirements. Finally, paragraph 2(a) of the GATS Annex on Financial Services provides that, notwithstanding any other provisions of the GATS, a WTO Member may take measures for prudential reasons, including for the protection of e.g. investors and depositors, or to ensure the integrity and stability of the financial system.

7.570 For all these reasons, we conclude that the term "FFIs" as it appears in China's commitments concerning banking services covers foreign companies that supply financial services classifiable under subsectors (a) to (f).[745] Accordingly, it is our view that, as used in China's relevant commitments, the term "FFIs" covers foreign banks, foreign finance companies, as well as other foreign non-bank financial institutions, including EPS suppliers.

7.571 Having found that EPS suppliers of other Members are FFIs for the purposes of China's market access commitments, there is no need to go on to determine whether China has any market access commitments in subsector (d) and mode 3 that would apply to any foreign service suppliers that are not FFIs. We thus proceed to examine China's current market access commitments in respect of FFIs that provide their services through mode 3.

---

[744] See paras. 7.196-7.197 above.

[745] It is not necessary in this dispute to determine whether, for the purposes of China's Schedule, the term "FFIs" covers only companies, or whether they also include other organizations and entities.

7.572 We note that the claims put forward by the United States in the present dispute concern the provision of EPS for domestic RMB payment card transactions in China.[746] Consequently, it would appear that for purposes of China's mode 3 entry, the relevant business in which EPS suppliers of other WTO Members would engage in China is local currency (RMB) business.[747] China's mode 3 entry expressly states that for local currency business, and after expiry of the phase-out period of five years, FFIs – which in our view include EPS suppliers of other WTO Members – may provide their services to all Chinese enterprises and natural persons, without being subject to geographic restrictions or non-prudential authorization criteria restricting their ownership, operation or juridical form.[748] The enterprises and natural persons that EPS suppliers serve are issuers, acquirers, merchants and private or corporate card holders.[749]

7.573 Significantly, China's mode 3 entry does not set out any limitations on the number of service suppliers in the form of a monopoly or exclusive service suppliers.[750] The entry nonetheless specifies that China's market access commitment is subject to a limitation concerning qualifications for FFIs to engage in local currency business.[751] Pursuant to the limitation in question, prior to applying for authorization to engage in local currency business, FFIs must have three years of business operation in China and be profitable for two consecutive years. In other words, as also pointed out by China[752], FFIs must engage in foreign currency business through commercial presence in China before they can apply for authorization to conduct local currency business.

7.574 It should be added that, as a general matter, China's Schedule might possibly set out additional relevant limitations on market access in the section that concerns horizontal commitments. Neither party argues that this is the case, however. Having reviewed these horizontal commitments, we consider that they do not modify the result we have reached on the basis of the mode 3 entry in question.

7.575 Accordingly, we come to the conclusion that in respect of services classified under subsector (d) and provided by FFIs – which we consider include EPS provided by EPS suppliers of other WTO Members – China has made a commitment on market access concerning mode 3. That commitment is not subject to any limitations on the number of service suppliers. But it is subject to a limitation with regard to the qualifications that FFIs must meet to be permitted to engage in local

---

[746] The United States alleges, for instance, that China refuses to allow EPS suppliers of other WTO Members "to process payment card transactions in China denominated and paid in China's domestic currency, Renmimbi ('RMB')". United States' first written submission, para. 3.

[747] The Panel asked the United States whether its Article XVI claims that are based on China's mode 3 market access entry related to foreign or local currency business. The United States did not provide a direct answer to the question. It pointed out that whether the purchase is RMB-denominated or whether the payment card is RMB-denominated, a payment card transaction would, in its view, be processed by CUP when the card is issued and used in China. United States' response to Panel question No. 65, para. 168. China, for its part, understands the United States to be claiming a right of market access to engage in local currency business. China states that although the United States in its view avoided answering Panel question No. 65, the subject matter of this dispute is what the United States calls "domestic transactions denominated and paid in RMB", which China understands to be part of local currency business. China's second written submission, para. 69.

[748] See sections A, B and C of the relevant mode 3 market access entry. We also note that China's mode 3 national treatment entry further specifies that with the expiry of the phase-out period of five years, China may no longer maintain any limitations on national treatment in respect of FFIs. As stated in the relevant entry, FFIs may do business, without restrictions or need for case-by-case approval, with foreign invested enterprises or non-Chinese natural persons, or with Chinese clients.

[749] The enterprises or persons with which EPS suppliers do business vary according to the type of network EPS suppliers use (four-party vs. three-party model).

[750] We do not understand the parties to argue otherwise. E.g. United States' second written submission, para. 116; China's first written submission, paras. 133-139.

[751] See section C of the relevant mode 3 market access entry.

[752] China's response to Panel question No. 52(a), para. 86.

currency (RMB) business. As a consequence, China is obligated to give EPS suppliers of other WTO Members access to its market, through commercial presence, so that they may engage in local currency business in China, subject to such suppliers meeting the aforementioned qualifications requirement.

### 2. Whether the measures at issue are inconsistent with Article XVI of the GATS

7.576 The United States asserts that China made relevant commitments in its Schedule not to maintain any limitations on the number of EPS suppliers of other WTO Members in respect of the services at issue**.** As a result of these commitments, the United States considers the measures at issue are inconsistent with China's obligations under Articles XVI:1 and XVI:2(a) of the GATS.[753] In respect of Article XVI:2(a), the United States claims that each of the six requirements establishes and maintains CUP as both a "monopoly" supplier and an "exclusive service supplier" within the meaning of Article XVI:2(a) of the GATS for all RMB bank card transactions.[754]

7.577 China asserts that the United States has failed to demonstrate that the measures at issue maintain or adopt limitations on the number of service suppliers that are inconsistent with Article XVI:1 or XVI:2(a) of the GATS.[755] China argues that the legal instruments which form the basis of the United States' claims establish a common national network for processing domestic inter-bank bank card transactions. In its view, this does not equate to a "monopoly" network.[756] It submits that there is nothing in the instruments that would prevent the issuance or acceptance of bank cards bearing more than one logo and capable of being processed over multiple networks.[757] Moreover, it considers the fact that bank cards, POS devices and ATMs must adhere to certain technical standards does not preclude their adherence to other technical standards.[758] Finally, in respect of requirements identified in relation to Hong Kong and Macao, China argues that its own obligations under the covered agreements do not extend to separate customs territories, and therefore there is no "legal basis" for the claims advanced by the United States relating to services in Hong Kong or Macao under the modes of supply at issue in this dispute.[759]

7.578 The Panel recalls its conclusions that certain Chinese legal instruments require that bank cards issued in China bear the Yin Lina/UnionPay logo, and furthermore, China, requires that issuers become members of the CUP network, and that the bank cards they issue in China meet certain uniform business specifications and technical standards.[760] We found that China also imposes requirements that all terminals (ATMs, merchant processing devices and POS terminals) in China that are part of the national bank card inter-bank processing network be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo.[761] We also concluded that China requires acquirers to post the *Yin Lian*/UnionPay logo, become members of the CUP network and be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo.[762] In addition, we found that certain instruments mandate that CUP and no other EPS supplier handle the clearing of certain RMB bank card transactions that involve either an RMB bank card issued in China and used in Hong Kong or Macao,

[753] United States' first written submission, para. 61.
[754] United States' first written submission, para. 65; response to Panel question No. 64, para. 165.
[755] China's response to Panel question No. 22; second written submission, para. 90.
[756] China's first written submission, paras. 54, 92-93, and 101; opening statement at the first meeting of the Panel, para. 20; response to Panel question No. 22; comments on United States' response to Panel question Nos. 70-72, 86-96, 115-123, paras. 72 and 73.
[757] China's second written submission, para. 93; comments on United States' response to Panel question Nos. 70-72, 86-96, 115-123, para. 73.
[758] China's response to Panel question No. 22.
[759] China's response to Panel question No. 18, paras. 1-5.
[760] See Section VII.E.2(a) above.
[761] See para. 7.239 above.
[762] See Section VII.E.2(c) above.

or an RMB bank card issued in Hong Kong or Macao that is used in China in an RMB transaction.[763] We did not conclude, however, that there is a general requirement that mandates the use of CUP or otherwise establishes CUP as the sole supplier of EPS for all domestic RMB bank card transactions that take place in China.[764] Similarly, we did not conclude that there are broad prohibitions on the use of "non-CUP cards" for cross-region or inter-bank transactions.

7.579 As we have concluded that there is no requirement that establishes CUP as the "sole supplier" (i.e. the alleged "sole supplier requirements"), and that there are no broad prohibitions on the use of non-CUP cards for cross-region or inter-bank transactions (the alleged "cross-region/-bank requirements"), we do not address the United States' claims under Article XVI in respect of these two alleged "requirements". By contrast, we have concluded that China maintains in place certain issuer, terminal equipment and acquirer requirements (the "issuer requirements", "terminal requirements" and "acquirer requirements", respectively), and that CUP enjoys exclusivity as the EPS supplier in respect of transactions concerning Chinese nationals travelling in Hong Kong or Macao, and Hong Kong or Macao nationals travelling in China (the "Hong Kong/Macao requirements"). Therefore, we consider below whether these four requirements are inconsistent with China's obligations under Article XVI of the GATS, as claimed by the United States.

7.580 With this in mind, we recall our conclusion above[765] that China has not undertaken any market access commitments under mode 1 in Sector 7.B(d) of its Schedule in respect of the services at issue in this dispute. In light of this finding, the Panel further finds that the issuer, terminal equipment, acquirer and Hong Kong/Macao requirements are not inconsistent with Article XVI of the GATS.

7.581 In addition, we concluded above[766] that China has undertaken a market access commitment under mode 3 in Sector 7.B(d) of its Schedule in respect of the services at issue in this dispute. In light of this finding, we therefore proceed to consider whether the issuer, terminal equipment, acquirer and Hong Kong/Macao requirements are inconsistent with any of China's market access obligations in respect of this commitment. Additionally, in the light of the United States' assertion that each of the four requirements at issue maintains limitations on the number of service suppliers in the form of a "monopoly" and "exclusive service supplier" within the meaning of Article XVI:2(a) of the GATS, we begin our assessment under Article XVI:2(a) of the GATS.

(a) Whether the relevant requirements fall within the scope of Article XVI:2(a) of the GATS

7.582 The United States argues that each of the requirements at issue is inconsistent with Article XVI:2(a) of the GATS because they limit the number of foreign suppliers of EPS for bank card transactions. The United States considers these measures establish and maintain CUP as both a "monopoly" supplier and an "exclusive service supplier" within the meaning of Article XVI:2(a) of the GATS for all RMB bank card transactions.[767] In accordance with statements by the Appellate Body in *US – Gambling*, the United States submits that the terms "monopolies" and "exclusive service suppliers" should be interpreted to include not only limitations that are "in the form" of monopolies or exclusive service suppliers, but also those that are "in effect" such limitations.[768]

7.583 China argues that the Appellate Body made clear in *US – Gambling* that the scope of Article XVI:2(a) extends only to "quantitative" or "quantitative-type measures" and therefore,

[763] See paras. 7.361-7.383 above.
[764] See paras. 7.385-7.504 above.
[765] See para. 7.538 above.
[766] See paras. 7.539-7.575 above.
[767] United States' first written submission, para. 65; response to Panel question No. 64, para. 165.
[768] United States' response to Panel question No. 67; see also second written submission, paras. 132-136.

Article XVI does not extend to measures that "merely have the effect of limiting the number of services suppliers".[769] China argues that, if Article XVI were understood to encompass measures that "have the effect" of limiting the number of service suppliers, then measures that are permitted under other provisions of the GATS would need to be considered to fall within the scope of Article XVI due to their limiting effect. China argues that the subject matter of Article XVI would thus "begin to overlap" with other GATS disciplines, and this would inappropriately "blur the distinction" between different disciplines and would "intrude upon" Members' rights.[770] Furthermore, China disagrees with the United States that the terms "monopoly" and "exclusive service suppliers" should be interpreted to have the same meaning.[771]

7.584 The Panel will consider the scope of Article XVI:2(a) of the GATS before assessing the United States' particular claims. We first note that the parties provided several definitions and explanations of the terms "monopoly" and "exclusive service suppliers".

7.585 Article XXVIII(h) of the GATS defines "monopoly supplier of a service" as "any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service". Article VIII:5 states: "The provisions of this Article shall *also* apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory" (emphasis added).

7.586 Referring to dictionary definitions[772] and the meaning given to the term "monopoly supplier of a service" in Article XXVIII(h) of the GATS, the United States emphasizes that a monopoly supplier is a single or sole supplier that has an exclusive right to operate in a market. China similarly refers to the definition in Article XXVIII(h) in arguing that a monopoly encompasses a sole supplier. Regarding "exclusive service suppliers", the United States observes that they are not granted sole access, but rather, more than one exclusive service supplier will be granted rights to operate in a market that protects them from competition. China appears to agree, based on Article VIII:5 of the GATS, that the term "exclusive service suppliers" entails a small number of service suppliers that are protected from competition.

7.587 As a general textual matter, the definitions of the term "monopoly" provided by the United States support the view that the notion of a monopoly service supplier may overlap with that of an exclusive service supplier. However, Article XVI:2(a) of the GATS draws a distinction between these two terms. We must give meaning to all terms and cannot therefore assume that the terms mean one or the same thing.[773] Taking into account the different meaning given to these terms in the text of the Articles VIII:5 and XXVIII(h) of the GATS, and the distinction made in Article XVI:2(a), we consider that a monopoly supplier is a sole supplier authorized or established formally or in effect by a Member, whereas an exclusive service supplier is one of a small number of suppliers in a situation where a Member authorizes or establishes a small number of service suppliers, either formally or in effect, and that Member substantially prevents competition among those suppliers. We have not identified anything in the definitions provided by the parties, or elsewhere, that would lead us to

[769] China's response to Panel question No. 67 (quoting Appellate Body Report, *US – Gambling*, para. 248).
[770] See China's response to Panel question No. 67 (citing Panel Report, *US – Gambling*, para. 6.305).
[771] China's response to Panel question No. 66.
[772] As also pointed out by the United States, a monopoly can be defined as "exclusive possession or control of the trade in a commodity or service … the condition of having no competitor in one's trade or business…" or as "an exclusive privilege to carry on a business, traffic, or service granted by a government". See United States' first written submission, para. 65, citing *New Shorter Oxford English Dictionary* (1993), p. 1819.
[773] See Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3, at p. 29.

conclude differently. Thus, for the purposes of Article XVI:2, we do not consider that a monopoly supplier is at the same time an exclusive service supplier.

7.588 Due to the formulation of the United States' panel request and its subsequent argumentation[774], we understand the United States to claim that, in the event that the Panel was to determine that CUP operates as the sole supplier in the Chinese market, then CUP constitutes a monopoly within the meaning of Article XVI:2(a). We note, in this respect, the United States alleges specifically that CUP is the "sole supplier" of EPS for RMB bank card transactions.[775] In the event that the Panel was to determine that CUP is one of a small number of EPS suppliers, then we understand it is the United States' view that CUP operates as an exclusive service supplier within the meaning of that provision. Thus, whether the requirements at issue establish CUP as the *sole* supplier of EPS services, or whether they establish CUP as one of a small number of EPS suppliers and substantially prevent competition[776], the United States considers that the requirements are inconsistent with Article XVI:2(a). We will assess the United States' claims with this understanding in mind.

7.589 We next address the parties' arguments concerning the scope of Article XVI:2(a), namely, whether Article XVI:2(a) extends to cover measures that impose "quantitative" or "quantitative-type" limitations, and whether it should be interpreted to include not only limitations that are "in the form" of monopolies or exclusive service suppliers, but also those that are "in effect" such limitations.

7.590 As noted by both parties, the Appellate Body in *US – Gambling* considered the meaning of the terms "monopoly" and "exclusive service suppliers" that appear in Article XVI:2(a). It stated:

> [T]he reference, in Article XVI:2(a), to limitations on the number of service suppliers "in the form of monopolies and exclusive service suppliers" should be read to include limitations that are in form *or in effect*, monopolies or exclusive service suppliers.[777] (emphasis original)

7.591 Looking at the remaining context of Article XVI:2(a), the Appellate Body concluded that the thrust of Article XVI:2(a) is not on the "form" of a measure, but on its "numerical, or quantitative, nature", stating:

> This is not to say that the words "in the form of" should be ignored or replaced by the words "that have the effect of". Yet, at the same time, they cannot be read in isolation. Rather, when viewed as a whole, the text of sub-paragraph (a) supports the view that the words "in the form of" must be read in conjunction with the words that precede them—"limitations on the *number* of service suppliers"—as well as the words that follow them, including the words "*numerical* quotas". (emphasis added)

---

[774] See, e.g. United States' first written submission, para. 65. The United States argues that the "types of privileges afforded CUP by the measures, including the ability to set prices, fall within the definition of both 'monopoly' and 'exclusive service supplier'".

[775] The United States specifically alleges in this dispute that China maintains certain measures, including requirements that mandate the use of CUP and/or establish CUP as the *sole supplier* of EPS for all domestic transactions denominated and paid in RMB. The United States also considers that CUP is the sole supplier for transactions pertaining to the particular RMB card-based transactions taking place in China, Macao and Hong Kong at issue in this dispute. See, e.g. United States' first written submission, para. 4.

[776] In respect of whether CUP would constitute an exclusive service provider, we recall that China asserts that a second domestic RMB clearing organization, the RCBFCC, currently supplies EPS in the Chinese market. See China's response to Panel question Nos. 98, 113 and 114. The United States disputes that the RCBFCC handles the processing of RMB payment card transactions. As we explained above, we are unable to verify China's assertion that the RCBFCC is a second EPS supplier operating in China, or the United States' contention in this regard. See paras. 7.488 and 7.489 above.

[777] Appellate Body Report, *US – Gambling*, para. 230.

> Read in this way, it is clear that the thrust of sub-paragraph (a) is not on the *form* of limitations, but on their *numerical*, or *quantitative*, nature.[778] (emphasis original)

7.592 Therefore, as these statements reflect, whether a limitation is "in the form of" a monopoly or exclusive service supplier within the meaning of Article XVI, turns notably on whether it is "numerical" or "quantitative" in nature. We understand the Appellate Body to mean that even a measure that is not, for instance, called a "quota" can fall within the scope of Article XVI:2(a), if it is quantitative in its thrust and therefore, limits the supply of a service as a quota would do. Regarding the form of such a measure, it may be any type of government-imposed law or regulation.[779]

7.593 Accordingly, we consider that in our Article XVI:2 analysis of the four requirements at issue we must focus, not on whether they formally or explicitly institute a monopoly or an exclusive service supplier, but on whether they constitute a limitation that is numerical and quantitative in nature. More particularly, we must examine whether they are of such a nature that they limit to one, or a small number, the number of authorized EPS suppliers in China.

7.594 With the foregoing considerations in mind, we proceed to consider whether the issuer, terminal equipment, acquirer and Hong Kong/Macao requirements constitute such "limitations on the number of service suppliers" "in the form of" a monopoly or an exclusive service supplier as those terms are used in Article XVI:2(a) of the GATS.

(b) Whether the issuer, terminal equipment and acquirer requirements are inconsistent with Article XVI:2(a) of the GATS

7.595 The United States argues that, in accordance with its GATS Schedule, China committed not to maintain any limitations on the number of foreign service suppliers of EPS. We recall that the United States argues that the imposition of various requirements "ensure CUP's privileged position", both "explicitly" and "effectively".[780] Specifically, the United States argues that no EPS supplier other than CUP benefits from requirements imposed on issuers and acquirers of bank cards, or terminal equipment requirements. Due to the need to fulfil these requirements, the United States argues that issuers and acquirers must have access to the CUP system, and must pay for that access.[781] It contends that it is thus "economically unviable" for any foreign supplier of EPS to participate in the market.[782] This is so, it argues, because it does not make "economic sense" for banks and processing entities to pay for the privilege of using a foreign EPS supplier in addition to what it pays to have access to CUP's network.[783] Broadly, it argues that each of these requirements help "entrench CUP's position as sole service supplier in the market".[784] In addition, it argues that the collective effect of these requirements establish CUP as the sole entity able to provide EPS for bank card transactions in

[778] Appellate Body Report, *US – Gambling*, para. 232.
[779] Regarding the "effect" of a measure, unlike Article XVI:2(a) of the GATS, we note that Article XV of the GATS, entitled "Subsidies" refers to the "distortive effects on trade in services" that subsidies may have. Article XV:2 indicates that a Member may request consultations with another Member in instances where it considers itself to be "adversely affected" by a subsidy of that other Member. Thus, this provision contemplates the "effect" a measure may have. Article XVI:2(a) does not expressly refer to the "effects" that arise from a limitation such as a monopoly or exclusive service provider.
[780] United States' first written submission, para. 46
[781] United States' first written submission, paras. 50-52.
[782] United States' first written submission, para. 66.
[783] United States' first written submission, para. 69.
[784] United States' second written submission, paras. 173, 180 and 183.

China.[785] In this respect, it argues that the requirements gave CUP automatic and universal acceptance of its RMB bank cards by banks and merchants.[786]

7.596 China contends that none of these three requirements "have anything to do with the maintenance or adoption of a limitation on market access 'in the form of' of a monopoly or exclusive service supplier arrangement".[787] In addition, as discussed in Section VII.E.2(b) above, China argues that the United States failed to identify any aspect of these alleged requirements that would prevent the issuance or acceptance of bank cards that are capable of being processed over multiple networks, and therefore, it failed to establish that these measures impose "quantitative" or "quantitative-type" limitations on market access such that they would violate Article XVI:2(a) of the GATS.[788] Accordingly, China requests the Panel to reject the United States' claims under Article XVI.

7.597 The Panel concluded in Section VII.E.2(a) above that, China, through Document Nos. 37, 57 and 129 imposes requirements on issuers that bank cards issued in China bear the *Yin Lian*/UnionPay logo, and furthermore, China, through Document Nos. 17, 37, 57, 76 and 129 requires that issuers become members of the CUP network, and that the bank cards they issue in China meet certain uniform business specifications and technical standards. In reaching findings on these issuer requirements, we further indicated that none of the legal instruments reflecting these requirements indicates that issuers who are members of CUP may not join other networks in China (with the result that the bank cards issued work over those other networks), or that bank cards that meet CUP's uniform business specifications and technical standards must not, or cannot, simultaneously meet those of other networks.[789]

7.598 We further concluded in Section VII.E.2(b) above that China, through Document Nos. 37 and 153, imposes requirements that all terminals (ATMs, merchant processing devices and POS terminals) in China that are part of the national bank card inter-bank processing network must be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo. In reaching findings on these terminal equipment requirements, we further indicated that none of the legal instruments reflecting these requirements indicates that terminal equipment that must be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo could not also be capable of accepting, at the same time, bank cards bearing the logo of different EPS suppliers. Hence, we saw no basis to conclude that the terminal equipment requirements would prevent the acceptance of bank cards that would be capable of being processed over an inter-bank network in China other than that of CUP.[790]

7.599 Finally, we concluded in Section VII.E.2(c) above that China, through Document No. 153, imposes requirements on acquirers to post the *Yin Lian*/UnionPay logo and furthermore, China, through Document Nos. 37, 76 and 153, imposes requirements that acquirers join the CUP network and comply with uniform business standards and technical specifications of inter-bank interoperability, and that terminal equipment operated or provided by acquirers be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo. In reaching findings on these acquirer requirements, we further concluded that none of the legal instruments reflecting these requirements indicates that acquirers may not also accept bank cards that would be capable of being processed over an inter-bank network in China other than that of CUP.[791]

---

[785] For further explanation on the United States' arguments concerning the collective effect of the requirements at issue, see paras. 7.482-7.506 above.
[786] United States' second written submission, para. 190.
[787] China's second written submission, para. 92.
[788] China's second written submission, para. 93.
[789] See paras. 7.297-7.299 above.
[790] See para. 7.334 above.
[791] See paras. 7.359-7.360 above.

7.600 It is clear from our conclusions as to the nature of these requirements that none of them imposes a limitation on the supply of EPS services that is quantitative in nature, i.e. they do not require that CUP shall be established and maintained as a "monopoly" or an exclusive service supplier. In addition, in view of our conclusions, we find that none of the provisions in the legal instruments that reflect these three requirements imposes an express limitation on the number of EPS suppliers that is numerical or quantitative in nature, be it in the form of a monopoly or exclusive service supplier. As we explained, we perceive no limitation on the number of EPS suppliers that could support the issuance of bank cards bearing their own logo. Similarly, we see no limitation on the number of EPS suppliers resulting from the fact that terminal equipment in China must be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo. Finally, we see no limitation on the number of EPS suppliers that arises from the fact that acquirers must post the *Yin Lian*/UnionPay logo and be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo.

7.601 We also recall that, in our evaluation of the existence of a "sole supplier" requirements above, we assessed the instruments at issue in this dispute not only individually, but also together.[792] We consider our conclusions above equally relevant to our assessment here.

7.602 As is clear from our assessment above, we concluded that the United States did not identify anything in the requirements that would lead us to conclude that the issuer, terminal and acquirer requirements considered alone or in combination, have the "effect" of limiting the number of services suppliers so as to maintain or establish CUP as a monopoly or exclusive service provider. As explained above, we noted that the imposition of these requirements places CUP in a unique position and may grant CUP certain advantages in the EPS market. Despite this, we nevertheless concluded that the United States has not identified anything in the instruments, when considered individually or together, that would explicitly establish CUP as the sole supplier of *all* RMB bank card transactions. In addition, we indicated that the fact that the various measures (such as Document Nos. 17, 37, 49, 57, 76, 129, 142, 153) mandate compliance with CUP business and technical standards does not mean that issuers or acquirers are prevented from operating over other networks. We explained that the fact that the stated objective for CUP is to establish a "countrywide", "unified" or single network is not indicative of an intention to create an exclusive network.

7.603 We further concluded that the United States has not submitted evidence beyond mere assertions to support its conclusion that the rules and requirements imposed under certain of the instruments at issue make it technically difficult for foreign EPS suppliers to operate in the market, thereby effectively "entrenching" CUP as the sole supplier. We found that the United States did not submit any evidence to support its assertion that, due to costs or other reasons, such as the fact that competing standards are inherently incompatible, other EPS suppliers would not enter the market.

7.604 Finally, we rejected the United States' assertion that the collective "economic" effect of the imposition of the requirements is to entrench CUP's status as a sole supplier in China.[793] In reaching this conclusion, we noted that the United States did not establish that the economic effect of any of the requirements was to prevent foreign EPS suppliers from entering and establishing themselves in China. Finally, we noted that we have no direct evidence to assess whether the instruments at issue make it economically unviable for other EPS suppliers to establish themselves and operate in China.

7.605 Accordingly, we are unable to conclude that the imposition of issuer, acquirer and terminal equipment requirements imposes a limitation on the number of EPS suppliers in China in the form of a monopoly or exclusive service supplier. For these reasons, we are unable to conclude that the issuer,

[792] See paras. 7.385-7.481 and 7.482-7.506 above.
[793] See paras. 7.500-7.504 above.

terminal equipment and acquirer requirements, considered either separately or in combination, are inconsistent with Article XVI:2(a) of the GATS.[794]

(c) Whether the requirements pertaining to RMB card-based transactions taking place in China, Macao and Hong Kong are inconsistent with Article XVI:2(a) of the GATS

7.606 In Section VII.E.2(a) above, we concluded that, as reflected in various legal instruments, certain instruments mandate that CUP and no other EPS provider handle the clearing of certain RMB bank card transactions that involve either an RMB bank card issued in China and used in Hong Kong or Macao, or an RMB bank card issued in Hong Kong or Macao that is used in in China in an RMB transaction.[795] These bank card transactions concern payment for expenses including shopping, meals and accommodation, or small cash withdrawals from ATMs.

7.607 The United States argues that this requirement establishes and maintains CUP as a "monopoly" supplier or an "exclusive service supplier" within the meaning of Article XVI:2(a) of the GATS in respect of the services at issue. On the basis that China made specific market access commitments not to maintain any limitations on the number of foreign EPS suppliers, the United States considers these requirements are inconsistent with China's obligations under Article XVI:2(a) of the GATS.

7.608 China contends that there is no legal basis for the claims advanced by the United States in relation to EPS services in Hong Kong or Macao under the modes of supply at issue. Pursuant to Article XVI:2 of the GATS, China argues that a Member's schedule only implicates the provision of services in the territory of that Member.[796] China submits that Hong Kong and Macao are separate customs territories for purposes of the covered WTO agreements, and that each maintains their own rights and obligations in respect of these agreements. In consideration of their status, China argues that its own obligations under the covered agreements therefore do not extend to Hong Kong and Macao. Accordingly, it requests that the Panel reject these claims.[797]

7.609 As an initial point, the Panel notes that the four legal instruments identified in connection with this requirement – Document Nos. 8, 16, 219 and 254 – were also identified in connection with the alleged "sole supplier" requirements. In addition, Document No. 219 was also identified in connection with cross-region/inter-bank prohibitions. The United States argues that these four instruments "entrench"[798], or enforce, the existence of the sole supplier requirement and cross-region/inter-bank prohibitions. Because we found above[799] that no "sole supplier" requirement has been demonstrated in respect of the supply of EPS for *all* domestic RMB bank card transactions taking place in China, and that there are no cross-region/inter-bank prohibitions, we do not reach conclusions on these instruments in respect of either of these "requirements". Rather, our analysis focuses on these instruments as they concern RMB bank card-based transactions taking place in China, Macao and Hong Kong. We therefore address the United States' Article XVI claims in this respect only.

---

[794] We consider in Section G, whether these same requirements are inconsistent with China's obligations under Article XVII of the GATS.

[795] See paras. 7.361-7.383 above. We recall our conclusion above that Document No. 219 does not require that CUP be the sole supplier of EPS services in respect of RMB card-based transactions taking place in China, Macao and Hong Kong. See, specifically, paras. 7.372-7.376 above.

[796] China's second written submission, para. 95.

[797] China's first written submission, fn. 27; response to Panel question No. 18, paras. 1-5; second written submission, para. 95.

[798] United States' second written submission, paras. 141 and 190.

[799] See paras. 7.385-7.481 and 7.482-7.506.

7.610 The Panel finds it useful to begin with China's contention that there is no legal basis for the claims advanced in relation to Hong Kong and Macao due to their status in the WTO as separate customs territories. The WTO status of Hong Kong and Macao *per se* is not in question in this dispute, nor is the fact that each of these territories maintains its own rights and obligations in respect of the WTO Agreements. What is at issue is whether or not the particular requirements in question relate to China's WTO obligations.

7.611 We understand that China invokes the language in Article XVI:2 to support its contention that its WTO obligations do not extend to Hong Kong or Macao. Pursuant to Article XVI:2 of the GATS, a Member's market access commitments impose limitations on certain measures that a Member may maintain or adopt "either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule". On its face, we understand this language to indicate merely that a measure of a Member may be subject to obligations under Article XVI not only in cases where it is applicable or enforced across the entire territory of a Member, but also in cases where it is applicable or enforced in only a part of that Member's territory.

7.612 The United States identifies different scenarios in which it considers Document Nos. 8, 16 and 254 operate together to ensure CUP's exclusivity in respect of the RMB card-based transactions taking place in China, Macao and Hong Kong. In the case of a Chinese national travelling to Hong Kong and making a purchase, according to the United States, CUP would mandatorily provide services to the issuing bank in China and the acquiring bank in either Hong Kong or Macao. Hence, EPS suppliers of other WTO Members would be prohibited from establishing a local presence in China to supply EPS services to either the issuing bank located in China or the acquiring bank located in either Hong Kong or Macao.[800] In a situation where either a Hong Kong or Macao national travels to China and makes a purchase, the United States argues that CUP would also mandatorily provide services to the issuing bank in either Hong Kong or Macao as well as the acquiring bank in China. Here again, the United States submits that a foreign EPS supplier would be prohibited from providing services to either the issuing or acquiring bank.[801] Finally, the United States contends that a foreign EPS supplier is prohibited from providing its services from China to an issuing or acquiring bank even, for instance, where the issuing bank is located in Hong Kong and issues a card to a Hong Kong national who then makes a purchase in Hong Kong.[802]

7.613 In our discussion of the services at issue above[803], we indicated that the clearing and settlement of a given bank card transaction involves participation by various actors. Under a four-party model, typically a card holder, an acquirer, an issuing bank/institution and an EPS supplier would all be involved in a transaction.[804] Under a three-party model or other similar variations, at a minimum, a card holder and an EPS supplier would be involved in a given transaction.

7.614 We also found above[805] that China's Schedule contains a mode 3 market access commitment that covers the supply of EPS. This includes the supply of EPS provided under both the three-party

[800] United States' response to Panel question No. 9, para. 46. We recall our conclusion in paragraphs 7.538 above that China has no market access commitment under mode 1 in respect of the services at issue.

[801] United States' response to Panel question No. 9, para. 47.

[802] United States' response to Panel question No. 9, para. 48.

[803] See paras. 7.14-7.24 above.

[804] In the case a card holder uses a payment card to make a purchase, a merchant would be involved in the transaction. If a card holder uses a payment card to withdraw cash, for instance from an ATM, a merchant would not be involved. In either case, an acquiring institution would be involved in the transaction, either having supplied a POS terminal to the merchant or by servicing the ATM. As discussed in paras. 7.46-7.54 above, third party "processors" may also participate in the transaction.

[805] See paras. 7.539-7.575 above.

and four-party models. This commitment requires that foreign EPS suppliers are permitted to establish operations in China and supply their services from within China to the relevant customers.

7.615 It is clear to us from Document Nos. 8, 16 and 254, and as illustrated through the examples presented by the United States, that both actors located in China and actors outside of China, in either Hong Kong or Macao, would be involved in the types of transactions which are governed by these three instruments. In the first two scenarios described in paragraph 7.612, at least one of the actors involved in the transaction – be it the issuer or acquirer – will be located in China. As we understand, in the third example outlined above, the United States contends that the RMB bank card holder, issuer of such a card, acquirer and merchant would all be located outside of China, in either Hong Kong or Macao, while the EPS supplier and settlement bank would be located in China.

7.616 The issue arises whether the supply of services through commercial presence under China's mode 3 commitment includes the supply of services to all actors under these three scenarios, including actors located outside of China, in either Hong Kong or Macao. In assessing this issue, we note that the supply of a service through commercial presence (mode 3) is defined in Article I:2(c) of the GATS as the supply of a service "by a service supplier of one Member, through commercial presence in the territory of any other Member". "Commercial presence" is defined in Article XXVIII, as follows:

> (d) "commercial presence" means any type of business or professional establishment, including through
>
> > (i) the constitution, acquisition or maintenance of a juridical person, or
> >
> > (ii) the creation or maintenance of a branch or a representative office,
> >
> > within the territory of a Member for the purpose of supplying a service

7.617 As the panel noted in its report in *Mexico – Telecoms*, this definition is silent with respect to any other territorial requirement (as is the case in cross-border supply under mode 1) or the nationality of the service recipient (as is the case in consumption abroad under mode 2). The definition of services supplied through commercial presence addresses only the location of the foreign service supplier, not that of the recipient of the relevant service, nor the nationality of the recipient. It indicates that for purposes of the GATS a service is supplied through mode 3 if a service supplier of a Member supplies its service through commercial presence in the territory of another Member.[806] The definition does not state that a foreign service supplier may supply its services only to recipients that are in the territory of the Member in which the service supplier has established a commercial presence and are nationals of that Member. Nor does the definition state that a foreign service supplier may not supply its services to recipients that are outside the territory of the Member in which the service supplier has established a commercial presence. Taking into account the absence of any territorial qualification as to the location of the recipient of a service, the panel in *Mexico – Telecoms* concluded that Mexico's commitment under mode 3 covered the supply of basic telecommunications services at issue both within Mexico and from Mexico into any other country.[807]

---

[806] Panel Report, *Mexico – Telecoms*, para. 7.375.

[807] In reaching this view, the panel in *Mexico – Telecoms* also took into account the fact that the Chairman's Note for Scheduling Basic Telecommunications Services Commitments makes specific reference to "local, long distance and international services", as well as the fact that Mexico did not exclude international

7.618 We agree with the reasoning of the panel in *Mexico – Telecoms.* Nothing in the GATS suggests that the supply of a service through commercial presence in the territory of a Member does not extend to the "export" of services from that Member's territory to a recipient in the territory of another Member or to a foreign recipient located in the "exporting" Member's territory. A foreign service supplier may therefore, subject to any limitations set out in the Member's schedule, supply a committed service to a foreign recipient wherever located, and of whatever nationality or origin.[808]

7.619 In view of our interpretation, and in the absence of a specific mode 3 limitation in China's Schedule that restricts the supply of EPS from within China into the territory of other WTO Members, we consider that China's commitment under mode 3 covers not only the supply of EPS to clients within China, but also the supply of EPS to clients located in the territory of other WTO Members.[809]

7.620 Having concluded that China's mode 3 commitment for EPS covers the supply of EPS into the territory of any other WTO Member, we do not agree with China that there is no legal basis for the claims advanced in relation to Hong Kong and Macao. Having so concluded, we therefore turn to consider whether China has fulfilled its obligations in Section 7.B(d) of its Schedule to ensure that EPS suppliers of any other Member may supply their services from China to issuers and acquirers, in a four-party model, or to the card holder and merchant, in a three-party model or other similar variations, in order to comply with its obligations under Article XVI:2(a) of the GATS.

7.621 We recall again, the measures require that only CUP handle the processing of the relevant transactions taking place in Hong Kong or Macao, or China. These transactions include situations in which (i) a Chinese national travels to Hong Kong or Macao and initiates an RMB bank card transaction with a card issued in China; and (ii) a Hong Kong or Macao national travels to China and initiates an RMB bank card transaction there with a card issued in either Hong Kong or Macao.

7.622 In the light of our understanding of what the supply of EPS under mode 3 may entail, we conclude that China's mode 3 commitment for EPS is applicable to the two scenarios described in the preceding paragraph.[810] Due to the requirement that only CUP handle the processing, in the event a foreign EPS supplier established itself in China through commercial presence, that foreign EPS supplier would be prevented from providing its services with respect to any such transaction. This would be the case despite the fact that China committed to allow foreign EPS suppliers to provide these services, subject to their meeting the qualifications requirements specified in China's mode 3 market access entry.

---

services in the sector column, or elsewhere in its schedule, from the scope of services that commercial agencies may supply. The panel concluded that the Chairman's Note was an important part of the circumstances of the conclusion of the negotiations of the GATS, and should be given considerable weight in its assessment. See Panel Report, *Mexico – Telecoms*, paras. 7.376-7.377.

[808] This means, for example, that a mode 3 commitment on data processing services would allow a foreign company established in the territory of a Member to supply data processing services to a consumer located in the territory of another Member. Similarly, a mode 3 commitment on "hotel services" would allow a foreign-owned hotel established in the territory of that Member to supply hotel services to foreign tourists.

[809] It is useful to note that the supply of EPS from China into the territory of another Member could potentially be subject to market access or national treatment limitations in China and/or that other Member. For instance, the supply of services could be limited by the mode 3 market access commitments of China. Or it could be limited by the mode 1 (cross-border supply) commitments of the other Member.

[810] We recall, in footnote 475 above, we explained that we would address the United States' claim only in relation to Document Nos. 8, 16 and 254 in (i) the case of a Chinese national travelling to Hong Kong and making a purchase with a card issued in China; (ii) the case of a Hong Kong or Macao national travelling to China and making a purchase with a card issued in Hong Kong or Macao. We stated that we would not consider a third scenario involving a Hong Kong or Macao national making an RMB purchase in either of these territories with an RMB payment card issued in either Hong Kong or Macao because we consider that the United States' claim in respect of the third scenario falls outside our terms of reference.

7.623 We recall that we need to determine whether the requirements at issue impose a limitation on the number of EPS suppliers, be it in the form of a monopoly or exclusive service suppliers. As we have explained in this section, Document Nos. 8, 16 and 254[811] mandate that only CUP handle the processing of RMB bank card transactions that involve either an RMB bank card issued in China and used in Hong Kong or Macao, or a bank card issued in Hong Kong or Macao that is used in China in an RMB transaction. Thus, the Hong Kong/Macao requirements limit the number of suppliers of EPS to one, namely to CUP. Plainly, this limitation is of a numerical and quantitative nature. We recall that a monopoly supplier is a sole supplier authorized or established formally or in effect by a Member. Due to the exclusivity that CUP enjoys as the sole EPS supplier in respect of the relevant transactions, we conclude that with regard to these transactions CUP is a monopoly within the meaning of Article XVI:2(a) of the GATS.[812]

7.624 Therefore, and for the foregoing reasons, we find that the Hong Kong/Macao requirements impose a limitation on the number of service suppliers in the form of a monopoly within the meaning of Article XVI:2(a) of the GATS for the supply of EPS for RMB bank card transactions that involve either an RMB bank card issued in China and used in Hong Kong or Macao, or an RMB bank card issued in Hong Kong or Macao that is used in China in an RMB-denominated transaction. This limitation on the number of suppliers is imposed even in respect of EPS suppliers of other WTO Members that meet the qualifications requirements specified in China's mode 3 market access entry. Because China has not "otherwise specified in its Schedule" that it may maintain such a limitation, we conclude that the Hong Kong/Macao requirements imposed by China are inconsistent with Article XVI:2(a) of the GATS.

(d) Whether China's requirements, when considered jointly, are inconsistent with Article XVI:2(a) of the GATS

7.625 The Panel recalls that the United States requested that the Panel consider the Chinese requirements at issue not only individually, but also in conjunction with each other, as it considers the requirements at issue are not just WTO-inconsistent when analysed individually, but operate together in a manner that is also WTO-inconsistent.[813] . The United States argues that this would help to ensure the effective resolution of this dispute.[814]

7.626 We concluded above that we would not address the United States' claims under Article XVI in respect of the sole supplier requirement or cross-region/inter-bank-bank prohibitions, as we concluded on the evidence before us that China does not maintain in place either of these "requirements". Having concluded that China maintains in place certain issuer requirements, terminal equipment requirements, acquirer requirements and Hong Kong/Macao requirements, however, we considered whether these four requirements are inconsistent with China's obligations under Article XVI of the GATS, as claimed by the United States. Ultimately, we concluded above[815] that the United States failed to establish that the issuer, terminal equipment and acquirer requirements, considered either separately or in combination, are inconsistent with Article XVI:2(a) of the GATS. Separately, we concluded that the Hong Kong/Macao requirements impose a limitation on the number of service suppliers in the form of a monopoly within the meaning of Article XVI:2(a) of the GATS. Because China has not "otherwise specified in its Schedule" that it may maintain such a limitation in

[811] The Panel specifically refers to Article 6 of Document No. 16, Article 6 of Document No. 8 and Articles 3, 4 and 17 of Document No. 254. See paras. 7.372-7.377 and 7.402-7.404 above.

[812] In our view, the relevant markets in which CUP is a monopoly within the meaning of Article XXVIII(h) of the GATS are the supply of EPS for RMB bank card transactions that involve a bank card issued in China and used in Hong Kong or Macao, and for RMB bank card transactions that involve a bank card issued in Hong Kong or Macao that is used in China in an RMB-denominated transaction.

[813] United States' first written submission, para. 29; response to Panel question No. 4.

[814] United States' first written submission, para. 32

[815] See paras. 7.600-7.605 above.

respect of its mode 3 market access commitment, we concluded that the Hong Kong/Macao requirements imposed by China are inconsistent with Article XVI:2(a) of the GATS.[816]

7.627 In the light of the United States' request, we consider whether an assessment of the requirements in conjunction with each other would modify our conclusions. We have noted above on various occasions[817] that the Hong Kong/Macao requirements are limited in scope to bank card transactions that involve bank cards issued in China and used in Hong Kong or Macao, or alternatively, bank cards issued in Hong Kong or Macao and used in China. Due to their limited scope, we do not see how consideration of the Hong Kong/Macao requirements in conjunction with the issuer, terminal equipment and acquirer requirements would lead us to conclude that the issuer, terminal equipment and acquirer requirements impose a type of limitation that is inconsistent with Article XVI:2(a) of the GATS. In other words, it is not clear to us how combining the Hong Kong/Macao requirements with any of the other requirements would have the effect of converting any of the other requirements into the type of measure referred to in Article XVI:2(a). We therefore conclude that the United States has not established that the Hong Kong/Macao, issuer, terminal equipment and acquirer requirements, when considered in conjunction, give rise to a separate and independent breach of Article XVI:2(a) of the GATS.

(e) Whether the measures at issue are inconsistent with Article XVI:1 of the GATS

7.628 We recall that the United States has raised claims in respect of both Articles XVI:1 and XVI:2(a) of the GATS. Several panels have discussed the relationship between Articles XVI:1 and XVI:2. The panel in *US – Gambling* found "[t]he ordinary meaning of the words, the context of Article XVI, as well as the object and purpose of the GATS confirm that the restrictions on market access that are covered by Article XVI are only those listed in paragraph 2 of this Article".[818] On this basis, finding that the measures at issue were inconsistent with Articles XVI:2(a) and (c), the panel in that dispute did not consider it necessary to reach findings in respect of Article XVI:1 of the GATS. The Appellate Body in that dispute did not specifically address what is required to establish a violation of Article XVI:1.[819]

7.629 In *China – Publications and Audiovisual Products*, the panel concluded similarly to the panel in *US – Gambling*, as follows:

> Paragraph 1 of Article XVI sets out the general principle that a Member must accord to services and service suppliers of other Members treatment no less favourable than that specified under the "terms, limitations and conditions" contained in its schedule. Paragraph 2 is more specific. It defines, in six sub-paragraphs, the measures that a Member, having inscribed a specific sectoral commitment, must not adopt or maintain "unless otherwise specified in its Schedule". The six types of measures form a closed or exhaustive list, as indicated by the wording of the chapeau to paragraph 2 ("the measures … are defined as"). Under Article XVI, a Member undertakes a minimum standard of treatment, and is thus free to maintain a market

[816] See para. 7.624 above.
[817] See paras. 7.398, 7.401, 7.407, 7.480 and 7.491 above.
[818] Panel Report, *US – Gambling*, paras. 6.318, 6.298-6.299.
[819] Appellate Body Report, *US – Gambling*, para. 256. On appeal, the Appellate Body noted that Antigua conditionally appealed whether the measures at stake were also inconsistent with Article XVI:1 of the GATS, "in the event the Appellate Body were to agree with the United States' argument that GATS Articles XVI:2(a) and (c) only apply to limitations that are in form specified exactly and expressly in terms of numerical quotas." Having upheld the panel's interpretation of sub-paragraphs (a) and (c) of Article XVI:2, the Appellate Body decided to "leave the issue of the relationship between the first and the second paragraphs of Article XVI for another day" (Appellate Body Report, *US – Gambling*, para. 256).

> access regime less restrictive than set out in its schedule, as confirmed in paragraph 1 which refers to a standard of "no less favourable" treatment.[820]

7.630 Bearing the approaches of these panels in mind, we similarly do not consider it necessary to proceed in our analysis under Article XVI:1. We first recall our finding above that the issuer, terminal equipment and acquirer requirements are not among the measures which Article XVI:2 says a Member may not maintain, and more specifically that they do not constitute market access limitations within the meaning of Article XVI:2(a) of the GATS. That being so, as the United States has directed its arguments toward alleging a market access limitation of the type described in Article XVI:2(a), it is difficult to see how the relevant requirements could be subject to Article XVI:1. In any event, in the absence of any meaningful attempt by the United States to demonstrate that the issuer, terminal equipment and acquirer requirements, taken either individually or together, are separately inconsistent with Article XVI:1, we consider that the United States has failed to meet its burden to present a *prima facie* case in respect of its Article XVI:1 claim.

7.631 In addition, we recall our finding above that the Hong Kong/Macao requirements imposed by China pursuant to Document Nos. 8, 16 and 254[821] are inconsistent with Article XVI:2(a). In the light of this finding, there is in our view no need to offer additional findings on these requirements under Article XVI:1 and we therefore decline to consider this claim further.

### 3. Conclusions

7.632 Having completed its analysis, we recall our main conclusions on the United States' claims under Article XVI of the GATS.

(a) China's commitment under mode 1 in Sector 7.B(d) of its Schedule

7.633 The Panel finds that China has not undertaken a market access commitment under mode 1 in Sector 7.B(d) of its Schedule in respect of the services at issue. Therefore, the Panel concludes that the issuer, terminal equipment, acquirer and Hong Kong/Macao requirements are not inconsistent with Article XVI of the GATS in this respect.

(b) China's commitment under mode 3 in Sector 7.B(d) of its Schedule

7.634 The Panel finds that China has undertaken a market access commitment under mode 3 in Section 7.B(d) of its Schedule in respect of the services at issue in this dispute. That commitment is not subject to a limitation on the number of service suppliers in the form of monopolies.

*(i) Issuer, terminal equipment, acquirer requirements*

7.635 The Panel finds that the United States failed to establish that the issuer, terminal equipment and acquirer requirements are inconsistent with Article XVI:2(a) of the GATS, as these requirements do not impose a limitation that falls within the scope of Article XVI:2(a). The Panel further finds that the United States failed to meet its burden to present a *prima facie* case in respect of its Article XVI:1 claims concerning the issuer, terminal equipment and acquirer requirements.

---

[820] Panel Report, *China – Publications and Audiovisual Products*, para. 7.1353.

[821] The Panel specifically refers to Article 6 of Document No. 16, Article 6 of Document No. 8 and Articles 3, 4 and 17 of Document No. 254. See paras. 7.372-7.377 and 7.402-7.404 above.

*(ii) Hong Kong/Macao requirements*

7.636 The Panel finds that China, through Document Nos. 8, 16 and 254[822], imposes a limitation on the number of service suppliers in the form of a monopoly for CUP concerning the supply of EPS for RMB bank card transactions that involve either an RMB bank card issued in China and used in Hong Kong or Macao, or an RMB bank card issued in Hong Kong or Macao that is used in China in an RMB transaction. That limitation on the number of service suppliers is imposed even in respect of EPS suppliers of other WTO Members that meet the qualifications requirements specified in China's mode 3 market access entry. Accordingly, we find that the Hong Kong/Macao requirements imposed by China are inconsistent with Article XVI:2(a) of the GATS. In the light of this finding, the Panel exercised judicial economy with respect to the United States' claims under Article XVI:1 of the GATS regarding the Hong Kong/Macao requirements.

## G. THE UNITED STATES' CLAIMS UNDER ARTICLE XVII OF THE GATS

7.637 The Panel now turns to assess the United States' claims under Article XVII of the GATS. The United States claims that each of the challenged Chinese requirements (measures) are inconsistent with Article XVII in view of commitments taken by China under subsector (d) and modes 1 and 3. Article XVII is entitled "National Treatment" and provides as follows:

> 1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.
>
> 2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
>
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member. (footnote omitted)

7.638 As noted, the United States claims that all six of China's requirements at issue are inconsistent with Article XVII both individually and in conjunction with each other. It bases these claims on national treatment commitments which it alleges were assumed by China under subsector (d) and modes 1 and 3. The United States submits that these requirements treat foreign suppliers of EPS services less favourably than CUP.[823]

7.639 China requests the Panel to dismiss the United States' claims under Article XVII in their entirety. With regard to its national treatment commitments, China argues that the United States failed to demonstrate that these commitments are relevant to the services and service suppliers at issue. More specifically, China contends that the United States failed to demonstrate that EPS suppliers of other WTO Members are "foreign financial institutions" within the meaning of China's GATS Schedule.[824] As concerns China's national treatment commitments in mode 1, China submits

[822] The Panel specifically refers to Article 6 of Document No. 16, Article 6 of Document No. 8 and Articles 3, 4 and 17 of Document No. 254. See paras. 7.372-7.377 and 7.402-7.404 above.
[823] United States' first written submission, para. 76; second written submission, para. 215.
[824] China's first written submission, para. 146.

that the United States improperly bases its claims under Article XVII on the same aspects of the same requirements that are the foundation of the United States' claims under Article XVI of the GATS.[825] China argues that it reserved the right to introduce market access limitations for subsector (d) and mode 1, including limitations under Article XVI:2 that might be seen as discriminatory. China is of the view that its right to introduce such measures cannot be taken away by a finding that the exact same aspects of the requirements at issue are inconsistent with Article XVII. According to China, this would defeat the choice that it made by leaving market access unbound in mode 1.[826]

7.640 The Panel begins its assessment of the United States' Article XVII claims by setting out its analytical approach and determining the scope of its Article XVII findings.

### 1. Analytical approach and scope of Article XVII findings

7.641 As has been pointed out by the United States, the panel in *China – Publications and Audiovisual Products* effectively applied a three-part test to assess whether a Member's measure is inconsistent with Article XVII.[827] The United States suggests that we follow the same analytical approach.[828] We find it appropriate to do so, noting also that China has not specifically opposed the United States' suggestion. Accordingly, in order to sustain its claim that China's measures are in breach of Article XVII, the United States as the complaining party needs to establish all of the following three elements:

(i) China has made a commitment on national treatment in the relevant sector and mode of supply, regard being had to any conditions and qualifications, or limitations[829], set out in its Schedule;

(ii) China's measures are "measures affecting the supply of services" in the relevant sector and mode of supply; and

(iii) China's measures accord to services or service suppliers of any other Member treatment less favourable than that China accords to its own like services and service suppliers.

7.642 We separately examine these three elements below. The Chinese requirements we will review in this section include the issuer requirements, the terminal equipment requirements and the acquirer requirements. As concerns the remaining three requirements at issue, we recall our conclusion that the United States has not established the existence of the alleged sole supplier requirements or the alleged cross-region/inter-bank prohibitions. We consequently do not examine these requirements under Article XVII. Furthermore, as we have determined above that the Hong Kong/Macao requirements are inconsistent with Article XVI of the GATS in respect of foreign EPS suppliers supplying EPS through mode 3, in the interest of judicial economy we refrain from

[825] China's first written submission, para. 148.
[826] China's first written submission, para. 159.
[827] The panel in *China – Publications and Audiovisual Products* at one point in its report distinguished four elements. But elsewhere in its report, the panel combined two of the four elements into one, thus effectively applying a three-part test. See Panel Report, *China – Publications and Audiovisual Products*, paras. 7.1272, 7.942 and 7.956.
[828] United States' first written submission, paras. 74 and 75.
[829] Regarding the term "limitations", we note that Article XX:1 of the GATS refers specifically to "terms, limitations and conditions" to market access, and "conditions and qualifications" to national treatment. This accords with the wording of Articles XVI:2 (on market access), XVII:1 (on national treatment) and XX:1(b) (on schedules of specific commitments). For simplicity, we adopt the term "limitations", which is used in the column headings in China's Schedule (and those of other Members), and throughout the 1993 and 2001 Scheduling Guidelines.

determining whether these requirements are also inconsistent with Article XVII for mode 3 suppliers. We do, however, examine whether the Hong Kong/Macao requirements are inconsistent with Article XVII in respect of foreign EPS suppliers supplying EPS through mode 1.

7.643 Having clarified which requirements are to be the subject of our Article XVII findings, we can commence our three-part analysis of the relevant requirements.

## 2. China's requirements considered individually

(a) Whether China has undertaken relevant national treatment commitments

7.644 The first element of our three-part analysis is to determine whether China has made commitments on national treatment in the relevant sector and modes of supply, regard being had to any limitations set out in its Schedule. The Panel recalls that the United States in this case has identified subsector (d) as the relevant inscribed sector, and modes 1 and 3 as the relevant modes of supply. We first consider whether China has undertaken national treatment commitments under mode 1.

*(i) Mode 1 commitments*

General

7.645 The United States argues that China has made a full national treatment commitment for subsector (d) in mode 1, having inscribed "None" (no limitations) for this mode in the national treatment column of its Schedule.[830]

7.646 China responds that the United States improperly bases its national treatment claims on "the same aspects of the same measures" that are the foundation of its market access claims under Article XVI of the GATS.[831] In China's view, the measures described in Article XVI:2 cannot simultaneously be subject to Article XVII, without wholly disregarding the basis upon which market access and national treatment commitments were scheduled.[832] For China, the United States' approach is contrary to the "order of precedence" that Article XX:2 establishes in favour of Article XVI, as well as the principle of effectiveness of treaty interpretation (*effet utile*).[833] According to China, Article XVI governs "all aspects" of the measures described in Article XVI:2(a)-(f), including any respect in which such a measure is potentially discriminatory.[834] Articles XVI and XVII are thus "mutually exclusive" in their respective spheres of application.[835] To interpret these provisions otherwise would make it impossible for China to remove a national treatment inconsistency, while leaving in place its market access limitation.[836] It would defeat entirely the policy choice that China made by leaving market access unbound in mode 1.[837]

7.647 The United States disagrees with China's argument that the inscription of "Unbound" for market access in mode 1 affects the scope of its national treatment commitment for that mode.[838] Article XVI:2, for the United States, does not extend to restrictions that are discriminatory.[839] A

[830] United States' first written submission, paras. 20 and 77.
[831] China's first written submission, paras. 148 and 150.
[832] China's first written submission, para. 150.
[833] China's first written submission, para. 156.
[834] China's first written submission, para. 156.
[835] China's first written submission, para. 156.
[836] China's second written submission, para. 119.
[837] China's first written submission, para. 159.
[838] United States' second written submission, para. 194.
[839] United States' response to Panel question No. 69, para. 196.

measure limiting the number of foreign suppliers only would not, for example, limit "the number of services suppliers" under Article XVI:2(a), since the measure is silent as to how many domestic persons can supply the service.[840] As for Article XX:2, the United States argues that it is simply a scheduling rule that exists because measures may be inscribed in a Member's schedule that are inconsistent with both Articles XVI and XVII.[841] For the United States, Article XX:2 does not make Articles XVI and XVII "mutually exclusive" in their respective spheres of application, as argued by China.[842] Thus, an "Unbound" inscription for market access, combined with a "None" for national treatment, "carves out" only overall quantitative limitations, not limitations that discriminate against foreign suppliers.[843]

7.648 According to the European Union, an inscription of "Unbound" in the market access column of a schedule logically implies that a Member has retained the right to impose any of the limitations under Article XVI:2, and that those limitations, in accordance with Article XX:2, extend to its national treatment obligations under Article XVII, despite the absence of limitations scheduled under this provision.[844] Japan, Australia and Ecuador agree that China's unbound entry for market access allows it to maintain market access limitations that are discriminatory.[845] Guatemala, on the other hand, argues that the inscription of "Unbound" for market access means that China must respect any national treatment commitments that it has made under Article XVII.[846]

7.649 The Panel notes that the parties disagree on the scope of China's national treatment commitment in mode 1, as it applies to the measures at issue. Their disagreement focuses on the effect, if any, of China's market access inscription of "Unbound" on the scope of its national treatment commitment, the entry for which is inscribed as "None".[847] To resolve this issue, we begin by examining Article XX:1 of the GATS, which sets out the basic rule for a Member inscribing commitments in its schedule:

> 1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III [including Articles XVI and XVII] of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:
> (a) terms, limitations and conditions on market access;
> (b) conditions and qualifications on national treatment;
> ...

7.650 We observe that Article XX:1 requires a Member to inscribe, for the sectors it has committed in its Schedule, the limitations ("terms, limitations and conditions") it intends to maintain for market access, and the limitations ("conditions and qualifications") it wishes to maintain for national treatment. Each inscription of a limitation (or absence thereof) is normally entered in the appropriate market access or national treatment column of the Schedule by inscribing "None" (no limitations),

---

[840] United States' response to Panel question No. 69, para. 196.
[841] United States' second written submission, para. 195.
[842] United States' second written submission, para. 195.
[843] United States' second written submission, para. 196.
[844] European Union's response to Panel question No. 7(a), para. 22.
[845] Japan's response to Panel question No. 24; Australia's response to Panel question No. 7(a) and 7(b); Ecuador's oral statement, para. 17.
[846] Guatemala's response to Panel question No. 7(a), para. 28.
[847] Since we have found that China's market access inscription of "Unbound, except …" amounts to unbound market access, for the sake of simplicity we use the term "Unbound" in this part of the Report.

"Unbound" (no commitment), or the measure or measures that limit the commitment.[848] This terminology and usage is drawn from the Scheduling Guidelines.[849]

7.651 In the light of the basic rule set out in Article XX:1, supplemented by the Scheduling Guidelines, we now examine the relevant entries in China's Schedule. We start with China's inscription for national treatment in mode 1. We recall that China has inscribed the term "None" in the column entitled "Limitations on National Treatment". Although no specific definition exists in the GATS of the term "None", its ordinary meaning is clear when read in conjunction with the title of the column in which the term appears. It indicates that China has undertaken "no" limitations – in other words, a full commitment – with respect to national treatment in this mode, unless otherwise inferred from its Schedule.[850] Hence, as regards the supply of services in subsector (d) through mode 1, the entry of "None" in the national treatment column suggests that China would be committed to providing full national treatment. This national treatment would extend to "all measures affecting the supply of services", the scope of Article XVII as defined in that provision.

7.652 We continue our analysis by examining China's inscription for market access in mode 1, which we have found in paragraph 7.538 to amount to "Unbound". Although there is no specific definition in the GATS of this term, we note that a general dictionary meaning of the term "bound" is to be "compelled or obliged".[851] This sense is supported by a specialized legal dictionary, which gives a meaning of "constrained by a contractual or other obligation".[852] Thus the term "unbound" would indicate an absence of constraint or obligation.[853] In the same vein, the Scheduling Guidelines instruct a Member wishing to retain the freedom to introduce measures inconsistent with market access or national treatment to record the term "Unbound" in its GATS Schedule.[854] Since we have found subsector (d) to be unbound for market access, this suggests that China is under no constraint or obligation to grant market access within the terms of Article XVI:2. Unlike Article XVII, however, the scope of the market access obligation does not extend generally to "all measures affecting the supply of services". Instead, it applies to six carefully defined categories of measures of a mainly quantitative nature. The issue thus arises whether the scope of these measures, and thus the extent of China's absence of obligation with respect thereto, extends to discriminatory measures in the sense of Article XVII.

---

[848] Occasionally, Members use variations of these basic inscriptions. A common example is the inscription "Unbound except …", an example of which is found in China's market access inscription for mode 4 in subsector (d).

[849] 1993 Scheduling Guidelines, paras. 24, 25, and 27; 2001 Scheduling Guidelines, paras. 42, 44, and 46. The original 1993 Scheduling Guidelines were updated and formally agreed in a 2001 Decision by the Council for Trade in Services. The 1993 Scheduling Guidelines are considered a supplementary source of interpretation for the GATS. See Appellate Body Report, *US – Gambling,* para. 196.

[850] The interpretation of "None" as meaning a full commitment has been confirmed, in the context of a market access commitment, by the Appellate Body (Appellate Body Report, *US – Gambling,* para. 215).

[851] *Shorter Oxford English Dictionary*, Vol.1, p. 236.

[852] *Black's Law Dictionary*, p. 210.

[853] We note as additional context that the term "unbound" is also used in connection with GATT 1994 goods schedules to indicate, with respect to a particular tariff line, absence of obligation. See, for example, usage in China's WTO goods schedule (Schedule CLII, People's Republic of China, Part I – Most-favoured-nation Tariff, Section II – Other Products) in which "bound rate of duty" is indicated in one column, and "Base rate of duty U/B" in another. The structure of a WTO goods schedules is described generally in a Secretariat Note on "Preparation of the Uruguay Round Schedules of Concession on Market Access", MTN.GNG/MA/W/25 of 22 December 1993.

[854] 1993 Scheduling Guidelines, para. 11; 2001 Scheduling Guidelines, para. 18. See also Appellate Body Report, *US – Gambling*, fn. 257, which states: "This notation is the opposite of the notation 'Unbound', which means that a Member undertakes *no* specific commitment."

7.653 On this matter, the United States takes the position that discriminatory quantitative restrictions are not within the scope of Article XVI:2.[855] The Panel, in assessing the scope of the six categories of measures in Article XVI:2, observes at the outset that subparagraph (f), concerning foreign equity limitations, is expressly discriminatory, and that the limitation on joint ventures in subparagraph (e) is inherently so since this business form is very likely applicable only to foreign service suppliers. Nonetheless, while the wording of subparagraphs (e) and (f) suggests that discriminatory measures are not completely excluded from the scope of Article XVI:2, it does not, in the Panel's view, indicate whether the other four subparagraphs also extend to discriminatory measures.

7.654 Pursuing our examination of the scope of Article XVI:2, we note that the wording of the quantitative measures described in subparagraphs (a)-(d) contains nothing that would suggest that measures having discriminatory aspects are for this reason excluded. This view finds contextual support in the wording of Article XX:2 (examined in paragraph 7.657 below), which is premised on the existence of measures "inconsistent with both Articles XVI and XVII", and thus on the existence of measures within the scope of Article XVI:2 that have discriminatory aspects. Since nothing in the generality of the wording of Article XX:2 indicates that it applies only to measures within the scope of subparagraphs (e) and (f), which are expressly or inherently discriminatory in nature, we view Article XX:2 as a further indication that measures within the scope of any of the subparagraphs of Article XVI:2 can have discriminatory aspects. This view is also supported by the Scheduling Guidelines, in which the generality of the discussion on measures inconsistent with both Articles XVI and XVII reflects the view that, overall, Article XVI:2 extends to measures with discriminatory aspects.[856] For these reasons, the Panel finds that the obligations in Article XVI:2 can extend to measures that are also within the scope of Article XVII. With respect to China's inscription of "Unbound" for market access in mode 1, our finding would therefore suggest that China may introduce or maintain any measures falling within Article XVI:2, including those that may be discriminatory within the meaning of Article XVII.

7.655 The Panel notes, however, that its analysis of the scopes of Articles XVI and XVII leads to an apparent ambiguity in China's inscriptions in mode 1 for market access and national treatment. On the one hand, China's full national treatment commitment under Article XVII extends to "all measures affecting the supply of a service", which would appear to include measures within the scope of its unbound market access commitment. On the other, China's unbound market access commitment under Article XVI would appear to extend to measures that are also discriminatory, and within the scope of its full national treatment commitment. The United States argues that China's full national treatment commitment implies that measures inconsistent with both Articles XVI and XVII are subject to China's obligations under Article XVII. China, on the other hand, argues that its absence of market access commitment means that such measures are *not* subject to any obligations it may have under Article XVII.

7.656 In resolving this difference of view, the Panel considers that the main issue is not an ambiguity over the scope of Article XVI and the scope of Article XVII. The main issue is rather a lack of clarity about the scope of the *inscriptions* "Unbound" and "None" when applied, in China's Schedule, to measures that conflict with both market access and national treatment obligations. In considering this more specific question, we observe that the basic scheduling rule in Article XX:1, referred to above, does not determine how a Member should inscribe a limitation in such a case. Instead, we note that a special scheduling rule in Article XX:2 aims to resolve this lack of clarity:

[855] United States' second written submission, para. 196.
[856] 1993 Scheduling Guidelines, para. 11; 2001 Scheduling Guidelines, para. 18.

> Measures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.

7.657 The wording of Article XX:2 indicates that it applies when a measure is (a) inconsistent with both Article XVI and Article XVII, and (b) inscribed in the market access column of a Member's Schedule. As long as these two requirements are met, then the inscription under market access will provide a "condition or qualification" or, in the simpler usage we adopt, a "limitation", to Article XVII as well. In other words, the single inscription of a measure conflicting with both Articles XVI and XVII in the market access column of a schedule provides a limitation for both discriminatory and non-discriminatory aspects of the measure.

7.658 The Panel draws several inferences from the wording of Article XX:2. First, the provision confirms the basic point that measures exist that are inconsistent with both market access and national treatment obligations. In that sense, the scope of Article XVI and the scope of Article XVII are not mutually exclusive, as China appears to argue. Both provisions can apply to a single measure. As Article XX:2 makes clear, a single measure can contain or give rise to two simultaneous inconsistencies: one with respect to a market access obligation, the other with respect to a national treatment obligation. To maintain or introduce such a measure, the normal rule for inscribing commitments in Article XX:1 might suggest that a Member needs to enter an explicit limitation in both the market access and national treatment columns. In such cases however, the special rule in Article XX:2 provides a simpler requirement: a Member need only make a single inscription of the measure under the market access column, which then provides an implicit limitation under national treatment.

7.659 Secondly, the Panel observes that the wording of Article XX:2 indicates that what is inscribed in the market access column is a "measure" which, in the situation of conflict contemplated by Article XX:2, must encompass aspects that are inconsistent with both Articles XVI and XVII. In this way, a single inscription under Article XVI of a "measure" will provide a limitation as well under Article XVII.

7.660 The United States argues that the term "Unbound" cannot be viewed as the inscription of "measures" and therefore cannot provide a condition or qualification to Article XVII through the operation of Article XX:2.[857] In contrast, China says that the term "Unbound" is "simply a shorthand device for inscribing all measures, present or future" that are inconsistent with Article XVI:2.[858] The Panel notes that Article XX:2 states that "*[m]easures* inconsistent with both Articles XVI and XVII shall be inscribed ..." (emphasis added). We see nothing in the text of Article XX:2 that would constrain the latitude of a Member to inscribe the "measures" excluded from Article XVI:2 either individually or collectively. In our view, it would be incongruous if an inscription of "Unbound" had an effect different from that of inscribing individually all possible measures within the six categories foreseen under Article XVI:2. To take a different interpretation would be to elevate form over substance. In our assessment, therefore, an inscription of the term "Unbound" in the market access column should be viewed as an inscription of "measures", specifically of all those defined in Article XVI:2, which a Member may not maintain or adopt, unless otherwise specified in its schedule. For this reason, we find that Article XX:2 does apply to situations where a Member has inscribed "Unbound" in the market access column of its schedule. In the Panel's view, the inscription of "Unbound" in the market access column of China's Schedule has the equivalent effect of an inscription of all possible measures falling within Article XVI:2.

---

[857] United States' response to Panel question No. 69, para. 173.
[858] China's response to Panel question No. 69, para. 125.

7.661 Having found that the special scheduling rule in Article XX:2 applies to China's inscription of "Unbound", the Panel must now consider what effect this has on the scope of China's national treatment commitment. The Panel recalls that Article XX:2 provides, in the case of measures inconsistent with both Articles XVI and XVII, that the measure inscribed in the market access column encompasses aspects inconsistent with *both* market access and national treatment obligations. Consequently, an "Unbound" inscription in the market access column encompasses inconsistencies with Article XVII as well as those arising from Article XVI. The inscription of "Unbound" will therefore, in the terms of Article XX:2, "provide a condition or qualification to Article XVII as well", thus permitting China to maintain measures that are inconsistent with both Articles XVI and XVII. With an inscription of "Unbound" for subsector (d) in mode 1 under Article XVI, and a corresponding "None" for Article XVII, China has indicated that it is free to maintain the full range of limitations expressed in the six categories of Article XVI:2, whether discriminatory or not.

7.662 The Panel recalls that China's overall argument is that the United States improperly cites "the same aspects of the same measures" to support claims that China both maintains a monopoly inconsistent with Article XVI:2(a) and violates its national treatment commitment under Article XVII.[859] China submits that Article XVI "governs all aspects of the measures identified in Article XVI:(a)-(f), including the maintenance of a monopoly", and that this is in accordance with Article XX:2 and necessary to give effect to China's "Unbound" entry in the market access column.[860] Our findings respond to China's argument on this point, in that they imply that a measure that is inconsistent with both Articles XVI and XVII, and that is inscribed in the market access column of China's Schedule, could not be found to be in breach of China's full national treatment commitment. The relevant measure would not be subject to China's full national treatment commitment as it would be covered by the market access limitation.

7.663 In the present case, we consider that our interpretation of the meaning of "Unbound" when inscribed in the market access column of a schedule gives full meaning to that term. By inscribing "Unbound" under market access, China reserves the right to maintain any type of measure within the six categories falling under Article XVI:2, regardless of its inscription in the national treatment column. We observe, however, that our interpretation also gives meaning to the term "None" in the national treatment column. Due to the inscription of "None", China must grant national treatment with respect to any of the measures at issue that are not inconsistent with Article XVI:2. China's national treatment commitment could thus have practical application should China, for example, choose to allow in practice the supply of services from the territory of other WTO Members into its market, despite the fact that it has not undertaken any market access commitments in subsectors (a) to (f) of its Schedule.

7.664 We point out that our conclusion on the relationship of the inscription "Unbound" under Article XVI with that of "None" under Article XVII preserves the freedom of WTO Members, when taking services commitments, to choose the combination of market access and national treatment limitations, if any, that they wish to maintain. Our conclusion does not narrow the range of options available to WTO Members to limit their market access and national treatment commitments. It focuses solely on how to interpret through scheduling rules, notably Article XX:2, the inscriptions that a WTO Member has chosen to enter in its schedule. We emphasize as well that we do not find that either of Articles XVI or XVII is substantively subordinate to the other. We find simply that Article XX:2 establishes a certain *scheduling* primacy for entries in the market access column, in that a WTO Member not wishing to make any commitment under Article XVI, discriminatory or non-discriminatory, may do so by inscribing the term "Unbound" in the market access column of its schedule.

[859] China's first written submission, para. 150.
[860] China's first written submission, paras. 149-159.

7.665 For all these reasons, the Panel finds that China's market access entry concerning subsector (d) and mode 1 allows it to maintain any measures in that subsector and mode that are inconsistent with both Articles XVI and XVII.

Whether China has mode 1 national treatment commitments that apply to China's relevant requirements

7.666 Having considered the mode 1 market access and national treatment entries in China's Schedule, we address whether China has mode 1 national treatment commitments that apply to China's relevant requirements. We first examine the Hong Kong/Macao requirements. At the outset of our examination we recall that we have already found above at paragraph 7.624 that these requirements are inconsistent with Article XVI:2(a) because China has undertaken market access commitments in mode 3 for subsector (d) and because these requirements constitute limitations on the number of service suppliers in the form of a monopoly – a limitation not included in China's schedule. The question arises whether these same requirements constitute limitations on the number of service suppliers only with regard to mode 3 or whether they also limit the number of service suppliers with regard to mode 1.

7.667 We recall that the instruments that impose the Hong Kong/Macao requirements – Document Nos. 8, 16 and 254 – mandate that only CUP handle the processing of RMB payment card transactions that involve either an RMB payment card issued in China and used in Hong Kong or Macao, or an RMB card issued in Hong Kong or Macao and used in China. Therefore, it is clear to us that in respect of such transactions EPS suppliers of other WTO Members are precluded from providing their services on a cross-border basis to consumers (i.e. issuers or acquirers), that are based in China. In the light of this, the Hong Kong/Macao requirements in our view constitute limitations on the number of service suppliers in the form of a monopoly, including with regard to EPS suppliers of other WTO Members that would supply their services on a cross-border basis to Chinese consumers (mode 1 supply). In other words, we consider that these requirements impose an Article XVI:2(a)-type limitation on market access through mode 1.

7.668 As such, the Hong Kong/Macao requirements are covered by China's market access entry for mode 1 and subsector (d). We have determined above that due to the inscription of "Unbound" in that entry and Article XX:2, China is allowed to maintain the full range of limitations expressed in Article XVI:2, whether discriminatory or not. More particularly, Article XX:2 makes clear that even if the Hong Kong/Macao requirements, in addition to being market access limitations, are also "measures affecting the supply of services" within the meaning of Article XVII:1 and result in EPS suppliers of other WTO Members being treated less favourably than like Chinese services and service suppliers when supplying through mode 1, the inscription of "Unbound" in China's market access entry provides "a condition or qualification to Article XVII". In turn, Article XVII:1 states that a Member's national treatment obligations apply "subject to any conditions and qualifications set out [in its Schedule]". Accordingly, despite the inscription of "None" in its national treatment column concerning subsector (d) and mode 1, China has no obligation in respect of the Hong Kong/Macao requirements to accord to EPS supplied through mode 1, and EPS suppliers of other WTO Members supplying through mode 1, treatment no less favourable than that it accords to its own like services and service suppliers.

7.669 For these reasons, we conclude that the Hong Kong/Macao requirements, to the extent that they affect the cross-border supply of EPS (mode 1), are not inconsistent with China's obligations under Article XVII:1 of the GATS.

7.670 With respect to the issuer, terminal equipment and acquirer requirements, we have previously found that, contrary to the United States' assertion, these requirements are not subject to Article XVI because they do not impose any market access limitations of the type specified in Article XVI:2(a).

As a result, the inscription of "Unbound" in China's market access column does not apply to these requirements. We recall, however, that China has inscribed in its national treatment column a full national treatment commitment in mode 1 for subsector (d). The issuer, terminal equipment and acquirer requirements are covered by this commitment if they are "measures affecting the supply" of EPS through mode 1. We will address this issue further below.[861]

*(ii) Mode 3 commitments*

General

7.671 The Panel must now examine whether China has undertaken national treatment commitments in subsector (d) concerning mode 3. China's Schedule in the column entitled "Limitations on national treatment" contains a relevant entry. It reads as follows:

> (3) Except for geographic restrictions and client limitations on local currency business (listed in the market access column), foreign financial institution [*sic*] may do business, without restrictions or need for case-by-case approval, with foreign invested enterprises, non-Chinese natural persons, Chinese natural persons and Chinese enterprises. Otherwise, none.[862]

7.672 The United States notes that this entry provides for no national treatment limitations concerning subsector (d) and mode 3 other than the geographic and client limitations inscribed in the mode 3 market access column. The United States argues that because those market access limitations expired in December 2006, there are no longer any national treatment limitations with regard to subsector (d) and mode 3. In the United States' view, China must therefore provide national treatment within the meaning of Article XVII to foreign EPS suppliers supplying services on a commercial presence basis.[863]

7.673 China responds that its mode 3 national treatment commitments for subsector (d) mirror the corresponding limitation on market access inscribed by China in its Schedule for the same subsector and mode. Thus, China submits that its mode 3 national treatment commitments are limited to "foreign financial institutions". In other words, China contends that the only types of entities that may provide relevant services on a commercial presence basis are foreign financial institutions.[864] China argues that contrary to the United States' assertion, this limitation of its commitments to foreign financial institutions did not expire five years after China's accession to the WTO. China also contends that the United States failed to demonstrate that EPS suppliers of other WTO Members are foreign financial institutions.[865]

7.674 The Panel observes that China's national treatment entry concerning mode 3 ends with the phrase "otherwise, none". This indicates that there are no limitations on China's national treatment commitment concerning subsector (d) and mode 3 other than those set out in the preceding sentence of the entry. Having regard to that sentence, we note that it refers to geographic restrictions and client limitations on local currency business conducted by foreign financial institutions that are listed in the corresponding mode 3 market access column of China's Schedule. However, these restrictions and limitations were only in effect until December 2006.[866] As a consequence, under the terms of the

[861] See paras. 7.680 et seq. below.
[862] For the geographic restrictions and client limitations on local currency business that are listed in the market access column of China's Schedule, see Annex G.
[863] United States' first written submission, paras. 20 and 77.
[864] China's first written submission, para. 137.
[865] China's first written submission, paras. 131-132.
[866] The relevant restrictions and limitations expired five years after China's accession to the WTO.

entry in question, foreign financial institutions must no longer face any limitations on national treatment.

7.675 The next issue we consider is whether EPS suppliers of other WTO Members constitute foreign financial institutions within the meaning of the entry in question. We recall that we addressed the same question in the context of our analysis of China's market access commitments concerning subsector (d) and mode 3. We determined there that EPS suppliers of other WTO Members – i.e. WTO Members other than China – can be properly considered foreign financial institutions.[867] We find no basis to conclude differently in the context of the present inquiry. Indeed, we note that the mode 3 national treatment limitations specifically refer to the mode 3 market access limitations.

7.676 In our view, the entry at issue therefore supports the conclusion that China has committed to allow EPS suppliers of other WTO Members to carry out local currency business[868] in China with issuers, acquirers, merchants and card holders[869], without restrictions that would constitute limitations on national treatment, except for any national treatment limitations inscribed by virtue of Article XX:2 in the mode 3 market access column concerning subsector (d). A relevant limitation that is inscribed in the market access column concerns qualifications for foreign financial institutions to engage in local currency business.[870]

7.677 We are mindful that there are limitations on national treatment contained in the section of China's Schedule that sets out horizontal commitments. However, we discern nothing in the horizontal section of China's Schedule that would lead us to modify the conclusion we have reached on the basis of the columns on national treatment limitations and market access limitations.

7.678 For all these reasons, we conclude that, with regard to EPS provided by suppliers of other WTO Members, China has made a commitment on national treatment concerning mode 3. That commitment is subject to a limitation concerning qualifications to engage in local currency business. China is therefore obligated to accord national treatment to like EPS and EPS suppliers of other WTO Members in respect of local currency (RMB) business, subject to such suppliers meeting the aforesaid qualifications requirement.

Whether China has mode 3 national treatment commitments that apply to China's relevant requirements

7.679 With respect to the issuer, terminal equipment and acquirer requirements, we found earlier that these requirements are not subject to Article XVI because they do not impose any market access limitations of the type specified in Article XVI:2(a). However, in our view these requirements are covered by China's aforementioned national treatment commitment for mode 3, provided they are "measures affecting the supply" of EPS through mode 3. We address this issue below.[871]

[867] See para. 7.570 above.

[868] As explained at para. 7.572 above, we understand that for the purposes of the requirements at issue the relevant business in which EPS suppliers of other WTO Members would engage is local currency (RMB) business.

[869] We recall that the enterprises or persons with which EPS suppliers do business vary according to the type of network that EPS suppliers use (four-party vs. three-party model).

[870] Pursuant to the entry in question, prior to applying for authorization to engage in local currency business, foreign financial institutions must have three years of business operation in China and be profitable for two consecutive years.

[871] See paras. 7.680 et seq. below.

(b) Whether China's requirements affect the supply of services

7.680 The second element of our Article XVII inquiry calls for an analysis of whether China's requirements (measures) affect the supply of services.[872] We recall that in this particular Article XVII inquiry, we are concerned with EPS services provided by service suppliers of other WTO Members through modes 1 and 3, because the United States bases its Article XVII claims on China's relevant commitments under these two modes of supply.

7.681 The Appellate Body has provided the following relevant clarification regarding the meaning of the term "affect":

> [T]he term "affecting" [as it appears in Article I:1 of the GATS] reflects the intent of the drafters to give a broad reach of the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing".[873]

7.682 Accordingly, we need to determine whether the Chinese requirements to be examined regulate or at least have an effect on the supply of EPS services by service suppliers of other Members through modes 1 and 3.

7.683 Turning now to the requirements to be examined under the second element of our Article XVII inquiry, we recall that in respect of the Hong Kong/Macao requirements we have already reached the conclusion that they are not inconsistent with Article XVII to the extent that they affect the cross-border supply of EPS. We do not, therefore, need to examine these requirements further. In contrast, we do need to determine whether the issuer, terminal equipment and acquirer requirements affect the supply of EPS.

7.684 The United States submits that these three requirements affect the supply of EPS by foreign suppliers because they directly regulate the terms on which they may be provided in China. The United States argues that they are requirements that promote CUP's position in the marketplace by imposing certain requirements on every key player in a card-based electronic payment transaction, including issuers, merchants and acquirers.[874] More specifically, the United States notes that, due to the issuer requirements, bank cards in China used for RMB purchases in China, as well as dual currency cards issued in China, must bear the CUP logo, while no foreign EPS supplier is afforded a similar privilege.[875] Similarly, the United States argues that as a consequence of the terminal equipment and acquirer requirements, all terminal equipment must accept CUP cards and acquirers in China must post the CUP logo and accept all bank cards bearing that logo. According to the United States, no foreign EPS supplier is afforded a similar privilege.[876]

7.685 China does not specifically address the issue of whether the requirements at issue affect the supply of services.

---

[872] To recall, Article XVII states that WTO Members must provide national treatment "in respect of all measures affecting the supply of services".

[873] Appellate Body Report, *EC – Bananas III*, para. 220. As indicated, the Appellate Body made this statement in relation to the term "affecting" as it appears in Article I:1 of the GATS. We find the statement to be equally relevant and persuasive when looked at in the context of our Article XVII analysis, not least in view of the Appellate Body's explicit reference to Article III of the GATT, which is the GATT-equivalent of Article XVII of the GATS.

[874] United States' first written submission, paras. 79 and 81.

[875] United States' first written submission, para. 80.

[876] United States' first written submission, para. 80.

7.686 The Panel notes that the issuer, terminal equipment and acquirer requirements are addressed, *inter alia*, to issuers, merchants and acquirers, but not to EPS suppliers. However, all three requirements explicitly relate to one – and only one – EPS supplier, CUP. As noted by the United States and as further explained by our findings below concerning the issue of less favourable treatment, these requirements have an effect on the terms on which CUP can supply its services in the Chinese market. We have not been made aware of any parallel requirements that would specifically relate to EPS suppliers other than CUP. Therefore, due to the fact that the three requirements in question have an effect on the terms on which CUP can supply its services, they also have a consequential effect on the terms on which CUP's potential competitors, which include EPS suppliers of other Members, can supply their services in China, e.g. on a cross-border basis or through commercial presence. In the light of this, we conclude that the issuer, terminal equipment and acquirer requirements "have an effect" on, and hence affect, the mode 1 and 3 supply of EPS by suppliers of other Members. In other words, we consider that the three requirements at issue each constitute "measures affecting the [mode 1 and 3] supply of services" within the meaning of Article XVII:1.

(c) Whether China's requirements accord less favourable treatment

7.687 It remains for us to address the third and last element of our Article XVII inquiry. This involves determining whether China's requirements (measures) accord to services or service suppliers of any other Member "treatment less favourable" than that China accords to its own "like services and service suppliers". We note that the GATS provides no definition of the phrase "like services and service suppliers". In contrast, as regards the concept of "less favourable treatment", Article XVII:3 provides useful clarification. It states that formally identical or different treatment is deemed less favourable "if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member". We deduce from this that, subject to all other Article XVII conditions being fulfilled, formally identical or different treatment of service suppliers of another Member constitutes a breach of Article XVII:1 if and only if such treatment modifies the conditions of competition to their detriment.

7.688 The only requirements at issue in respect of which we reach the third element of our Article XVII inquiry are the issuer, terminal equipment and acquirer requirements. In respect of these requirements, the United States alleges that on their face they confer an advantage, or privilege, on CUP that is not afforded EPS suppliers of another Member.[877] We therefore understand the United States to allege that China provides formally different treatment to CUP, on the one hand, and like EPS suppliers of other Members, on the other hand, and that the different treatment modifies the conditions of competition to the detriment of the latter.

7.689 Accordingly, our examination of the third Article XVII element will proceed in two steps for each of the relevant requirements. First we will analyse whether, and if so, how the requirements provide for different treatment between CUP and "like" EPS suppliers of other Members. We note in this respect that these requirements are not addressed to CUP, but at such entities as issuers or acquirers. Then we will examine whether any different treatment of like services and service suppliers that we might find amounts to less favourable treatment.

[877] United States' first written submission, paras. 80 and 109; second written submission, paras. 201-203 and 207.

*(i) Issuer requirements*

Different treatment of like services and service suppliers

7.690 The United States points out that the issuer requirements mandate that any payment cards used only for RMB purchases in China, as well as any dual currency cards issued in China, bear the CUP logo. The United States submits that no other EPS provider is afforded such a privilege.[878]

7.691 The United States argues in addition that the issuer requirements, as well as the other requirements at issue in this dispute, provide disparate treatment solely according to the identity of the EPS supplier: CUP or not CUP. In the United States' view, it is evident from China's own documents that China was concerned about the potential competition its domestic supplier of EPS would face from foreign suppliers of EPS as a result of China's WTO commitments. The United States considers that it is therefore unsurprising that the requirements at issue are meant to favour the domestic Chinese entity and accordingly discriminate on that basis. The United States further observes that outside of its protected Chinese home market, CUP is being described by other EPS suppliers as an active competitor in the global market for card-based electronic payment transactions. The United States also points out that CUP's Articles of Association are explicit that the company is "[T]o provide advanced electronic payment technologies and specialized services in connection with the inter-bank card information switching."[879] To the United States, it is clear that CUP provides services for payment card transactions "like" those provided by foreign suppliers of EPS for payment card transactions and that the basis for the differential treatment by China is ultimately one of origin. Referring to the panel report in *China – Publications and Audiovisual Products*[880], the United States submits that the "like service suppliers" requirement of Article XVII is therefore satisfied.[881]

7.692 China does not specifically address whether the issuer requirements result in different treatment of CUP and its services, on the one hand, and "like" services and service suppliers of other Members, on the other hand. China considers that it is unnecessary to resolve this question. In China's view, the United States' claims under Article XVII should be dismissed because the United States did not distinguish its national treatment claims from its market access claims.[882]

7.693 The Panel first addresses the issuer requirements that relate to the *Yin Lian*/UnionPay logo use. These requirements mean that bank cards issued by commercial banks in China must bear the *Yin Lian*/UnionPay logo. In contrast, there is nothing in the record to indicate that bank cards must bear the logos of other EPS suppliers. Thus, the requirements in question give rise to formally different treatment between CUP and its network, on the one hand, and other EPS suppliers and their networks, on the other.

7.694 As concerns the other relevant type of issuer requirements – those relating to interoperability – we recall that they require issuers in China to join CUP, and bank cards issued in China to be interoperable with the CUP network. The parties have not made us aware of any comparable requirement whereby issuers would have to join other networks and bank cards would need to be interoperable with them. We consequently determine that the relevant requirements also result in formally different treatment between CUP and other EPS suppliers.

---

[878] United States' first written submission, para. 80.
[879] Article 12 of CUP's Articles of Association.
[880] Panel Report, *China – Publications and Audiovisual Products*, para. 7.975.
[881] United States' first written submission, paras. 82-87.
[882] China's response to Panel question No. 124, para. 91.

7.695 The question we need to consider next is whether the issuer requirements accord different treatment to "like services and service suppliers". We note in this regard the United States' reliance on the following statement by the panel in *China – Publications and Audiovisual Products*:

> When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the "like service suppliers" requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin. We note that similar conclusions have been reached by previous panels. We observe that in cases where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required to determine whether service suppliers on either side of the dividing line are, or are not, "like".[883]

7.696 The United States argues that the basis for the differential treatment resulting from the issuer requirements, as well as the other Chinese requirements at issue in this dispute, is "ultimately one of origin".[884] We are not persuaded. As an initial matter, we recall that some of the relevant provisions of the instruments through which these requirements are maintained refer to the network logo – the *Yin Lian*/UnionPay logo – as opposed to the logo of the company China UnionPay (CUP). For reasons we have stated earlier, however, we consider that it makes no significant practical difference whether the relevant Chinese instruments formally refer to the network logo or the CUP logo, as long as CUP remains the company charged with operating the relevant nationwide inter-bank network.[885] We also accept, of course, that CUP is a Chinese EPS supplier. But the issuer requirements do not provide for different treatment between Chinese EPS suppliers, on the one hand, and EPS suppliers of other Members, on the other. Rather, they distinguish between CUP, including via the references to the network logo, and all other EPS suppliers. The "all other" category comprises actual or potential EPS suppliers of other Members as well as actual or potential Chinese EPS suppliers. Indeed, the United States itself has stated that the treatment of EPS suppliers varies "according to the identity of the EPS supplier: CUP or not CUP."[886]

7.697 According to the panel in *China – Publications and Audiovisual Products*, in a case "where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis [of 'likeness'] would probably be required." As our case fits this situation, consistent with the view expressed by that panel, we undertake a more detailed analysis of the likeness issue.

7.698 We address first the reference in Article XVII to "like services". As there is a particular framework for analyzing the "likeness" of products in the context of Article III of the GATT 1994[887], we requested the parties to provide their views on any relevant criteria for establishing the "likeness" of services in the context of Article XVII. Neither party provided the Panel with such criteria, however, or suggested a particular analytical framework.[888] In approaching this matter, we do not assume that without further analysis we may simply transpose to trade in services the criteria or analytical framework used to determine "likeness" in the context of the multilateral agreements on trade in goods. We recognize important dissimilarities between the two areas of trade – notably the

---

[883] Panel Report, *China – Publications and Audiovisual Products*, para. 7.975 (original footnote omitted).

[884] United States' first written submission, para. 87.

[885] See para. 7.251 above.

[886] United States' first written submission, para. 82.

[887] E.g. Appellate Body Report, *EC – Asbestos*, para. 102.

[888] United States' response to Panel question No. 124, para.124; China's response to Panel question No. 124 para. 91.

intangible nature of services, their supply through four different modes, and possible differences in how trade in services is conducted and regulated.

7.699 We thus begin our interpretative analysis by considering the ordinary meaning of "like". The dictionary defines the adjective "like" as "[h]aving the same characteristics or qualities as some other person or thing; of approximately identical shape, size, etc., with something else; similar".[889] To us, this range of meanings suggests that for services to be considered "like", they need not necessarily be exactly the same, and that in view of the references to "approximately" and "similar", services could qualify as "like" if they are essentially or generally the same.[890] The aforementioned definition highlights another point: something or someone is like in some respect, such as – in the terms of the definition – the "shape, size, etc." of a thing or person. To determine in what respect services need to be essentially the same for them to be "like", we turn to consider the context of the phrase "like services".

7.700 We note that Article XVII:1 requires that a Member accord to services of another Member "treatment no less favourable" than that it accords to its own like services. Article XVII:3 clarifies in relevant part that a Member would be deemed to provide less favourable treatment if it "modifies the conditions of competition in favour of services … of [that] Member compared to like services … of any other Member". We deduce from these provisions that Article XVII seeks to ensure equal competitive opportunities for like services of other Members. These provisions further suggest that like services are services that are in a competitive relationship with each other (or would be if they were allowed to be supplied in a particular market). Indeed, only if the foreign and domestic services in question are in such a relationship can a measure of a Member modify the conditions of competition in favour of one or other of these services.

7.701 Furthermore, we note that Article XVII is applicable to all services[891], in any sector, and that services – which are intangible – may be provided through any of the four modes of supply. As well, Article XVII refers to "like services and service suppliers". In the light of this complexity, "like services and service suppliers" analyses should in our view take into account the particular circumstances of each case. In other words, we consider that determinations of "like services", and "like service suppliers", should be made on a case-by-case basis.[892]

7.702 In the light of the above, we consider that a likeness determination should be based on arguments and evidence that pertain to the competitive relationship of the services being compared.[893] As in goods cases where a panel assesses whether a particular product is a "like product", the determination must be made on the basis of the evidence as a whole.[894] If it is determined that the services in question in a particular case are essentially or generally the same in competitive terms, those services would, in our view, be "like" for purposes of Article XVII.[895]

---

[889] *Shorter Oxford English Dictionary*, Vol. 1, p. 1601.

[890] We note in this regard that another panel based a likeness determination on a finding that the services at issue were "virtually the same". Panel Report, *EC – Bananas III (Ecuador)*, para. 7.322.

[891] Except for services supplied in the exercise of governmental authority. See Article I:3(b) of the GATS.

[892] For a similar view with regard to "like products" determinations in the context of Article III of the GATT 1994, see Appellate Body Reports, *EC – Asbestos*, para. 101; and *Japan – Alcoholic Beverages II*, DSR 1996:I, 97, at p. 113.

[893] This is also consistent with the approach taken in the goods context. See Appellate Body Reports, *EC – Asbestos*, paras. 99 and 103; and *Philippines – Distilled Spirits*, fn. 211.

[894] See Appellate Body Report, *EC – Asbestos*, para. 103.

[895] It is important to note that even if relevant services are determined to be "like" and a measure of a Member is found to result in less favourable treatment of "like" services of another Member, it may still be possible to justify that measure under one of the general exceptions set out in Article XIV of the GATS.

7.703 With the foregoing observations in mind, we turn to assess whether EPS supplied by CUP are like those supplied by EPS suppliers of other Members. To that end, we must review any relevant evidence. To begin with, evidence submitted by the United States indicates that CUP is perceived by other global EPS suppliers as a competitor in the global marketplace.[896] Additional evidence submitted by the United States indicates that CUP and EPS suppliers of other Members provide a data-processing infrastructure.[897] Both CUP and EPS suppliers of other Members also provide services in connection with inter-bank bank card information switching.[898] Specifically, both categories of suppliers are engaged in the authorization[899] and clearing[900] of payment card transactions and also facilitate their settlement[901]. They are further involved in any related transfer of data and information.[902] Moreover, both CUP and EPS suppliers of other Members establish common standards, rules and procedures that enable transaction information and data processing for the purpose of processing payment card transactions.[903] Finally, CUP and EPS suppliers of other Members mediate or arbitrate any business disputes arising out of payment card transactions.[904] Thus, evidence placed on record by the United States shows that CUP and EPS suppliers of other Members offer essentially the same description of their business scope and of the specific services that they provide.

7.704 While the evidence provided by the United States is not extensive, it is sufficient to raise a presumption that the services supplied by CUP and those supplied by EPS suppliers of other Members are essentially the same in competitive terms. China has not adduced any evidence to rebut the United States' assertion, nor has China asserted that the services supplied by CUP, on the one hand, and by foreign EPS suppliers, on the other, are not "like" services.[905] Moreover, evidence submitted

---

[896] Visa IPO Prospectus, Exhibit US-3, p. 147; MasterCard 2009 Annual Report, Exhibit US-5, p. 20. We understand that there are currently no EPS suppliers of other WTO Members providing EPS in China for domestic inter-bank RMB transactions. We also note that the 2007 China Payment System Development Report of the PBOC compares CUP's inter-bank transaction volume to that of Visa, MasterCard and American Express (2007 China Payment System Development Report, Financial Service Report of the People's Bank of China, No. 5, 2008, Exhibit US-15, p. 59). Moreover, we note that American Express, in its 2010 annual report, indicates that it "competes in the global payment industry with other card networks, including, among others, Visa, MasterCard, Diners Club International … and Discover…" (American Express 2010 Annual Report, Exhibit US-7, p. 13).

[897] Article 12 of CUP's Articles of Association; MasterCard 2009 Annual Report, Exhibit US-5, p. 7; and Visa IPO Prospectus, Exhibit US-3, p. 138.

[898] Article 12 of CUP's Articles of Association; Visa IPO Prospectus, Exhibit US-3, p. 135; and MasterCard 2009 Annual Report, Exhibit US-5, pp. 78.

[899] Article 2.4.A of Chapter III of the Business Practices Appendix of Document No. 76; MasterCard 2010 Annual Report, Exhibit US-6, p. 8; and Visa IPO prospectus, Exhibit US-3, p. 136.

[900] Article 2.4.B of Chapter III, and Article 1.4.1 of Chapter IV, of the Business Practices Appendix of Document No. 76; MasterCard 2010 Annual Report, Exhibit US-6, p. 9; and Visa IPO prospectus, Exhibit US-3, pp. 136-137.

[901] Article 2.4.B of Chapter III, and Articles 1.4.3 and 2 of Chapter IV, of the Business Practices Appendix of Document No. 76; MasterCard 2010 Annual Report, Exhibit US-6, p. 9; and Visa IPO prospectus, Exhibit US-3, pp. 136-137.

[902] Article 12 of CUP's Articles of Association; Article 3 of Chapter I, and Article 1.2 of Chapter III, of the Business Practices Appendix of Document No. 76; Visa IPO prospectus, Exhibit US-3, pp. 130-131.

[903] Article 12 of CUP's Articles of Association; MasterCard 2010 Annual Report, Exhibit US-6, pp. 4 and 18; and Visa IPO prospectus, Exhibit US-3, p. 131.

[904] Article 12 of CUP's Articles of Association; Visa IPO prospectus, Exhibit US-3, pp. 129 and 131; and Visa 2010 Annual Report, Exhibit US-4, p. 8.

[905] China notes that the creation of CUP reflected a desire to "establish alternatives to the global networks". China's first written submission, para. 54. Similarly, China states that CUP operates China's national inter-bank payment card network. In establishing a nationwide network, China wanted to achieve the network effects associated with inter-bank payment cards, "but without having the Chinese market taken over by the same [global] network operators that had come to dominate other markets". China's first written submission, paras. 54, 44 and 57. Finally, China states that the United States has not identified anything in the instruments

by China regarding the existence of dual-logo bank cards – i.e. bank cards bearing the *Yin Lian*/UnionPay logo and the logo of an EPS supplier of another Member and that are interoperable with the networks of both suppliers – lends support to the view that EPS supplied by CUP and suppliers of other Members are closely competitive services.[906] Furthermore, in the particular circumstances of this case, we do not see how our conclusion on "likeness" of services could be different depending on whether EPS suppliers of other Members supply EPS through mode 1 or through mode 3. In the light of this, we consider that EPS supplied by CUP are like EPS supplied by EPS suppliers of other Members.

7.705 Turning now to the issue of "likeness" of service suppliers, we note that in a different dispute, a panel has found that entities may be considered like service suppliers if, and to the extent that, they provide like services.[907] We agree that the fact that service suppliers provide like services may in some cases raise a presumption that they are "like" service suppliers. However, we consider that, in the specific circumstances of other cases, a separate inquiry into the "likeness" of the suppliers may be called for. For this reason, we consider that "like service suppliers" determinations should be made on a case-by-case basis.

7.706 In the present case, we have already found that CUP and EPS suppliers of other Members provide like services. Furthermore, the evidence before us indicates that CUP and EPS suppliers of other Members describe their business scope in very similar terms, and that CUP is perceived by EPS suppliers of other Members as a competitor in the global marketplace. This suggests that these suppliers compete with each other in the same business sector. Also, in the particular circumstances of this case, we see no basis for reaching a different conclusion on "likeness" of service suppliers depending on whether EPS suppliers of other Members supply EPS through mode 1 or through mode 3.

7.707 Additionally, we recall that in our case the treatment in China of EPS suppliers varies according to the identity of the EPS supplier or its network, namely according to whether or not the EPS supplier is CUP or the network is that of CUP. We consider that the fact that EPS suppliers of other Members are not CUP, and that their networks are not that of CUP, does not render EPS suppliers of other Members or their networks "unlike" CUP or its network. In our view, to accept otherwise would make it easy to circumvent the national treatment obligation and would deprive Article XVII of any useful effect.

7.708 Based on these elements and considerations, and in the absence of any evidence from China suggesting that CUP is different from EPS suppliers of other Members, we consider that for purposes of this case CUP and EPS suppliers of other Members are "like" suppliers of EPS, at least to the extent that they provide "like" services.

7.709 In the light of our findings above, we thus come to the conclusion that the issuer requirements result in different treatment of "like" EPS and EPS suppliers of other Members.

Less favourable treatment

7.710 In relation to the "less favourable treatment" condition, the United States argues that due to the issuer requirements, issuing banks may not use the CUP logo unless they have access to the CUP

---

at issue that prevents other EPS suppliers from processing inter-bank payment card transactions, and that there is nothing in these instruments that establishes a "monopoly". China's opening statement at the first meeting of the Panel, para. 20.

[906] "Dual-logo bankcards bearing the *Yin Lian* logo and the logo of an international network operator", Exhibit CHN-112.

[907] Panel Report, *EC – Bananas III (Ecuador)*, para. 7.322.

network, paid CUP for that access, and meet CUP's technical standards. The United States considers that issuing banks have no reason to seek an alternative EPS supplier, as any issuing bank is required to have access to the CUP system and to pay for that access. According to the United States, the issuer requirements have three competitive effects – they guarantee CUP an income stream from every credit card issued for domestic use within China, they give issuers an incentive to control costs by using CUP as their exclusive supplier, and they provide free branding to CUP. The United States submits that, in contrast, foreign suppliers of EPS are forced to secure such access and promote their brand on their own. The United States contends that even if a foreign supplier of EPS were to convince an issuer to issue a card, these requirements ensure that it will not be able to compromise CUP's prominent logo or obtain any market share to the certain exclusion of CUP. In its view, the value, if any, of co-branding or having a non-CUP supplier of EPS is extremely limited in any event, because only CUP can handle inter-bank or cross-region card-based electronic transactions.[908]

7.711 China does not specifically address whether the issuer requirements accord less favourable treatment to like EPS and EPS suppliers of other Members. China contends, however, that the requirement that all RMB-denominated cards bear the *Yin Lian* logo does not require banks to purchase network services from CUP. China further states that CUP charges for network services on a transaction-by-transaction basis.[909]

7.712 The Panel first addresses the *Yin Lian*/UnionPay logo element of the issuer requirements. To recall our earlier finding, China requires that RMB bank cards, and dual currency bank cards, that are issued in China by commercial banks and usable in domestic inter-bank RMB transactions must bear the *Yin Lian*/UnionPay logo on the front of the card.[910] We have also found no basis on which to conclude that the provisions in question would prohibit the issuance of relevant cards that would be capable of being processed over a network in China that is not that of CUP. As a result, any EPS supplier of another Member that wishes to have a commercial bank in China issue a bank card on its network would have no choice but to accept that the *Yin Lian*/UnionPay logo feature prominently on the front of that card. Holders of the relevant bank card would thus be constantly reminded of the availability of CUP, a competing EPS supplier, and its network. There is a further way in which CUP benefits from the Chinese requirements that bank cards issued in China bear the *Yin Lian*/UnionPay logo. As a consequence of these requirements, issuers must give publicity to the *Yin Lian*/UnionPay logo by putting it on all cards that they issue, and they must do so for free, whereas EPS suppliers of other Members are not entitled to have their logo put on CUP-branded cards. The attention that is drawn in this way to the CUP network raises its profile.[911] Based on these elements, we consider that China's requirements that RMB and dual currency bank cards bear the *Yin Lian*/UnionPay logo modify the conditions of competition in favour of CUP. Pursuant to Article XVII:3, these requirements can therefore be considered to result in like EPS suppliers of other Members being treated less favourably than CUP.

7.713 We now consider the interoperability element of the issuer requirements. The United States asserts in this context that issuers must have access to the CUP network and must pay fees to CUP for that access. The United States also refers to a guaranteed income stream for CUP from every credit card that is issued. However, the United States has not established that the issuer requirements entail, or are associated with, access fees payable to CUP, let alone their level and other modalities.[912] Nor

[908] United States' first written submission, paras. 80 and 100-101.

[909] China's response to question No. 104(b), para. 51.

[910] In the case of credit cards issued solely for domestic use in China the CUP anti-counterfeiting logo must also be displayed.

[911] We note that according to one global EPS supplier, brand recognition is one of the principal competitive factors in the global payments industry. See American Express 2010 Annual Report, Exhibit US-7, p. 13.

[912] For instance, it is not clear whether fees would need to be paid for every bank card that is issued or whether access fees would have to be paid by issuers for access to CUP independently of the number of bank

has the United States provided evidence to substantiate its assertion that the issuer requirements guarantee CUP an income stream from each and every credit card issued in China. In contrast, we agree that issuers in China must have access to the CUP network, and that bank cards that must display the *Yin Lian*/UnionPay logo must also be interoperable with CUP. Accordingly, we confine our analysis to these particular requirements. We recall in this connection that these requirements do not appear to prevent issuers who are members of CUP from joining other networks in China, or that bank cards that meet CUP's uniform business specifications and technical standards must not, or cannot, simultaneously be interoperable with other EPS suppliers' networks.

7.714 In effect, these interoperability requirements guarantee that all commercial banks that issue bank cards for use in domestic inter-bank RMB transactions in China are members of CUP. They further guarantee that all bank cards that are issued for such use by commercial banks – CUP cards as well as non-CUP cards – are capable of being processed over CUP's network. In contrast, EPS suppliers of other Members have to convince issuers to join their networks.[913] They might be unsuccessful in that endeavour, or at least they might fail to achieve the same level of membership of relevant issuing banks.[914] And even if they could achieve the same level of membership, unlike CUP, EPS suppliers of other Members would need to expend time and effort in the process.[915] Moreover, if issuers in China were to issue relevant bank cards that are interoperable with the networks of EPS suppliers of other Members, those bank cards would also need to be interoperable with the CUP network. In contrast, in cases where CUP-branded bank cards are issued, they would not need to be interoperable with networks of EPS suppliers of other Members.[916] Based on these elements, we consider that the interoperability requirements in question modify the conditions of competition in favour of CUP. By virtue of Article XVII:3, they thus result in like EPS suppliers of other Members being treated less favourably than CUP.

7.715 In the particular case of the issuer requirements, we do not see how our conclusions on the issue of less favourable treatment could be affected by whether a like EPS supplier of another Member provides its services under mode 1 or mode 3. In our view, the conditions of competition of EPS suppliers of other Members are adversely modified irrespective of whether the relevant services are provided under mode 1 or 3. In relation to mode 3, it is nonetheless necessary to add that the issuer requirements result in less favourable treatment of like EPS suppliers of other Members even if these suppliers meet the qualifications for engaging in local currency business that are stipulated in China's mode 3 limitation.

7.716 We observe, finally, that with regard to three-party networks, the United States argues that, due to the issuer requirements, three-party EPS suppliers are not able to issue their own branded bank

---

cards they issue on that network. This information would also be important for any assessment of the United States' assertion that the alleged access fees give issuers an incentive to control costs by using CUP as their exclusive supplier. We add in this regard that, in our understanding, it is not uncommon for issuing banks to issue bank cards on the networks of different EPS suppliers' networks, to meet bank clients' demand. See, e.g. MasterCard 2009 Annual Report, Exhibit US-5, p. 21.

[913] We recall in this respect that issuers play an essential part in the business model of EPS suppliers. They issue the bank cards that are used in transactions that will be processed over a particular EPS supplier's network.

[914] Evidence submitted by the United States suggests that a relevant factor in this regard is the economic attractiveness to bank card issuers of an EPS supplier's network. See American Express 2010 Annual Report, Exhibit US-7, p. 13; Discover 2010 Annual Report, Exhibit US-8, p. 10.

[915] Evidence provided by the United States indicates that the success of marketing and promotional campaigns is a relevant competitive factor for EPS suppliers. See American Express 2010 Annual Report, Exhibit US-7, p. 13.

[916] We note in this regard that according to one EPS supplier, one of the main competitive factors in the global payments industry is the number of cards in force and the amount of spending on these cards. See American Express 2010 Annual Report, Exhibit US-7, p. 13.

cards.[917] As also indicated by the United States, three-party EPS suppliers ordinarily issue cards directly to card holders.[918] We note that the issuer requirements concern commercial banks as issuers and bank cards issued by such banks. We consider that to the extent that EPS suppliers, such as those that implement a three-party model, use institutions authorized as commercial banks in China to issue bank cards, or are themselves authorized as commercial issuing banks, the issuer requirements result in less favourable treatment of such EPS suppliers.

*(ii) Terminal equipment requirements*

Different treatment of like services and suppliers

7.717 The United States recalls that under the terminal equipment requirements all ATMs, merchant card processing equipment and POS terminals must accept cards bearing the CUP logo. According to the United States, there is no equivalent requirement for other cards, and no foreign EPS supplier is afforded a similar privilege.[919]

7.718 The United States further argues that the terminal equipment requirements, as well as the other requirements at issue in this dispute, provide disparate treatment solely according to the identity of the EPS supplier: CUP or not CUP. The United States considers that CUP provides services for payment card transactions "like" those provided by foreign suppliers of EPS for payment card transactions and that the basis for the differential treatment by China is ultimately one of origin. Referring to the panel report in *China – Publications and Audiovisual Products*, the United States submits that the "like service suppliers" requirement of Article XVII is therefore satisfied.[920]

7.719 China does not specifically address whether the terminal requirements result in different treatment of CUP and its services, on the one hand, and "like" services and service suppliers of other Members, on the other hand. China considers that it is unnecessary to resolve this question because the United States national treatment claims in its view should be dismissed in their entirety.[921]

7.720 The Panel notes that pursuant to the terminal equipment requirements, terminal equipment that joins the national bank card inter-bank processing network must be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo. In contrast, the record does not indicate that China imposes a requirement whereby terminal equipment must be capable of accepting bank cards bearing the logos of other EPS suppliers. In the light of this, we determine that the terminal equipment requirements result in formally different treatment between CUP and other EPS suppliers.

7.721 The next issue for us to examine is whether the terminal equipment requirements accord different treatment to "like services and service suppliers". As with the issuer requirements, the terminal equipment requirements in our view draw a distinction between CUP and other EPS suppliers that is not based on origin, but on the identity of the EPS supplier, or the network it operates. Therefore, as in the context of our analysis of the issuer requirements, we consider it appropriate to undertake a more detailed analysis of the likeness issue than the one that was conducted by the panel in *China – Publications and Audiovisual Products*. We recall that we have already conducted such an analysis above. Thus, for the reasons set out in paragraphs 7.698 - 7.708 above, we consider that for purposes of this case EPS supplied by CUP are "like" EPS supplied by EPS suppliers of other

[917] United States' response to Panel question No. 25, para. 82.
[918] Ibid., para. 81.
[919] United States' first written submission, paras. 80 and 109.
[920] United States' first written submission, paras. 82-87.
[921] China's response to Panel question No. 124, para. 91.

Members, and that CUP and EPS suppliers of other Members are "like" suppliers of EPS, at least to the extent that they provide "like" services.[922]

7.722 In the light of the above, we conclude that the terminal equipment requirements result in different treatment of "like" EPS and EPS suppliers of other Members.

Less favourable treatment

7.723 The United States argues that the terminal equipment requirements modify the conditions of competition in favour of CUP. CUP is guaranteed access to all merchants in China who accept credit cards, while foreign EPS must market themselves to each POS terminal user. The United States observes that the main value that an EPS supplier has to offer issuing banks and card holders is the ability to use a card at a large number of locations, and the larger the network of merchants that use the card, the greater the attractiveness of the EPS supplier to its customers. The United States argues that the terminal equipment requirements give CUP automatic and universal acceptance of its bank cards by banks and merchants. In contrast, in China a foreign EPS supplier must build that network by marketing itself to merchants and acquiring banks. The United States notes in this respect that EPS suppliers must ordinarily invest heavily and incur substantial expense to build acceptance of their payment products by merchants, often in vigorous competition with other suppliers of EPS.[923]

7.724 China does not specifically address whether the terminal equipment requirements accord less favourable treatment to like EPS and EPS suppliers of other WTO Members.

7.725 The Panel recalls that pursuant to the terminal equipment requirements all terminals in China that are part of the national bank card inter-bank processing network must be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo. This guarantees that all bank cards that bear the *Yin Lian*/UnionPay logo can be accepted by commercial bank and merchant terminal equipment in China and processed over CUP's network. As regards EPS suppliers of other WTO Members, we recall that the terminal equipment requirements do not appear to preclude terminals from accepting at the same time bank cards that would be capable of being processed over a network in China other than that of CUP. Consequently, EPS suppliers of other WTO Members could seek to obtain access to the terminals that must be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo. These terminals could then process transactions also over their networks. However, EPS suppliers of other WTO Members may not be able to get access to all these terminals because, unlike in the case of bank cards bearing the *Yin Lian*/UnionPay logo, commercial banks, acquirers and merchants could refuse access.[924] Also, even if the same level of access to terminal equipment could be achieved by EPS suppliers of other WTO Members, they would need to expend time and effort, which is not the case for CUP.[925] As pointed out by the United States, the level of access to bank and merchant terminals that an EPS supplier has is an important determinant of its attractiveness to issuers as well as bank card users and thus of its competitive position.[926] Based on

[922] As we indicated earlier, in the particular circumstances of this case, we see no basis for reaching a different conclusion on "likeness" of services or service suppliers depending on whether EPS suppliers of other WTO Members supply EPS through mode 1 or through mode 3.

[923] United States' first written submission, paras. 102 and 110; second written submission, para. 207; response to Panel question No. 15, para. 56.

[924] Evidence submitted by the United States suggests that a relevant factor in this regard is the economic attractiveness to merchants of participating in an EPS supplier's network. See American Express 2010 Annual Report, Exhibit US-7, p. 13.

[925] As noted earlier, EPS suppliers suggest that the success of marketing and promotional campaigns is a relevant competitive factor for them. See American Express 2010 Annual Report, Exhibit US-7, p. 13.

[926] We note in this regard that according to evidence submitted by the United States the quantity and quality of establishments where bank cards can be used ranks among the principal competitive factors in the global payments industry. See American Express 2010 Annual Report, Exhibit US-7, p. 13.

these elements, we consider that the terminal equipment requirements modify the conditions of competition in favour of CUP. Having regard to Article XVII:3, they therefore accord to like EPS suppliers of other WTO Members less favourable treatment than to CUP.

7.726 In the particular case of the terminal equipment requirements, we do not consider that our conclusions on the issue of less favourable treatment are affected by whether a like EPS supplier of another WTO Member provides its services under mode 1 or mode 3. In our view, the conditions of competition of EPS suppliers of other WTO Members are adversely modified irrespective of whether the relevant services are provided under mode 1 or 3. In relation to mode 3, it is nonetheless important to add that the terminal equipment requirements result in less favourable treatment of like EPS suppliers of other WTO Members even if these suppliers meet the qualifications for engaging in local currency business that are stipulated in China's mode 3 limitation.

7.727 Finally, we note that the United States has not specifically addressed how the terminal equipment requirements affect three-party networks. It is clear to us, however, that EPS suppliers operating such networks would find themselves in substantially the same position as EPS suppliers operating four-party networks as regards the issue of access to terminal equipment in China. We therefore consider that our finding of less favourable treatment applies to EPS suppliers, regardless of whether they adopt a three- or a four-party model or some variation of either model.

*(iii) Acquirer requirements*

Different treatment of like EPS suppliers

7.728 The United States notes that under the acquirer requirements all acquiring institutions in China must post the CUP logo and accept all bank cards bearing that logo. According to the United States, no foreign EPS supplier is afforded a similar privilege.[927]

7.729 The United States further argues that the acquirer requirements, as well as the other requirements at issue in this dispute, provide disparate treatment solely according to the identity of the EPS supplier: CUP or not CUP. The United States considers that CUP provides services for payment card transactions "like" those provided by foreign suppliers of EPS for payment card transactions and that the basis for the differential treatment by China is ultimately one of origin. Referring to the panel report in *China – Publications and Audiovisual Products*, the United States submits that the "like service suppliers" requirement of Article XVII is therefore satisfied.[928]

7.730 China does not specifically address whether the acquirer requirements result in different treatment of CUP and its services, on the one hand, and "like" services and service suppliers of other WTO Members, on the other hand. China considers that it is unnecessary to resolve this question because the United States national treatment claims in its view should be dismissed in their entirety.[929]

7.731 The Panel recalls that pursuant to the acquirer requirements acquirers must (i) post the *Yin Lian*/UnionPay logo and (ii) be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo. The latter requirements relate both to terminal equipment and interoperability. In contrast, the parties have not made us aware of any requirements whereby acquirers would have to post the logos of other EPS suppliers or be capable of accepting bank cards bearing their logos. We therefore consider that the acquirer requirements result in formally different treatment between CUP and other EPS suppliers.

[927] United States' first written submission, para. 80.
[928] United States' first written submission, paras. 82-87.
[929] China's response to Panel question No. 124, para. 91.

7.732 We now address whether the acquirer requirements accord different treatment to "like services and service suppliers". As with the issuer and terminal equipment requirements, the acquirer requirements in our view draw a distinction between CUP and other EPS suppliers that is not based on origin, but on the identity of the EPS supplier, or the network it operates. Therefore, as in the context of our analysis of the issuer and terminal equipment requirements, we consider it appropriate to undertake a more detailed analysis of the likeness issue than the one that was conducted by the panel in *China – Publications and Audiovisual Products*. We recall that we have already conducted such an analysis above. Thus, for the reasons set out in paragraphs 7.698 - 7.708 above, we consider that for purposes of this case EPS supplied by CUP are "like" EPS supplied by EPS suppliers of other WTO Members, and that CUP and EPS suppliers of other WTO Members are "like" suppliers of EPS, at least to the extent that they provide "like" services.[930]

7.733 Based on the foregoing considerations, we conclude that the acquirer requirements result in different treatment of "like" EPS and EPS suppliers of other WTO Members.

Less favourable treatment

7.734 The United States argues that the acquirer requirements distort the competitive relationship between CUP and foreign EPS suppliers for the same reasons as the terminal equipment requirements. The United States adds that acquirers have important relationships with merchants, often providing POS terminal and processing equipment to merchants so that they can process payment cards. Acquirers also maintain merchants' accounts, handle relations with merchants, and ensure that payments are properly credited to merchants.[931]

7.735 China does not specifically address whether the acquirer requirements accord less favourable treatment to like EPS and EPS suppliers of other Members.

7.736 The Panel first addresses the acquirer requirements that relate to terminal equipment. Pursuant to these requirements, terminal equipment operated by acquiring banks and merchant terminal equipment provided by acquirers must be technically capable of accepting cards bearing the *Yin Lian*/UnionPay logo. We also recall our view that these requirements would not prevent the acceptance by acquirers, or merchants, of bank cards that would be capable of being processed over a network in China other than that of CUP. To that extent, the analytical starting point for these acquirer requirements is not substantially different from that for the terminal equipment requirements we have examined earlier.[932] Consequently, our considerations in paragraphs 7.717 to 7.727 above concerning the terminal equipment requirements are applicable, with the necessary modifications, to the acquirer requirements in question. Accordingly, on the basis of the factual situation described in this paragraph and the considerations set out in paragraphs 7.728 to 7.734, we consider that the acquirer requirements that relate to terminal equipment modify the conditions of competition in favour of CUP. That being the case, we also consider that they result in like EPS suppliers of other Members being treated less favourably than CUP.

7.737 We now proceed to address the interoperability element of the acquirer requirements. Pursuant to these acquirer requirements, acquirers must join CUP and comply with uniform business standards and technical specifications of inter-bank interoperability. We also recall that these requirements do not appear to prevent acquirers from complying with business standards and

[930] As we indicated earlier, in the particular circumstances of this case, we see no basis for reaching a different conclusion on "likeness" of services or service suppliers depending on whether EPS suppliers of other WTO Members supply EPS through mode 1 or through mode 3.

[931] United States' second written submission, para. 203.

[932] The main difference is that in this case, we are concerned only with those terminals that are operated or provided by acquirers.

technical specifications adopted by EPS suppliers of other Members. Thus, if EPS suppliers of other Members wish acquirers to join their networks and to be able to accept bank cards that are interoperable with their networks, they must take the initiative. It is uncertain, however, whether any such initiative would result in the same level of membership of relevant acquirers and the same number of acquirers meeting the business standards and technical specifications of EPS suppliers of other Members, because acquirers are not required to respond favourably. And even if EPS suppliers of other Members could achieve the same result, they would need to invest time and effort.[933] We note in this respect that acquirers are important to EPS suppliers because they acquire merchant transactions and provide merchants with terminal equipment that can process transactions over a particular EPS supplier's network. Based on these elements, we consider that the acquirer requirements that relate to interoperability modify the conditions of competition in favour of CUP. In view of Article XVII:3, we further determine that they result in like EPS suppliers of other Members being treated less favourably than CUP.

7.738 The final element of the acquirer requirements to be examined is the *Yin Lian*/UnionPay logo element. Pursuant to this requirement, acquirers must post the *Yin Lian*/UnionPay logo on merchant terminals. We also recall that this requirement does not appear to prevent the posting of the logo of competing EPS suppliers. Thus, while the *Yin Lian*/UnionPay logo is automatically posted, EPS suppliers of other Members who wish acquirers to post their logo need to invest time and effort to achieve this. In our view, the posting of an EPS supplier's logo on merchant terminals is relevant inasmuch as it alerts card holders to the option of using their bank card rather than paying in cash, for instance. The logo may thus generate additional transactions that the EPS supplier whose logo is posted can process. Also, since merchant terminals are frequently capable of accepting bank cards with a variety of logos, the fact that one EPS supplier's logo is posted while another's is not might mislead holders of cards bearing the latter's logo, in the sense that the absence of a particular logo might suggest that cards bearing that logo would not be accepted. As a result, such cards might either not be used by card holders or card holders might not seek to get such bank cards in the first place. Based on these elements, the requirement that acquirers must post the *Yin Lian*/UnionPay logo in our view modifies the conditions of competition in favour of CUP. In accordance with Article XVII:3, the requirement can thus be considered to result in like EPS suppliers of other Members being treated less favourably than CUP.

7.739 In the particular case of the acquirer requirements, we do not see how our conclusions on the issue of less favourable treatment could be affected by whether a like EPS supplier of another Member provides its services under mode 1 or mode 3. In our view, the conditions of competition of EPS suppliers of other Members are adversely modified irrespective of whether the relevant services are provided under mode 1 or 3. In relation to mode 3, it is nevertheless important to add that the acquirer requirements result in less favourable treatment of like EPS suppliers of other Members even if these suppliers meet the qualifications for engaging in local currency business that are stipulated in China's mode 3 limitation.

7.740 We also observe that the United States has not specifically addressed how the acquirer requirements affect three-party networks. As described by the United States, these networks ordinarily serve merchants directly. As regards the acquirer requirements that relate to terminal equipment and the logo posting, we do not see how EPS suppliers of other Members would be impacted differently, depending on whether they operate a three- or a four-party network or some variation of either type of network. With regard to the interoperability element of the acquirer requirements, we consider that to the extent that EPS suppliers, such as those that implement a three-party model, operate as acquiring banks in China, the interoperability element of the acquirer requirements results in less favourable treatment of such EPS suppliers.

[933] As noted earlier, EPS suppliers suggest that the success of marketing and promotional campaigns is a relevant competitive factor for them. See American Express 2010 Annual Report (Exhibit US-7), p. 13.

(d) Overall conclusions

7.741 As we have completed our analysis of the three Article XVII elements, we can come to overall conclusions on the United States' claims that the Hong Kong/Macao requirements as well as the issuer, terminal equipment and acquirer requirements are inconsistent with Article XVII.

*(i) Hong Kong/Macao requirements*

7.742 We found above that the Hong Kong/Macao requirements impose an Article XVI:2(a)-type limitation on market access through mode 1 and that they are therefore subject to China's "Unbound" market access entry for that mode and subsector (d). We further found that Article XX:2 indicates that even if the Hong Kong/Macao requirements are also "measures affecting the supply of services" within the meaning of Article XVII:1 and result in EPS suppliers of other Members being treated less favourably than like Chinese services and service suppliers when supplying through mode 1, the inscription of "Unbound" in China's market access entry provides "a condition or qualification to Article XVII". We determined on that basis that China has no obligation in respect of the Hong Kong/Macao requirements to accord national treatment to EPS supplied through mode 1, and EPS suppliers of other Members supplying through mode 1. For these reasons, we conclude that the Hong Kong/Macao requirements, to the extent that they affect the cross-border supply of EPS (mode 1), are not inconsistent with Article XVII:1 of the GATS.[934]

*(ii) Issuer requirements*

7.743 We also found that the issuer requirements (relating to both the *Yin Lian*/UnionPay logo and interoperability elements) are subject to commitments set out in China's mode 1 and 3 national treatment entries concerning subsector (d); that they are measures affecting the supply of services; and that they result in like EPS and EPS suppliers of other Members being treated less favourably than CUP and its EPS, irrespective of whether the relevant services are provided under mode 1 or 3 and even in cases where those other suppliers would meet the qualifications for engaging in mode 3 local currency business. For these reasons, we conclude that the issuer requirements are inconsistent with Article XVII:1 of the GATS. The issuer requirements that relate to the *Yin Lian*/UnionPay logo use are maintained through Articles 2.1(i) and 2.2(i) of Document No. 37; Articles 1, 2, 5 and 6 of Document No. 57; and Article 3.2(ii) of Document No. 129. Those that relate to interoperability are maintained through Articles 1.2(i), 2.1(iii), 2.2(i) and 3.1 of Document No. 37; Article 3 of Document No. 57; Article 3.2(ii) of Document No. 129; and Article 64 of Document No. 17 in conjunction with Document No. 76.

*(iii) Terminal equipment requirements*

7.744 We further found that the terminal equipment requirements (relating to both the *Yin Lian*/UnionPay logo and interoperability elements) are subject to commitments set out in China's mode 1 and 3 national treatment entries concerning subsector (d); that they are measures affecting the supply of services, and that they result in like EPS and EPS suppliers of other Members being treated less favourably than CUP and its EPS, irrespective of whether the relevant services are provided under mode 1 or 3 and even in cases where those other suppliers would meet the qualifications stipulated in China's Schedule for engaging in mode 3 local currency business. For these reasons, we conclude that they are inconsistent with Article XVII:1 of the GATS. These requirements are maintained through Articles 1.2(i) and 2.1(ii) of Document No. 37 and also Article 2.2 of Document No. 153.

[934] We recall that we exercised judicial economy in respect of the United States' claim that the Hong Kong/Macao requirements are also inconsistent with Article XVII to the extent that they affect the supply of EPS through commercial presence in China (mode 3).

*(iv) Acquirer requirements*

7.745 Finally, we found that the acquirer requirements (relating to both the posting of the *Yin Lian*/UnionPay logo and the capability of accepting bank cards bearing the *Yin Lian*/UnionPay logo ) are subject to commitments set out in China's mode 1 and 3 national treatment entries concerning subsector (d); that they are measures affecting the supply of services, and that they result in like EPS and EPS suppliers of other Members being treated less favourably than CUP and its EPS, irrespective of whether the relevant services are provided under mode 1 or 3 and even in cases where those other suppliers would meet the qualifications stipulated in China's Schedule for engaging in mode 3 local currency business. For these reasons, we conclude that they are inconsistent with Article XVII:1 of the GATS. The acquirer requirement that relates to the posting of the *Yin Lian*/UnionPay logo is maintained through Article 2.2 of Document No. 153. The requirements that relate to the capability of acquirers to accept bank cards bearing the *Yin Lian*/UnionPay logo (terminal equipment and interoperability elements) are maintained through Article 2.2 of Document No. 153; Article 1.2(i) of Document No. 37; and paragraphs 2 and 3 of the Notice as well as Articles 2.1 and 5.2.1-5.2.3 of Chapter I of Document No. 76.

## 3. China's requirements considered jointly

7.746 The Panel now addresses the United States' request that the Chinese requirements at issue should be considered not only individually, but also when operating in conjunction. The United States argues that this would help to ensure the effective resolution of this dispute.[935]

7.747 According to the United States, the requirements at issue are not just WTO-inconsistent when analysed individually, but operate together in a manner that is also WTO-inconsistent.[936] The United States submits in this respect that the effect of the requirements at issue is to distort competition in China's market for EPS. The United States submits that these requirements maintain CUP as the sole entity able to provide the full range of EPS. The United States further observes that under these requirements, banks in China must join CUP in order to issue bank cards or acquire bank card transactions, and only cards bearing the CUP logo can be issued as RMB denominated cards. According to the United States, these requirements also mean that all banks that wish to acquire merchant transactions or operate ATMs and all merchants that wish to accept bank cards must join CUP and process transactions in accordance with CUP's rules and procedures. In the United States' view, these requirements gave CUP significant leverage and automatic and universal acceptance of its RMB payment card products by banks and merchants in China and permitted and supported CUP becoming the sole EPS supplier in China. The United States points out that no foreign EPS supplier enjoys any of these advantages.[937]

7.748 In considering the United States' request, the Panel recalls that it found above that the issuer, terminal equipment and acquirer requirements are each inconsistent with Article XVII:1 for modes 1 and 3. We further found that the Hong Kong/Macao requirements are inconsistent with Article XVI:2(a) for mode 3, and not inconsistent with Article XVII:1 for mode 1 (due to the absence of a national treatment obligation covering these requirements). In our view, these findings help to secure a positive solution to this dispute. That being so, we see no need to determine whether the same requirements, when considered in conjunction with each other, would give rise to an independent breach of Article XVII:1 for mode 1 or 3. We therefore decline to offer a separate

[935] United States' first written submission, para. 32.
[936] United States' first written submission, para. 29; response to Panel question No. 4.
[937] United States' second written submission, para. 207; response to Panel question No. 71, para. 7.

conclusion on whether the issuer, terminal equipment, acquirer and Hong Kong/Macao requirements, when considered jointly, are also inconsistent with Article XVII:1.[938]

## VIII. CONCLUSIONS AND RECOMMENDATIONS

8.1 For the reasons set forth in this Report, the Panel concludes as follows:

(a) In respect of the United States' panel request: [939]

(i) the Panel finds that China has failed to establish that the United States' panel request is inconsistent with Article 6.2 of the DSU on the grounds that it does not provide a brief summary of the legal basis sufficient to present the problem clearly.

(b) In respect of the services at issue:

(i) the Panel finds that the services at issue as defined by the United States in its request for the establishment of a panel are classifiable under Sector 7.B(d) of China's Schedule, which reads "[a]ll payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers draft (including import and export settlement)".

(c) In respect of repealed or replaced Chinese legal instruments:

(i) the Panel finds that Document Nos. 94 and 272 were repealed prior to the date of establishment of the panel and, therefore, do not figure in the Panel's findings or recommendations; and

(ii) the Panel finds that Document No. 66 was replaced by Document No. 53 prior to the date of establishment of the panel and, therefore, does not figure in the Panel's findings or recommendations.

(d) In respect of China's measures at issue:

(i) the Panel finds that China, through Document Nos. 37, 57 and 129, imposes requirements on issuers that bank cards issued in China bear the *Yin Lian*/UnionPay logo, and furthermore, China, through Document Nos. 17, 37, 57, 76 and 129, requires that issuers become members of the CUP network, and that the bank cards they issue in China meet certain uniform business specifications and technical standards;

(ii) the Panel finds that China, through Document Nos. 37 and 153, imposes requirements that all terminals (ATMs, merchant processing devices and POS terminals) in China that are part of the national bank card inter-bank

[938] This approach is consistent with that followed by the panel in *Turkey – Rice*. The panel in that case found two Turkish measures to be individually inconsistent with Turkey's WTO obligations. The panel then stated that "[i]n the light of these findings, and under the guidance of the principle of judicial economy, we do not see the need to reach a separate conclusion on these measures considered jointly, for the resolution of this dispute" (Panel Report, *Turkey – Rice*, para. 7.281). We further note that the United States itself has drawn our attention to this particular statement. See United States' first written submission, fn 49.

[939] The Panel's conclusions incorporate those set forth in its preliminary ruling, which is contained in document WT/DS413/4 circulated on 30 September 2011 and which forms an integral part of this Report.

processing network be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo;

(iii) the Panel finds that China, through Document No. 153, imposes requirements on acquirers to post the *Yin Lian*/UnionPay logo, and furthermore, China, through Document Nos. 37, 76 and 153, imposes requirements that acquirers join the CUP network and comply with uniform business standards and technical specifications of inter-bank interoperability, and that terminal equipment operated or provided by acquirers be capable of accepting bank cards bearing the *Yin Lian*/UnionPay logo;

(iv) the Panel finds that China, through Document Nos. 16, 8 and 254, imposes requirements that CUP and no other EPS supplier handle the clearing of certain RMB bank card transactions that involve either an RMB bank card issued in China and used in Hong Kong or Macao, or an RMB bank card issued in Hong Kong or Macao that is used in China in an RMB-denominated transaction;

(v) the Panel finds that the United States failed to establish that China, through Document Nos. 37, 57, 16, 8, 219, 254, 103, 153, 149, 53, 49, 129, 76, 17 and/or 142, imposes requirements that mandate the use of CUP and/or establish CUP as the sole supplier of EPS for all domestic RMB payment card transactions; and

(vi) the Panel finds that the United States failed to establish that China, through Document Nos. 37, 57, 153, 219 and/or 76, imposes broad prohibitions on the use of "non-CUP" cards for cross-region or inter-bank transactions.

(e) In respect of the United States' claims under Article XVI of the GATS:

(i) in relation to the United States' claims concerning China's Sector 7.B(d) mode 1 market access commitment, the Panel finds that the issuer, terminal equipment, acquirer and Hong Kong/Macao requirements are not inconsistent with Article XVI of the GATS, as China has not undertaken a market access commitment under this mode and in this sector in respect of the services at issue in this dispute;

(ii) the Panel finds that the United States failed to establish that the issuer requirements are inconsistent with Article XVI:2(a) of the GATS, in respect of China's Sector 7.B(d) mode 3 market access commitment, as these requirements do not impose a limitation that falls within the scope of Article XVI:2(a);

(iii) the Panel finds that the United States failed to establish that the terminal equipment requirements are inconsistent with Article XVI:2(a) of the GATS, in respect of China's Sector 7.B(d) mode 3 market access commitment, as these requirements do not impose a limitation that falls within the scope of Article XVI:2(a);

(iv) the Panel finds that the United States failed to establish that the acquirer requirements are inconsistent with Article XVI:2(a) of the GATS, in respect of China's Sector 7.B(d) mode 3 market access commitment, as these

requirements do not impose a limitation that falls within the scope of Article XVI:2(a);

(v) the Panel finds that the Hong Kong/Macao requirements are inconsistent with Article XVI:2(a) of the GATS because, contrary to China's Sector 7.B(d) mode 3 market access commitments, they maintain a limitation on the number of service suppliers in the form of a monopoly;

(vi) the Panel finds that the United States failed to establish that the Hong Kong/Macao, issuer, terminal equipment and acquirer requirements, when considered jointly, give rise to a separate and independent breach of Article XVI:2(a) of the GATS;

(vii) the Panel finds that the United States failed to present a *prima facie* case that the issuer, terminal equipment or acquirer requirements, considered either individually or jointly, are inconsistent with Article XVI:1 of the GATS in respect of China's Sector 7.B(d) mode 3 market access commitment; and

(viii) the Panel exercised judicial economy with respect to the United States' Sector 7.B(d) mode 3 market access claims under Article XVI:1 of the GATS regarding the Hong Kong/Macao requirements.

(f) In respect of the United States' claims under Article XVII of the GATS:

(i) the Panel finds that the issuer requirements are inconsistent with Article XVII:1 of the GATS, because contrary to China's Sector 7.B(d) mode 1 and mode 3 national treatment commitments, these requirements fail to accord to services and service suppliers of any other Member treatment no less favourable than China accords to its own like services and service suppliers;

(ii) the Panel finds that the terminal equipment requirements are inconsistent with Article XVII:1 of the GATS, because contrary to China's Sector 7.B(d) mode 1 and mode 3 national treatment commitments, these requirements fail to accord to services and service suppliers of any other Member treatment no less favourable than China accords to its own like services and service suppliers;

(iii) the Panel finds that the acquirer requirements are inconsistent with Article XVII:1 of the GATS, because contrary to China's Sector 7.B(d) mode 1 and mode 3 national treatment commitments, these requirements fail to accord to services and service suppliers of any other Member treatment no less favourable than China accords to its own like services and service suppliers;

(iv) the Panel finds that the Hong Kong/Macao requirements are not inconsistent with Article XVII:1 of the GATS, as China has no Sector 7.B(d) mode 1 national treatment obligation in respect of these requirements;

(v) the Panel exercised judicial economy with respect to the United States' Sector 7.B(d) mode 3 national treatment claims under Article XVII:1 of the GATS regarding the Hong Kong/Macao requirements; and

(vi) the Panel declined to conclude separately on whether the issuer, terminal equipment, acquirer and Hong Kong/Macao requirements, when considered jointly, are also inconsistent with Article XVII:1 of the GATS.

8.2 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the GATS, they have nullified or impaired benefits accruing to the United States under that agreement.

8.3 Pursuant to Article 19.1 of the DSU, we recommend that the Dispute Settlement Body request China to bring its measure into conformity with its obligations under the GATS.