

**CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES
(WT/DS413)**

U.S. ANSWERS TO PANEL’S FIRST SET OF WRITTEN QUESTIONS

Question 1. Could the United States explain further what is the difference, if any, between the acquirer requirements and those concerning the terminal equipment, specifically with regard to the aspect that is described as "capable of accepting all bank cards bearing the CUP logo/CUP bank cards"?

1. China maintains requirements with respect to both (i) merchants and operators of card processing equipment (POS terminals and ATMs) and (ii) acquiring institutions. China’s measures mandate that card processing equipment in China must be capable of accepting cards bearing the CUP logo. In addition, the measures imposed by China require that merchants and acquiring institutions must post the CUP logo (in other words, for example, the machines must have the correct software and communications capability to interface and work with CUP, the EPS supplier), and that acquiring institutions must be capable of accepting CUP cards and acquiring payment card transactions using cards bearing the CUP logo. In other words, this is a requirement in terms of the capabilities of the acquiring institution, regardless of the type of equipment located at a particular merchant’s place of business. Thus, the requirements for merchants and operators of card processing equipment and acquiring institutions are similar and mutually supportive, though they are contained in different instruments and are in some cases framed differently.

2. For example, Document No. 76, Chapter II, Section 1.2 (Exhibit US-56/US-63) contains a requirement that “the Unified Network Logo must be posted on the machines and equipment of any merchant developed by each Interoperating Member in accordance with relevant regulations of interoperability, and shall be posted on the merchant’s cash machines.”

3. Similarly, Document No. 37, Article 1, Section 1.2(i) (Exhibit US-40) mandates that “All terminals (such as ATM and POS) which join the nationwide bank card inter-bank processing network must be capable of accepting all bank cards bearing the CUP logo and must post the CUP logo. Document No. 37, Article 1, Section 2.1 (Exhibit US-40) further specifies that “[a]ll cards bearing the CUP logo must strictly abide by the unified technical specifications” and that “all bank card issuers must provide corresponding cross-region and inter-bank services pursuant to the unified business specifications.”

4. In addition, Document No. 153 requires that “POS terminals placed by the acquiring institutions or by third party service providers must conform to the business specifications and technical standards of cross-network interoperability, be posted with the unified CUP logo, and be capable of accepting all bank cards bearing the CUP logo.” (Section 2.2). Document No. 153, Section 2.2, further provides that “[f]or the acquiring institutions which cannot accept all bank cards bearing the CUP logo or intentionally set obstacles against the bank cards issued by others, customers, merchants and issuers are entitled to report and file complaints to PBOC.” In addition, Document No. 149, Section 2(5)(iii), provides that “[t]he acquiring organizations may not allow the non-CUP and non-PBOC 2.0 pre-payment cards to be accepted at any POS terminals.”

5. Finally, as a factual matter, when a consumer swipes a card at a merchant’s POS terminal, the BIN is transferred electronically either to an acquirer (if the POS terminal is connected to the acquirer) or directly to CUP (if the POS terminal is connected directly to CUP). When either the acquirer or CUP receive the BIN, they will compare it to CUP’s BIN table, which is the list of BINs that CUP is authorized to process. Once a BIN is confirmed to appear on CUP’s BIN table, the transaction is automatically processed over that network – in this case, the CUP network.

6. As is evident from these examples, China maintains separate but similar requirements with respect to both merchants and operators of card processing equipment and acquiring institutions.

Question 2. Could the United States explain further what is the difference, if any, between the sole supplier requirements ("requirements that mandate the use of CUP and/or establish CUP as the sole supplier") and the "broad prohibitions on the use of non-CUP cards"? More specifically, why does the United States seek separate findings on both requirements?

7. China maintains requirements mandating that all payment card transactions denominated and paid in RMB be handled through CUP. China also imposes prohibitions on the use of non-CUP cards and on the use of foreign EPS suppliers for payment card transactions.

8. These two types of measures operate in slightly different ways although their ultimate effect is the same on foreign suppliers of EPS for payment card transactions. That is, the foreign EPS supplier is excluded from China’s market with respect to these types of transactions. The United States seeks separate findings from the Panel in this regard to ensure that its findings reach the requirements 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. For example, Document No. 153 (Exhibit US-49) identifies CUP as the domestic clearance organization which specializes in the RMB bankcard information routing and exchange (Article 1.2). Document No. 153 is also unequivocal that “No third party service provider shall engage in bankcard information exchange services.”

9. Also illustrative are Document No. 37 (Exhibit US-40) and Document No. 57 (Exhibit US-41). Each contains both sole supplier requirements and prohibitions against the use of non-CUP cards or of non-CUP processing of payment card transactions. For example, Document No. 37, Article 1, Section 1.2, imposed a requirement that “By the end of this year [2001], all commercial banks shall, in accordance with unified standards and specifications of bank cards, complete transformation of their bank card processing system, and make technical preparations for accepting bank cards bearing the CUP logo.” Document No. 37 also operates to help establish the exclusive use of CUP for inter-bank transactions in several ways. First, Article 2, Section 2.1(i) provides that “all RMB credit cards issued solely for domestic use” and “[b]ank cards issued by all commercial banks with inter-bank usability in China must bear the CUP logo.” Second, Article 2, Section 2.1(ii) states that “[a]ll terminals (such as ATM and POS) which join the nationwide bank card inter-bank processing network must be capable of accepting all bank cards bearing the CUP logo and must post the CUP logo.” Third, Article 2, Section 2.1(iii) provides that “[a]ll cards bearing the CUP logo must strictly abide by the unified technical specifications and all bank card issuers must provide corresponding cross-region and inter-bank services pursuant to the unified business

specifications.” Fourth, Article 2, Section 2.1(iii) further specifies that “[c]ommercial banks which have opened bank card business in China must join the nationwide bank card inter-bank exchange network, to complete the interoperability of its bank card business processing system and nationwide bank card inter-bank processing network.” Fifth, Article 3, Section 3.1(i) states that banks which have joined the network must operate “in accordance with “Business Specifications for Interoperable Service of Bankcards.” Finally, Document No. 37, Article 2, Section 2.2(i), imposed a hard deadline prohibiting the use of non-CUP cards for cross-region or inter-bank transactions: “Starting in 2004, all bank cards not bearing a CUP logo will not be used for cross-region or inter-bank transactions.”

10. Similarly, Document No. 57 (Exhibit US-41), Articles 1-6, establish both sole supplier requirements and prohibitions on the use of non-CUP payment cards or the provision of EPS by entities other than CUP and also establish additional requirements that advance the goal of a single unified network using CUP cards as of 2001. See, e.g., Article 1, Section 1.2(i). Document No. 57, Article 3, mandates the abolition of “[r]egional bank card interoperability logos produced and designed regionally” and that “[s]tarting January 1, 2004, the specially engaged merchants of bank cards and terminal equipment such as ATM, POS etc. shall not bear any regional bank card interoperability logo.”

11. As is evident from these examples, China maintains both requirements mandating that all payment card transactions denominated and paid in RMB be handled through CUP and prohibitions on the use of non-CUP cards and on the use of foreign EPS suppliers.

Question 3. In its first written submission, the United States refers to different instruments when discussing the six requirements it alleges to be at issue in this dispute. For instance, the United States refers to sixteen different instruments when discussing sole supplier requirements in footnote 20 of its first written submission. However, it later refers to fifteen instruments in footnote 40 of its submission. Discrepancies exist with respect to other requirements as well. Could the United States please clarify in respect of the six requirements at issue which are the precise instruments on which the United States seeks findings?

12. With respect to the CUP sole supplier requirements referred to by the Panel, the United States would note that there are nineteen instruments that, in addition to being assessed individually, should be considered in conjunction with one another for purposes of the Panel’s analysis of a separate “measure” comprising requirements that mandate the use of CUP and/or establish CUP as the sole supplier of EPS for all domestic payment card transactions denominated and paid in RMB. The United States would refer the Panel to the U.S. answer to question No. 4 below, where the United States identifies the specific instruments that should be considered together with respect to the Panel’s analysis of the six particular categories of instruments that also constitute six separate “measures.”

Question 4. With reference to paragraph 36 of the United States' first written submission, could the United States indicate, in respect of each of the six requirements, which of the cited instruments would it be appropriate for the Panel to analyse in conjunction?

13. China maintains a monopoly structure that ensures that CUP is the sole entity that can supply EPS for RMB-denominated payment card transactions in China. Indeed, CUP is the sole entity that can supply EPS for any payment card transaction in China, irrespective of how the payment card is denominated or the currency of the transaction, provided that the

card was issued in China. Essentially, CUP must be used when a payment card is issued in China and used in China. As the United States has explained, China’s measures that provide for the monopoly structure and that operate to restrict the supply of EPS by foreign suppliers affect every aspect of a card-based electronic payment transaction and all of the key participants in a payment card transaction (including the issuing institution, the merchant, and the acquiring institution, and the EPS supplier).

14. Many of China’s measures have a significant degree of overlap, are complementary, and reinforcing in terms of their relationship with each other and with respect to the establishment and maintenance of CUP’s monopoly. In presenting its claims, the United States has identified certain measures, which, separately from being WTO-inconsistent when analyzed individually, operate together in a manner that is also WTO-inconsistent. The United States has also provided for each measure an illustrative list of instruments in which the particular measure is reflected. In the U.S. July 29 Response and the U.S. First Written Submission, the United States identified six categories of instruments that together establish six separate measures. It should also be noted that although the United States has grouped the instruments as falling into six categories, that there is a significant degree of overlap and many of the instruments contain provisions that complement and reinforce requirements across all six categories.

15. The United States has requested that the Panel analyze China’s measures both individually and in conjunction with one another as indicated with respect to the following categories of requirements maintained by China.

16. *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.* See, e.g., U.S. First Written Submission, para. 12 (bullet 1, note 20), para. 31 (bullet 1, note 40); U.S. July 29 Response, para. 77 (bullet 1, note 115).

- 1. Circular of the People’s Bank of China on Promulgation of Opinions on Implementation of Joint Work in Bank Card Interoperability in 2001 (Yinfa [2001] 37), issued on 19 February 2001 (“Document No. 37”) (Exhibit US-40);
- 2. Circular on Uniform Use of CUP Logo and its Holographic Label for Anti-Counterfeiting by the People’s Bank of China (Yinfa [2001] 57), issued on 13 March 2001 (“Document No. 57”) (Exhibit US-41);
- 3. Opinions on Bank Card Interoperability Related Work in 2002 by the People’s Bank of China (Yinfa [2002] 94), issued on 5 April 2002 (“Document No. 94”) (Exhibit US-42);
- 4. Circular Regarding Issues Concerning Bank Card Interoperability Related Work by the People’s Bank of China (Yinfa [2002] 272), issued on 29 August 2002 (“Document No. 272”) (Exhibit US-43);
- 5. Announcement of Clearing Arrangements Provided by Banks in Relation to Individuals’ Deposits, Exchanges, Bank Card and Remittance in RMB in Hong Kong (PBOC Announcement [2003] 16), issued on 19 November 2003 (“Document No. 16”) (Exhibit US-44);

- 6. Circular on Regulating the Administration of Foreign Currency Bank Cards by the State Administration of Foreign Exchange Circular (Huifa [2004] 66), issued on 30 June 2004 (“Document No. 66”) (Exhibit US-45);
- 7. Announcement of Clearing Arrangements Provided by Banks in Relation to Individuals' Deposits, Exchanges, Bank Cards and Remittance in RMB in Macao (PBOC Announcement [2004] 8), issued on 3 August 2004 (“Document No. 8”) (Exhibit US-46);
- 8. Notice of the People’s Bank of China Concerning Relevant Issues on Accepting and Using Renminbi Bank Cards in Border Areas (Yinfa [2004] 219), issued on 21 September 2004 (“Document No. 219”) (Exhibit US-47);
- 9. Circular Regarding Issues Concerning Individual RMB Business Handled by Banks in Mainland China and Banks in Hong Kong and Macao by the People’s Bank of China (Yinfa [2004] 254), issued on 28 October 2004 (“Document No. 254”) (Exhibit US-48);
- 10. Some 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 Taxation, China Banking Regulatory Commission and the State Administration of Foreign Exchange on Promoting the Development of Bank Card Industry (Yinfa [2005] 103), issued 24 April 2005 (“Document No. 103”), (Exhibit US-1);
- 11. Guiding Opinions of the People’s Bank of China on Regulating and Promoting the Development of Bank Card Acceptance Market (Yinfa [2005] 153), issued on 16 June 2005 (“Document No. 153”) (Exhibit US-49);
- 12. The Opinions of the Standing Office of the People’s Bank of China on the Circular on Strengthening the Safety Management of Bankcards 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 (Yinfa [2009] 149), issued 1 August 2009 (“Document No. 149”) (Exhibit US-50);
- 13. Notice of the State Administration of Foreign Exchange on the Management of Foreign Currency Bank Cards [2010] 53, issued 11 October 2010 (“Document No. 53”) (Exhibit US-51);
- 14. Notice of the China Banking Regulatory Commission on the Issues Concerning Wholly Foreign-funded and Chinese-foreign Equity Joint Banks in Conducting the Bank Card Business (Yin Jian Fa [2007] 49), issued 6 June 2007 (“Document No. 49”) (Exhibit US-62);
- 15. Circular on Further Improving Bank Card Interoperability Related Work by the People’s Bank of China (Yinfa [2003] 129), issued on 2 July 2003 (“Document No. 129”) (Exhibit US-53);

- 16. Notice of Circulating the Bank Card Connection Business Standard by the People's Bank of China (Yinfa [2001] 76), issued 29 March 2001, including but not limited to the Appendix, Business Practices for the Interoperable Service of Bank Cards (“Document No. 76”) (Exhibit US-56/US-63);
- 17. Measures for the Administration of Bank Card Business by the People’s Bank of China (Yinfa [1999] 17), issued on 27 January 1999 (“Document No. 17”) (Exhibit US-52);
- 18. Notice of the 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 Safety Management of Bank Cards and Preventing and Combating Bank Card Crimes (Yinfa [2009] 142), issued 27 April 2009 (“Document No. 142”) (Exhibit US-55); and
- 19. Notice of the China Banking Regulatory Commission on the Issues Concerning Wholly Foreign-funded and Chinese-foreign Equity Joint Banks in Conducting the Bank Card Business (Yin Jian Fa [2007] 49), issued 6 June 2007 (“Document No. 49”) (Exhibit US-62).

17. *Requirements on issuers that payment cards issued in China bear the CUP logo. See, e.g., U.S. First Written Submission, para. 12 (bullet 2, notes 21, 22), para. 31 (bullet 2, note 41); U.S. July 29 Response, para. 77 (bullet 2, notes 116, 117).*

- 1. Document No. 17 (Exhibit US-52);
- 2. Document No. 37 (Exhibit US-40);
- 3. Document No. 57 (Exhibit US-41);
- 4. Document No. 94 (Exhibit US-42);
- 5. Document No. 272 (Exhibit US-43);
- 6. Document No. 129 (Exhibit US-53);
- 7. Document No. 219 (Exhibit US-47); and
- 8. Document No. 76) (Exhibit US-56/US-63).

18. *Requirements that all ATM and POS terminals in China accept CUP cards. See U.S. First Written Submission, para. 12 (bullet 3, note 23), para. 31 (bullet 3, note 42); U.S. July 29 Response, para. 77 (bullet 3, note 118).*

- 1. Document No. 17 (Exhibit US-52);
- 2. Document No. 37 (Exhibit US-40);
- 3. Document No. 94 (Exhibit US-42);
- 4. Document No. 272 (Exhibit US-43);

- 5. Document No. 57 (Exhibit US-41);
- 6. Document No. 153 (Exhibit US-49);
- 7. Document No. 149 (Exhibit US-50); and
- 8. Document No. 76) (Exhibit US-56/US-63).

19. *Requirements on acquiring institutions to post the CUP Logo and be capable of accepting all bank cards bearing the CUP logo. See, e.g., U.S. First Written Submission, para. 12 (bullet 4, note 24), para. 31 (bullet 4, note 43); U.S. July 29 Response, para. 77 (bullet 4, note 119).*

- 1. Document No. 94 (Exhibit US-42);
- 2. Document No. 272 (Exhibit US-43);
- 3. Document No. 153 (Exhibit US-49);
- 4. Document No. 149 (Exhibit US-50);
- 5. Document No. 37 (Exhibit US-40);
- 6. Document No. 76) (Exhibit US-56/US-63).

20. *Broad prohibitions on the use of non-CUP cards. See, e.g., U.S. First Written Submission, para. 12 (bullet 5, note 25), para. 31 (bullet 5, note 44), para. 116; U.S. July 29 Response, para. 77 (bullet 5, note 120).*

- 1. Document No. 37 (Exhibit US-40);
- 2. Document No. 57 (Exhibit US-41);
- 3. Document No. 94 (Exhibit US-42);
- 4. Document No. 272 (Exhibit US-43);
- 5. Document No. 153 (Exhibit US-49);
- 6. Document No. 219 (Exhibit US-47); and
- 7. Document No. 76) (Exhibit US-56/US-63).

21. *Requirements relating to China, Macao, and Hong Kong that mandate the use of CUP. See, e.g., U.S. First Written Submission, para. 12 (bullet 6, note 26), para. 31 (bullet 6, note 45); U.S. July 29 Response, para. 77 (bullet 6, note 121).*

- 1. Document No. 16 (Exhibit US-44);
- 2. Document No. 8 (Exhibit US-46);
- 3. Document No. 219 (Exhibit US-47); and

- 4. Document No. 254 (Exhibit US-48).

Question 5. Does the United States seek findings on instruments that have been repealed or otherwise superseded or replaced? If instruments have either been repealed or replaced prior to the establishment of the Panel, on which basis does it consider the Panel could make findings on these instruments?

22. The United States requests that the Panel make findings with respect to each of the *measures* that the United States has challenged. As explained above, the United States has identified measures, which, separately from being WTO-inconsistent when analyzed individually, operate together in a manner that is also WTO-inconsistent. The United States has also provided for each of these six measures an illustrative list of instruments in which the particular measure is reflected. Each of these six measures remains in place and has not been affected by China's purported repeal of Document No. 94, Document No. 272, and Document No. 66. The United States would also refer the Panel to the U.S. responses to question 4 (above) and question 6 (below).

Question 6. The United States has specifically identified Document No. 94 (Exhibit US-42) and Document No. 272 (Exhibit US-43) as relevant instruments that establish each of the following requirements:

- (a) *Alleged requirements that mandate the use of China UnionPay and/or establish China UnionPay as the sole supplier of "electronic payment services" for all domestic transactions denominated and paid in RMB;*
- (b) *Alleged requirements on issuers that payment cards issued in China bear the UnionPay or "Yin Lian" logo;*
- (c) *Alleged requirements that all automated teller machines (ATM), merchant card processing equipment, and POS terminals in China accept China UnionPay cards;*
- (d) *Alleged requirements on acquiring institutions to post the UnionPay or "Yin Lian" logo and be capable of accepting all bank cards bearing the UnionPay or "Yin Lian" logo; and*
- (e) *Alleged prohibitions on the use of non-China UnionPay cards for cross-region or inter-bank transactions.*

In addition, the United States has identified Document No. 66 as establishing alleged requirements that mandate the use of China UnionPay and/or establish China UnionPay as the sole supplier of "electronic payment services" for all domestic transactions denominated and paid in RMB.

China alleges in footnote 27 of its first written submission that Document No. 94 and Document No. 272 were repealed on 23 March 2010, and therefore ceased to have legal effect prior to the establishment of the Panel. China stated in the context of the first substantive meeting of the parties that Document No. 66 was superseded by Document No. 53 prior to the Panel's establishment.

If the Panel were not to rule on any of these three measures, what impact, if any, would this have on the relevant US claims? In responding, could the United States indicate how the remaining instruments that have been identified establish the existence of each of these requirements?

23. If the Panel were to decline to make findings with respect to Documents Nos. 94, 272, and 66, there would be no impact on U.S. claims relating to the six distinct measures, comprised of various instruments operating together, where each instrument alone also constitutes a separate measure. Nor would there be any impact on U.S. claims with respect to the remaining instruments when those instruments are analyzed individually.

24. With respect to the six categories of requirements that constitute six separate measures, separate and apart from Document Nos. 94, 272, and 66, the remaining instruments establish a basis for U.S. claims with respect to each of the six measures (including the five identified in the Panel’s question).

25. With respect to the **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**, separate and apart from Document No. 94, Document No. 272, and Document No. 66, the remaining thirteen (13) instruments/measures challenged by the United States (Document No. 37, Document No. 57, Document No. 16, Document No. 8, Document No. 219, Document No. 254, Document No. 103, Document No. 153, Document No. 149, Document No. 53, Document No. 49, Document No. 129, and Document No. 76) establish a basis collectively for finding this measure to be inconsistent with China’s obligations under Article XVI and XVII of the GATS. *See* U.S. First Written Submission, para. 12 (bullet 1, note 20), para. 31 (bullet 1, note 40); U.S. July 29 Response, para. 77 (bullet 1, note 115).

26. For example, Document No. 153 (Exhibit US-49) states at Article 1(ii) that:

Regarding bank card clearance organizations. Bank card clearance organizations are legal persons which provide bank card inter-bank information exchange and clearing services. At the present time, China UnionPay is the domestic clearance organization which specializes in the RMB bank card inter-bank information routing and exchange...

27. In addition, Document No. 153 (Exhibit US-49) establishes that the only entity authorized to promote bankcard acceptance is CUP. Article 5 states that:

After being approved by PBOC, China UnionPay may set up branches in regions where there is a market demand, in accordance with the company’s overall plan to provide bank card information exchange and clearance services. A nationwide inter-bank transaction network shall be formed as soon as possible.

In order to regulate the payment clearance services market, and strengthen the administration of information routing and exchange, the current professional service platform established by China UnionPay in non-CUP branch regions and engagement in inter-bank POS transaction information transfer shall be directly managed and operated by China UnionPay, and shall not be indirectly managed or operated through authorization.

28. Further, Document No. 53 (Exhibit U.S.-51) at Article 7.3 requires all dual branded, dual currency card bank identification numbers (“BINs”) to be submitted by issuers to “to the domestic RMB card clearing organizations.” Document No. 153 provides that “China Union Pay is the domestic clearance organization.” CUP is the only “domestic RMB clearing organization.” Document No. 53, Article 5.2, provides that “domestic card transactions inside China shall be settled in RMB through domestic clearing channels.” The impact of Document No. 53’s requirement is to guarantee that CUP processes all transactions in China relying on cards issued in China. Indeed, when a card holder swipes a card at a merchant’s POS terminal, the BIN is transferred electronically either to an acquirer (if the POS terminal is connected to the acquirer) or directly to CUP (if the POS terminal is connected directly to CUP). When either the acquirer or CUP receive the BIN, they will compare it to CUP’s BIN table, which is the list of BINs that CUP is authorized to process. Once a BIN is confirmed to appear on CUP’s BIN table, the transaction is automatically processed over that network – in this case, the CUP network.

29. Regarding the **requirements on issuers that payment cards issued in China bear the CUP logo**, separate and apart from Document No. 94, Document No. 272, and Document No. 66, there are other instruments/measures challenged by the United States (Document No. 17, Document No. 37, Document No. 57, Document No. 129, and Document No. 219) which establish a basis collectively for finding this measure (the requirements on issuers that payment cards issued in China bear the CUP logo) to be inconsistent with China’s obligations under Article XVI and XVII of the GATS. In addition, each of these instruments / measures individually is inconsistent with China’s obligations under Article XVI and XVII of the GATS. *See* U.S. First Written Submission, para. 12 (bullet 2, notes 21, 22), para. 31 (bullet 2, note 41); U.S. July 29 Response, para. 77 (bullet 2, notes 116, 117).

30. For example, Document No. 57 (Exhibit US-41) states at Article 1 that, “All bank cards issued by commercial banks solely for domestic use must bear the CUP logo at the specified position at the lower right corner on the front of the cards, and all RMB credit cards issued solely for domestic use must also bear the CUP holographic anti-counterfeiting logo at the specified position at the lower right corner on the front of the cards.” Document No. 57, Article 2, also states that: “All ‘dual account’ bank cards issued by any commercial banks that can be used both in China and abroad must bear the unified CUP logo at the specified position at the upper right corner on the front of the cards.”

31. With respect to the **requirements that all ATM and POS terminals in China accept CUP cards**, separate and apart from Document No. 94, Document No. 272, and Document No. 66, there are other instruments/measures challenged by the United States (Document No. 17 and Document No. 37) which establish a basis collectively for finding this measure (the requirements that all ATM and POS terminals in China accept CUP cards) to be inconsistent with China’s obligations under Article XVI and XVII of the GATS. In addition, each of these instruments / measures individually is inconsistent with China’s obligations under Article XVI and XVII of the GATS. *See* U.S. First Written Submission, para. 12 (bullet 3, note 23), para. 31 (bullet 3, note 42); U.S. July 29 Response, para. 77 (bullet 3, note 118).

32. For example, Document No. 57 (Exhibit US-41), Article 5, provides that, “All commercial banks shall take the job of promoting CUP logo use and acceptance seriously and gradually reduce the role of their own bank card brands in the market. Starting January 1 2004, all POS terminals and merchants in the bank card acceptance market must have the

CUP logo posted.” Article 6 states that, “Starting January 1, 2002, the specially engaged merchants of the bank cards and terminal equipment such as ATM, POS etc. shall not bear any regional bank card interoperability logo.” Document No. 153, Article 2(ii) (Exhibit US-49) contains similar requirements.

33. Regarding the **requirements on acquiring institutions to post the CUP Logo and be capable of accepting all cards bearing the CUP logo**, separate and apart from Document No. 94, Document No. 272, and Document no. 66, there are other instruments/measures challenged by the United States (Document No. 153 and Document No. 149) which establish a basis collectively for finding this measure (the requirements on acquiring institutions to post the CUP Logo and be capable of accepting all bank cards bearing the CUP logo) to be inconsistent with China’s obligations under Article XVI and XVII of the GATS. In addition, each of these instruments / measures individually is inconsistent with China’s obligations under Article XVI and XVII of the GATS. *See* U.S. First Written Submission, para. 12 (bullet 4, note 24), para. 31 (bullet 4, note 43); U.S. July 29 Response, para. 77 (bullet 4, note 119).

34. For example, Document No. 153 (Exhibit US-49), Article II(ii), provides: “POS terminals placed by the acquiring institutions or by third party service providers must conform to the business specifications and technical standards of cross-network interoperability, be posted with the unified CUP logo, and be capable of accepting all bank cards bearing the CUP logo.”

35. With respect to the **broad prohibitions on the use of non-CUP cards**, separate and apart from Document No. 94, Document No. 272, and Document no. 66, there are other instruments/measures challenged by the United States (Document No. 37 and Document No. 57) which establish a basis collectively for finding this measure (the broad prohibitions on the use of non-CUP cards) to be inconsistent with China’s obligations under Article XVI and XVII of the GATS. In addition, each of these instruments / measures individually is inconsistent with China’s obligations under Article XVI and XVII of the GATS. *See* U.S. First Written Submission, para. 12 (bullet 5, note 25), para. 31 (bullet 5, note 44); U.S. July 29 Response, para. 77 (bullet 5, note 120).

36. For example, Document No. 57 (Exhibit US-41), Article 5, provides, “All commercial banks shall take the job or promoting CUP logo use and acceptance seriously and gradually reduce the role of their own bank card brands in the market. Starting January 1 2004, all POS terminals and merchants in the bank card acceptance market must have the CUP logo posted.” Moreover, Article 6 states that, “Starting January 1, 2004, the specially engaged merchants of bank cards and terminal equipment such as ATM, POS etc. shall not bear any regional bank card interoperability logo.

Question 7. Could the United States explain with concrete examples how US EPS service suppliers would supply EPS through cross-border supply (mode 1) to consumers in China? Who are those consumers for GATS purposes?

37. EPS suppliers can supply EPS using a number of different business models depending on the local law and business needs. Absent the measures at issue in this dispute, U.S. EPS suppliers could supply EPS on a cross-border basis, which can be illustrated with the following hypothetical example. Assume that the issuing and acquiring banks are located in China, and the relevant transaction occurs in China. The U.S. EPS supplier has a data center located in the United States. The U.S. EPS supplier would have no or a very limited physical

presence in China, except that the acquiring and issuing banks would each maintain a piece of equipment (equivalent to a desktop computer terminal) that provides a gateway into the relevant EPS network.

38. Once the transaction is initiated by the card holder, all of the information relevant to the transaction would be transferred through the banks’ respective gateways to the EPS supplier’s data center in the United States, where it would be processed and, as appropriate, information would be returned to the acquiring and issuing banks in China. The U.S. EPS supplier could have a contractual arrangement with a local settlement bank in China which would receive settlement instructions from the data center and execute the transfer of funds between the issuing and acquiring banks. (It should be noted, however, that fund transfers do not always occur in the local market. In some cases, the transfer may take place in a default currency, e.g., U.S. dollars, in which case even the funds transfer could occur outside the country of the issuing and acquiring institutions. For example, the transfer of funds may occur between banks in New York even if the transaction, and the acquiring and issuing banks, are located outside the United States.) A similar arrangement could be put in place for a three-party system, in which the EPS supplier would be located in the United States, but the merchant and the bank could be located in-country.

39. To further elaborate on the above hypothetical, it is useful to consider how the components of EPS for payment card transactions would typically be provided. The first element of EPS includes the processing infrastructure, network, and rules and procedures that facilitate, manage, and enable the transmission of transaction information and payments, and which provide system integrity, stability and financial risk reduction. As noted, with respect to the processing infrastructure and network, each EPS supplier has a handful of data centers around the world which process transactions in well over 150 countries, and each participating bank maintains a piece of equipment (equivalent to a computer terminal) located in its facilities which serves as a “gateway” into the EPS supplier’s global network. The connection between the gateway and the EPS supplier’s network can take place cross-border. The rules and procedures are typically developed in the headquarters of each EPS supplier and are incorporated into the contractual arrangements with each participant in the system around the world.

40. The next three elements of EPS require processing in the centralized data centers, and could, therefore, be provided through the cross-border mode of supply. These elements include 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 and transmission 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 in a given period. The relevant processing functions are performed in the data centers using information obtained from the in-country gateway terminals. The data centers then communicate the processed information back to the in-country gateway terminals. The relevant services are provided cross-border.

41. The component of EPS that entails “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” can also be supplied cross-border. The data centers generate the information necessary to approve or decline a transaction and generate the instructions to the settlement banks to transfer funds. The instructions move cross-border when local settlement banks are used. With respect to China, U.S. EPS suppliers could use settlement

banks in China. However, the funds transfer could also take place in a default currency, e.g., U.S. dollars, in which case the settlement bank may actually be located outside the country of the issuing and acquiring banks.

42. With respect to the second part of the question, the issuing and acquiring banks are the consumers of EPS for payment card transactions. The EPS suppliers have contractual arrangements to supply services to those entities. The EPS suppliers do not provide services directly to individual card holders or individual merchants. See for example Visa’s 2010 Annual Report at 5 (Exhibit US-4) (“We operate an open-loop payments network, a multi-party system in which Visa connects financial institutions – issuing financial institutions (or ‘issuers’) that issue cards to cardholders, and acquiring financial institutions (or ‘acquirers’) that have the banking relationship with merchants – and manage the exchange of information and value between them. As such, Visa does not issue cards, extend credit or set rates and fees for consumers. In most instances, cardholder and merchant relationships belong to, and are managed by, our network of financial institution clients”). MasterCard’s 2010 Annual Report at 4 (Exhibit US-6) contains a similar description (“Our customers are financial institutions and other entities that act as issuers and acquires. . . . [C]ardholder and merchant transaction relationships are managed principally by our customers. We do not issue cards, extend credit to cardholders, determine the interest rates (if applicable) or other fees charged to cardholders by issuers, or establish the ‘merchant discount’ charged by acquirers in connection with the acceptance of cards that carry our brands”).

Question 8. Could the United States explain with concrete examples how US EPS services suppliers supply EPS through commercial presence (mode 3) in China? More precisely, what activities would be performed in China's territory?

43. Absent the measures at issue in this dispute, there are a number of activities that U.S. EPS suppliers could perform in China, including infrastructure and processing activities, as well as marketing, sales, product design, and IT. That said, it is common for certain aspects of EPS to be supplied on a cross-border basis, including the centralized processing of payment card transactions and related financial information transmission. In fact, CUP itself has built a significant international presence by providing its EPS on a cross-border basis.

Question 9. Does the United States claim that the Hong Kong and Macao requirements represent a violation of China's commitments under both mode 1 and mode 3?

44. Yes. As explained in the U.S. July 29 Response (sections V.B, V.C, and V.I) and in the U.S. First Written Submission (paras. 4, 13, 54, 58 and 80), China requires that CUP be used to handle all RMB transactions in Macao or Hong Kong using bank cards issued in China, and that CUP be used to handle any RMB transactions in China using RMB cards issued in Hong Kong or Macao.

45. The following examples illustrate the operation of the restrictions and how the restrictions implicate China’s mode 1 and mode 3 commitments.

46. ***Example One:*** An issuing bank in China issues an RMB-denominated card to a Chinese national, who then travels to Hong Kong, where he or she makes a purchase. The merchant’s acquiring bank is located in Hong Kong. Under Chinese law, only CUP (located in China) could process this transaction. In doing so, it would be supplying services to both the issuing bank (located in China) and the acquiring bank (located in Hong Kong).

- **Mode 1 Violation:** Due to restrictions China has put in place, a U.S. EPS supplier would be prohibited from processing the transaction through servers in the United States. As a result, it would be prohibited from (a) supplying services cross-border (mode 1) directly to the issuing bank located in China; and (b) supplying services cross-border (mode 1) services to either bank by establishing and managing an account at a settlement bank in China.
- **Mode 3 Violation:** Due to restrictions China has put in place, a U.S. EPS supplier would also be prohibited from establishing a local presence in China (mode 3) to supply EPS to the issuing or acquiring banks in the same manner as CUP.

47. *Example Two:* An issuing bank in Hong Kong issues an RMB-denominated card to a Hong Kong national, who then travels to China, where he or she makes a purchase. The merchant's acquiring bank is located in China. Under Chinese law, only CUP (located in China) could process this transaction. In doing so, it would be supplying services to both the issuing bank (located in Hong Kong) and the acquiring bank (located in China).

- **Mode 1 Violation:** Due to restrictions China has put in place, a U.S. EPS supplier would be prohibited from processing the transaction through servers in the United States. As a result, it would be prohibited from (a) supplying services cross-border (mode 1) directly to the acquiring bank located in China; and (b) supplying services cross-border (mode 1) to either bank by establishing and managing an account at a settlement bank in China.
- **Mode 3 Violation:** Due to the restrictions China has put in place, a U.S. EPS supplier would also be prohibited from establishing a local presence in China (mode 3) to supply EPS to the issuing or acquiring banks in the same manner as CUP.

48. *Example Three:* An issuing bank in Hong Kong issues an RMB-denominated card to a Hong Kong national, who makes a purchase in Hong Kong. The merchant's acquiring bank is located in Hong Kong. Under Chinese law, only CUP (located in China) could process this transaction. In doing so, it would be supplying services to the issuing bank and the acquiring bank, both of which are located in Hong Kong.

- **Mode 1 Violation:** Due to the restrictions China has put in place, a U.S. EPS supplier would be prohibited from processing the transaction through servers in the United States. As a result, it would be prohibited from supplying services cross-border (mode 1) to either bank by establishing and managing an RMB account at a settlement bank in China.
- **Mode 3 Violation:** Due to the restrictions China has put in place, a U.S. EPS supplier would also be prohibited from establishing a local presence in China (mode 3) to supply EPS to the issuing or acquiring banks in the same manner as CUP.

Question 10. The United States argues (in paragraph 12 of its first written submission) that China requires that China UnionPay be used to handle all RMB transactions in Macao or Hong Kong using bank cards issued in China, and all RMB transactions in China using RMB cards issued in Hong Kong and Macao. Could the United States explain which modes of supply in China's commitments would be affected by these measures?

49. Please see the U.S. answer to question 9.

Question 11. Could the United States explain why in its discussion of the sole supplier requirements it mentions requirements relating to Hong Kong and Macao (see paragraph 80 of the United States' first written submission), given that the United States makes separate claims in respect of "requirements in China, Macao, and Hong Kong" (see e.g. paragraph 12 of the United States' first written submission)?

50. The cited paragraphs of the U.S. First Written Submission are intended to explain how China's measures "affect" the supply of a service. They do not, in themselves, identify the specific market access and national treatment claims.

51. CUP is designated as the sole supplier of EPS in different contexts. As explained in the U.S. July 29 Response and the U.S. First Written Submission, under one set of measures, CUP is designated as the sole supplier for transactions in China using RMB-denominated cards. (Essentially, for any payment card transaction in China, where the card has been issued in China, CUP is required to process the transaction.) A related but separate set of measures designates CUP as the sole supplier for transactions on RMB-denominated cards that are issued or used in Hong Kong and Macao. In making its claims the United States, the United States has treated these two sets of measures separately even though they both are inconsistent with China's commitments in subsector (d).

Question 12. The United States submitted Document No. 8 as Exhibit US-46 without any English translation. Exhibit US-44 contains English text that appears to be the English translation of "Document No. 8". Could the United States confirm whether Exhibit US-44 in fact contains the English language translation of both Document No. 16 (Exhibit US-44) as well as Document No. 8 (Exhibit US-46)?

52. Yes. Exhibit US-44 contains English translations of both Document No. 8 and Document No. 16.

Question 13. Could the United States confirm that Exhibit US-63 contains the Appendix to Document No. 76, "Business Practices for the Interoperable Service of Bank Cards" (Exhibit US-56)?

53. Yes. Exhibit US-63 contains the Appendix to Document No. 76, "Business Practices for the Interoperable Service of Bank Cards" (Exhibit US-56).

Question 14. The United States refers to Document No. 251 in paragraph 116 of its first written submission. This document has not been submitted as an exhibit, however. Is this the correct document, and if so, would the United States please submit it to the Panel?

54. The reference to Document No. 251 is a typographical error. The correct reference should be to Document No. 254.

Question 15. The United States argues that Document No. 37 (Exhibit US-40) and Document No. 57 (Exhibit US-41) contain requirements (i) to use the UnionPay or "Yin Lian" logo for all interbank payment cards and POS terminals, (ii) that all

commercial banks that issue and acquire interbank payment cards use this logo and join the network, and (iii) that all such cards meet interoperability requirements. China appears to confirm that these instruments contain these requirements (see China's first written submission, paragraph 45). Could the United States elaborate on how these logo and interoperability requirements support its conclusion that China UnionPay is the sole supplier of "electronic payment services" for all domestic transactions?

55. Document No. 37 (Exhibit US-40) and Document No. 57 (Exhibit US-41) reinforce the network of regulations China has put in place to establish and entrench the CUP monopoly. These measures support CUP’s monopoly and cannot be viewed in isolation from the other measures which the United States has identified. Document No. 37 and Document No. 57 require use of the CUP logo and require that all bankcards be interoperable with CUP. This is one piece of the puzzle. Other measures described in response to Question 6 prohibit other EPS suppliers from processing domestic transactions on domestic cards. Together the logo and interoperability requirements in conjunction with restrictions on processing of transactions that take place in China establish and entrench the CUP as the sole supplier of EPS services in China.

56. The logo and interoperability requirements set forth in Exhibits 40 and 41 were adopted as part of the effort to eliminate the competition of regional or closed-loop non-interoperable networks that previously proliferated in China prior to the existence of CUP (See Section V.B of the U.S. July 29 Response). The requirements that all cards and POS terminals must bear the Union Pay logo and be interoperable with the CUP network means that all banks who wish to issue bank cards, all bank that acquire merchant transactions or operate ATMs, and all merchants who wish to accept bank cards must join CUP and process transactions in accordance with CUP’s rules and procedures as set out in Document No. 76, Exhibit US-56. These requirements gave CUP automatic and universal issuance and acceptance of its RMB payments products by banks and merchants in China. These requirements permitted and supported CUP becoming the sole supplier of EPS in China while ensuring that merchants accepted CUP. Suppliers of electronic payment services 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.

57. By requiring that “all bank cards issued by commercial banks solely for domestic use must bear the CUP logo,” Document 57, Article 1 (Exhibit US-41), China is requiring that all commercial banks who wish to issue cards for domestic use must join the CUP network. In addition, China requires that “all cards bearing the CUP logo must strictly abide by the unified technical specifications.” Document 37, Article 2, Section 2.1 (iv) (Exhibit US-40). The unified technical specifications are set out in Document 76 (Exhibit US-56). Among the requirements of the uniform technical specifications are detailed rules on the use of the CUP logo, including clarification that CUP “possesses the ownership in and the use and management right of the logo, and promulgates administrative measures for the production, utilization, etc. of the ‘UnionPay’ logo.” Document 76, Article Section 4.2 (Exhibit US-56). Thus, an issuing bank cannot issue a foreign branded card that is not a dual brand/dual currency card jointly issued with CUP. Furthermore, banks must submit any cards issued jointly with CUP for approval and the National Bankcard Office monitors the use of the CUP logo. Document 57, Articles 3-4 (Exhibit US-56).

58. In addition, as explained in response to question 6 above, once the CUP logo appears on a card, all domestic RMB transactions must be processed over the CUP network. Document No. 53 (Exhibit U.S.-51) at Article 7.3 requires all DBDC BINs (i.e., card numbers that appear on dual-brand, dual currency cards) to be submitted by issuers to “to the domestic RMB clearing organizations”. According to Document No. 153, “China Union Pay is the domestic clearing organization”. Thus, CUP is the only “domestic RMB clearing organization.” And, according to Document No. 53 at Article 5.2, “domestic card transactions inside China shall be settled in RMB through domestic clearing channels.” The impact of Document No. 53’s requirement is to guarantee that CUP processes all transactions in China relying on cards issued in China.

59. As explained in response to question no. 1, when a payment card is used at a merchant’s POS terminal, the BIN is transferred electronically either to an acquirer or directly to CUP (if the POS terminal is connected directly to CUP). When either the acquirer or CUP receive the BIN, they will compare it to CUP’s BIN table, which is the list of BINs that CUP is authorized to process. Once a BIN is confirmed to appear on CUP’s BIN table, the transaction is automatically processed over that network – in this case, the CUP network.

Question 16. With reference to paragraphs 53 and 80 of the United States' first written submission, could the United States explain what is a "region" for the purposes of the relevant requirements? Also, what is the relationship, if any, between "regions" and the "border areas" referred to in paragraph 80?

60. Prior to the creation of CUP, there were 18 regional processing centers throughout China. Each regional center controlled a different geographic part of mainland China. Under a variety of regulations these regional networks were abolished in favor of CUP as a national standard. See, for example, Articles 5 and 6 of Document No. 57 (Exhibit US-41). China’s First Written Submission at paragraph 43 confirms this: “Beginning in 1993, the People’s Bank of China (“PBOC”) began a series of efforts to develop a function interbank payment card network. The first of these was the ‘Golden Card’ project, which established a series of regional interbank networks linked together at the national level by a central hub.”

61. “Border areas” (as that term is used in paragraph 80 of the U.S. First Written Submission) refers to the “special administrative regions” of Macau and Hong Kong.

Question 17. With reference to paragraph 89 of the United States' first written submission, could the United States clarify its position regarding whether the China UnionPay enjoys a monopoly with regard to all "domestic transactions under domestic and foreign currency cards" or only for "[a]ll cross-bank transactions of all bankcards"?

62. The two descriptions referenced by the Panel are equally accurate and reflect differences in the scope of individual instruments memorializing CUP’s monopoly position. In its First Submission, the United States cited to Document No. 66 (Exhibit US-45) for the proposition that CUP “shall arrange for the clearing in Renminbi in connection with the domestic transactions under domestic and foreign currency cards.” In its First Submission, China indicated that Document No. 66 was repealed and replaced by Document No. 53 (2010) (Exhibit US-51) on October 11, 2010 (21 days after the United States requested consultations in this proceeding). Even if that is the case, the same language is contained in Document No. 53, Article 5.2 (Exhibit US-51), and China does not dispute that this document

remains in effect. As this instrument indicates, CUP’s monopoly applies with regard to all “domestic transactions under domestic and foreign currency cards.”

63. Document No. 272 (Exhibit US-43) provides that CUP enjoys a monopoly with regard to “[a]ll cross-bank transactions of all bankcards.” Document No. 272 (Exhibit US-43) was purportedly repealed on March 23, 2010. Even in that case, Document No. 153, Article 1, Section 1.2 (Exhibit US-49) confirms that, “At present time, China Union Pay is the domestic clearance organization which specializes in the RMB bank card inter-bank information routing and exchange.” Document No. 153, Article 1, Section 1.3 (Exhibit US-49) further mandates that “No third party service provider shall engage in bank card information exchange services.” Therefore, China’s protection of CUP’s monopoly regarding “[a]ll cross-bank transactions of all bankcards” remains in effect.

64. Finally, to be clear, the United States has not limited its claim only to cross-bank transactions. CUP’s monopoly on EPS extends to any payment card transaction, where the card is issued in China and used in China.

Question 23. Does the question of whether a transaction must be handled over the CUP network depend on whether the payment card used is RMB-denominated, or on whether the purchase is RMB-denominated?

65. China maintains requirements mandating that all payment card transactions denominated and paid in RMB be handled through CUP. China also imposes prohibitions on the use of non-CUP cards and on the use of foreign EPS suppliers for payment card transactions. In the end, whether the purchase is RMB-denominated or whether the payment card is RMB denominated, a payment card transaction must be processed by CUP when two conditions are met: (1) the card is issued in China; and (2) the card is used in China. See, e.g., Document No. 57 (Exhibit US-41), Document No. 153 (Exhibit US-49), and Document No. 53 (Exhibit US-51).

66. In describing how these measures operate, the United States has focused on RMB-denominated cards (including dual brand/dual currency cards) because they constitute the vast majority of domestically issued cards that are used in China. However, even domestically issued foreign denominated currency cards must be processed by CUP when they are used in China.

Question 24. Would a claim on a bank credit card be considered a financial asset within the meaning of item (xiv) of the Annex on Financial Services? Why or why not?

67. A claim on a bank credit card is not a “financial asset” as that term is used in item (xiv) of the Annex on Financial Services. China claims that EPS for payment card transactions are classifiable under Item (xiv) of the Annex on Financial Services, “[s]ettlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments,” rather than subsector (d) in China’s schedule of commitments. Subsector (d) includes “[a]ll payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement).”

68. While China’s position depends on a broad definition of “financial asset,” such a definition does not accord with the ordinary meaning the term “financial asset” in context.

As the Vienna Convention makes clear, the context for a treaty provision includes “the entire article at issue; and the remainder of the treaty, i.e., its text, including its preamble . . . and annexes . . . and other means mentioned in [Article 31] paras. 2 and 3.” The provisions of the GATS, including other provisions of the Annex on Financial Services, constitute relevant context for interpreting Item (xiv), and support the conclusion that, as used in item (xiv), the term “financial asset” (and the term “negotiable instruments” that appears in the illustrative list that follows) refers to tradeable financial instruments, not non-tradeable claims such as that on a credit card.

69. UCC Article 8, Section 8-102(9) (Exhibit US-75) defines the term “financial asset” as follows:¹

(9) “Financial asset,” except as otherwise provided in Section 8-103, means:

(i) a security;

(ii) an obligation of a person or a share, participation, or other interest in a person or in property or an enterprise of a person, which is, or is of a type, dealt in or traded on financial markets, or which is recognized in any area in which it is issued or dealt in as a medium for investment; or

(iii) any property that is held by a securities intermediary for another person in a securities account if the securities intermediary has expressly agreed with the other person that the property is to be treated as a financial asset under this Article.

As context requires, the term means either the interest itself or the means by which a person's claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.

70. This interpretation is supported by the context in which the text appears. While the term “financial assets” is not a defined term in the Annex (or in the GATS), an illustrative list of the types of “financial assets subject to “settlement and clearing services” in item (xiv) consists exclusively of tradeable investment instruments (“securities, derivative products and other negotiable instruments”), which support the conclusion that the term “financial assets: is intended to be limited to these types of instruments.

71. An examination of each of the items in the illustrative list demonstrate that retail receipts, such as a claim on a payment card, are not of the same type of financial assets as the

¹ Elements of The Model Law on International Credit Transfers adopted in 1992 by the United Nations Commission on International Trade Law (“UNCITRAL”) were significantly influenced by the UCC and the success of the UCC in the United States was a driving force behind the international private law unification efforts that resulted a range of UNCITRAL model laws. The UCC is one of the uniform laws that has been drafted by the National Conference of Commissioners on Uniform State Laws and the American Law Institute governing commercial transactions. The types of commercial transactions are broad and include sales and leasing of goods, transfer of funds, commercial paper, bank deposits and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading, investment securities, and secured transactions. The UCC has been adopted in whole or in substantial part by all U.S. states.

items included in the illustrative list and, therefore, are not within the scope of “financial assets” referenced in the provision.

72. A claim on a bank credit card is not similar to a “security.” A “security” is generally defined as “an instrument that signifies an ownership position in a corporation (a stock), a creditor relationship with a corporation or government body (a bond) or rights to ownership...” The Economist, A Dictionary of Business, page 334 (Exhibit US-69); see also U.C.C. Article 8, Section 8-102 (15) (Exhibit US-75).

73. A claim on a bank credit payment card is not similar to a “derivative” which is generally defined as “a financial contract the value of which depends on the value of one or more underlying reference assets, rates or indices.” CPSS Glossary of Terms (Exhibit US-68).

74. Nor is a claim on a bank card is similar to a “negotiable instrument,” which is an unconditional order to pay a fixed amount of money that is transferable. On this latter category, the concept of “negotiability” is critical. For example, the United Nations System of National Accounts is an international standard system of national accounts. (The first international standard was published in 1953, and there have been revisions in 1968, 1993, and 2008.) The System of National Accounts (2008) (Exhibit US-70) states that “[t]hose financial claims that are negotiable are referred to as securities” and further explains (page 223, section 11.33):

Financial claims can be distinguished as to whether they are negotiable or not. A claim is negotiable if its legal ownership is readily capable of being transferred from one unit to another unit by delivery or endorsement. While any financial instrument can potentially be traded, negotiable instruments are designed to be traded on organized and other markets.

75. Moreover, U.S. courts have found that neither plastic credit cards nor sales slips generated in connection with credit card transactions are “negotiable instruments” and are excluded under Article 3 of the UCC. See, e.g., *Broadway Nat. Bank v. Barton-Russell Corp.*, 5 N.Y.S2d 933 (1992) (Exhibit US-71) (“[A] credit card is a commercial instrument, but...not a negotiable instrument”); *First National Bank of Findlay v. Fulk*, 566 N.E.2d 1270 (1989) (Exhibit US-72) (credit card slips lacked words of negotiability and thus were not negotiable instruments under state law); *First United Bank v. Philmont Corp.*, 533 So.2d 449 (Exhibit US-73) (“Credit card sales slips are not checks, drafts or other negotiable instruments as defined by UCC Articles 3 and 4...the sales slips are non-negotiable instruments evidencing the payment of money...”); *Commercial Bank & Trust Co. v. Bank of Louisiana*, 487 So.2d 655 (1986) (Exhibit US-74) (“[C]redit card sales drafts are plainly not negotiable instruments...”).

76. For example, in the U.S. antitrust case in Exhibit US-66, where court referred to services provided by Visa as “payment services,” the court also made a specific finding of fact that “There is no market for the sale of cardholder transactions... from merchant banks to issuing banks, and it would be meaningless to use such a market for purposes of analysis in this case. Only the member which issued a card has any interest in acquiring from merchant bank transactions effected by that card.” (Exhibit US-66) (page 33).

77. Additional context supporting this conclusion is provided by the phrase “settlement and clearing services for financial assets.” China’s position fails to account for the fact that

“settlement and clearing services for financial assets” is a substantially different financial service than EPS for payment card transaction, which is a type of retail payment services. Indeed, there are many practical differences between the systems used to settle and clear investment instruments of the kind referenced in item (xiv) and the systems used to settle and clear retail payment instruments. These differences relate to: (1) the financial instruments involved and the value of typical transactions, (2) the market participants involved in the transaction and related processing; (3) the infrastructure needs for such processes to occur safely and efficiently; (4) regulatory oversight; and (5) the risks that the processes present to the financial system as a whole.

78. The differences between the two distinct systems are recognized by the Committee on Payment and Settlement Systems (“CPSS”), a part of the Bank for International Settlements (“BIS”), cited by both China and the United States as providing helpful guidance. The CPSS is charged with developing the multilateral framework that governs payment systems, on the one hand, and securities settlement systems, on the other hand. The CPSS provides guidance concerning payment systems (which include suppliers of EPS for payment card transactions) and securities settlement systems. The CPSS “glossary of terms used in payments and settlement systems” clearly illustrates that the terms “clearing” and “settlement” each have different meanings in the respective payment and securities contexts. The definitions relating to payments systems, including EPS for payment card transactions, are drawn from different source documents than those for securities settlement systems. *See* U.S. Opening Statement, paras. 32-40 and the CPSS Glossary (Exhibit US-68) (defining the concepts of “clearance” and “settlement” differently depending upon context – whether in the context of securities settlement systems or in the context of payment systems). The BIS Glossary confirms that “settlement and clearing services for financial assets,” as explicitly qualified in item (xiv) of the GATS are clearing and settlement services for assets like derivative products, stocks, or bonds. In contrast, EPS for payment card transactions are used to clear and settle payments associated with the transfer of goods and services, not financial assets.

79. The settlement and clearing activities of assets such as securities and derivatives differs in critical ways from the settlement and clearing activities associated with retail payments. The first typically involve large value, investment-based transactions, while the latter involve numerous small, retail transactions. Furthermore, the actors involved in the “settlement and clearing of financial assets” are investors and specialized financial market participants such as “central securities depositories;” “clearing houses;” and “exchange members.” In contrast, the participants in retail payments are merchants, consumers, retail banks and EPS suppliers. Furthermore, the two types of activities are generally regulated by different government agencies and for different purposes, in part because the risks of the two systems are substantially different. Settlement and clearing systems for large scale financial assets are typically considered systemically significant while settlement and clearing systems for retail payments are not.

80. Finally, the subsector that is the most specific and accurate description for purposes of classifying EPS for payment card transactions is subsector (d) (“All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement”). 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 a type of “payment and money transmission” including “credit, charge, and debit cards” payment transactions. EPS suppliers are at the heart of this service. EPS clearly fall within the ordinary meaning of

“payment and money transmission services” as one type of “all” such services. Second, the phrase “all payment and money transmission services” is modified with an illustrative list that explicitly provides that it “include[s] credit, charge and debit cards.” This explicit reference is in line with the recognition that EPS is integral to the processing of credit, charge, debit and other payment card-based electronic payment transactions and, without EPS, payment card transactions could not occur.

Question 25. Are the United States' claims concerned with EPS suppliers operating under a three-party model? If so, where would the United States classify the services provided by EPS suppliers operating under such a model?

81. Yes, the U.S. claims do include three-party model transactions. As the United States indicated in paragraph 54 of the U.S. July 29 Response, an EPS transaction is fundamentally the same regardless of whether it occurs in the context of a four-party or three-party model. The only difference between a three-party model and a four-party model is that the EPS supplier itself serves as the issuer and acquirer in a three-party system.

82. Document No. 57 (Exhibit US-41), Articles 1 and 2 provides that any RMB denominated cards issued in China must be CUP cards. Furthermore, as explained in the U.S. response to question 23, Document No. 57 (Exhibit US-41), Document No. 153 (Exhibit US-49) and Document No. 53 (Exhibit US-51), require that all payment cards issued in China must be processed by CUP when used in China. Consequently, three-party model EPS providers are subject to the same restrictions on market access in China as four-party models. Three-party EPS providers are not able to issue their own branded cards and are not able to process domestic or foreign currency transactions for payment cards issued and used in China.

83. The definition of “electronic payment services for payment card transactions” as set forth in the U.S. panel request and as this service is further discussed and amplified in the U.S. July 29 Response (e.g., paragraph 32) and the U.S. First Written Submission includes both three-party and four-party EPS providers. Both three-party and four-party EPS suppliers would be properly classified under subsector (d) of China’s Schedule.

Question 26. Could the United States please comment on paragraph 12 of China's first oral statement, and specifically the argument that 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 another service?

84. 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. Suppliers of EPS manage, facilitate and enable payment card transactions and without this integrated service a payment card transaction could not happen. EPS suppliers 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. The network, rules and procedures, and operating system that are part of the EPS architecture that allow merchants to be paid promptly the amounts they are owed, and ensure that customers pay what they owe. EPS suppliers receive, check and transmit the information that the parties need for the completion of the transactions, and manage, facilitate, and enable the transmission of funds between participating entities. 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. Each component is critical to effectuate the payment card transaction and EPS suppliers provide the entire package of services to their customers, the entities that are participating in the payment card transactions.

85. The United States has described this package of services as “managing,” “facilitating,” or “enabling” the processing of payment card transactions. “Orchestrating” would be an equally valid term because without the EPS supplier, the transactions could not occur. 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 cardholders. That different elements of the service could be classified differently if it were possible to purchase them independently is beside the point. In any event, they cannot be purchased independently because it is necessary for each component element to work collectively for EPS to function properly.

86. As a legal matter, the observation in paragraph 12 of China’s oral statement is irrelevant to the question before the Panel. A particular service and its input services can be in the same subsector. To give an example, a company engaged in construction of houses may pay another company to lay the foundation. That other company’s activities may be an “input” service for the service of constructing the house, but that does not change the fact that laying the foundation is also a construction service. Thus, whether EPS can also be seen as an “input” for the service that issuers supply to cardholders or the service that acquiring institutions supply to merchants is not relevant to the question of where EPS is classified. Nor does it matter that individual elements of EPS can be seen as “inputs” for the entire package offered by the EPS supplier to “manage,” “facilitate,” or “process” payment card transactions for their customers – issuing institutions and acquiring institutions. The question is whether EPS fall in the same subsector of “payment and money transmission services, including credit, charge and debit cards.” They do, because they are what make payment and money transmissions occur by means of those cards.

Question 27. With reference to paragraph 37 of the United States' first oral statement, could the United States please provide a legal basis for its argument that subsector (d) covers clearing and settlement for payments associated with the transfer of goods and services, whereas item (xiv) of the Annex on Financial Services concerns clearing and settlement for financial assets?

87. EPS clearly falls within the ordinary meaning of “payment and money transmission services” as one type of “all” such services. The phrase “all payment and money transmission services” is modified with an illustrative list that explicitly provides that it “include[s] credit, charge and debit cards.” This explicit reference is in line with the recognition that EPS is integral to the processing of credit, charge, debit and other payment card-based electronic payment transactions, and without EPS (including authorization, clearing and settlement components of EPS) this service for payment card transactions could not occur.

88. The term “financial assets” is not a defined term in the Annex (or in the GATS). An illustrative list of the types of “financial assets subject to “settlement and clearing services” in item (xiv) consists exclusively of tradeable investment instruments (“securities, derivative products and other negotiable instruments”), which support the conclusion that the term “financial assets” is intended to be limited to these types of instruments.

89. Please also see the U.S. response to question 24 and paragraphs 32-40 of the U.S. Opening Statement.

Question 28. China's mode 1 market access entry for subsectors (a) through (f) reads as follows:

"(1) Unbound except for the following:

- 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."

Could the United States explain how the two "excepted" elements are considered to form part of the services identified in subsectors (a) through (f)? Please do so for each of the services identified in subsectors (a) through (f). Could the United States also explain further its example (from the first meeting) of advice given by banks to non-account holders under the second of the two "excepted" elements.

90. The matrix below sets out a response to the Panel’s question with respect to subsectors (a) through (f):

Subparagraph in China’s banking services commitment	Provision and transfer of financial information, etc., that form part of the service	Advisory, intermediation and other auxiliary financial activities that form part of the service
(a) Acceptance of deposits and other repayable funds from the public	Deposit holding entity provides statements to accountholders showing fluctuations in the amount of money in their accounts and variations in the applicable interest rate.	Deposit holding entity provides accountholders with advice on which of the entity’s financial products offers the best combination of terms and risk.
(b) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transactions	Lender provides statements to accountholders showing past payments, current balance, interest rates, and information on other types of financing.	Lender provides advice to borrowers on favorable refinancing opportunities or other ways to restructure their debt.
(c) Financial leasing	Lessor provides statements to lessee showing past payments.	Lessor provides advice to lessee on favorable leasing terms or other potential leasing arrangements.
(d) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers’ drafts (including import and export settlement)	Please see, for example, U.S. answer to question 46.	Please see, for example, U.S. answer to question 46.

(e) Guarantees and commitments	Guarantor monitors the performance of the borrower for the underlying debt and provides that information to the party that purchased the guarantee.	Guarantor may advise borrower on strategies to avoid default.
(f) Trading for own account or for account of customers: foreign exchange	Trader provides customers with data on currency movements.	Trader periodically advises customers on currencies it considers to be good investments.

91. The ability to “transfer financial information” and supply “advisory, intermediation and other auxiliary financial services” cross-border with respect to an integrated service (when the service supplier is located in a particular country) is often necessary for corporate risk management purposes and typically occurs in the ordinary course of business. Indeed, multinational financial services companies often centralize functions not considered as their “core” service. Such activities include those related to information technology (e.g., applications development, programming, and coding), specific operations (e.g., some aspects of finance and accounting, back-office activities and processing, and administration), and contract functions (e.g., call centers).

92. Finally, with respect to the example provided by the United States, where a bank provides non-account holders with advice, for example, investment and portfolio research or advice on acquisitions or corporate restructurings, that would constitute a service falling in subsector (l) of China’s Schedule: “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.”

Question 36. With reference to paragraph 34 of China's first written submission where China discusses merchant and issuer processors, please address:

(a) Whether and how issuer and merchant processors should be taken into account in the Panel's analysis of the US claims in this case.

93. Issuer processors provide payment-related services to issuers that support issuer interaction with suppliers of EPS. Similarly, acquirer processors provide payment-related services to acquirers that support acquirer interaction with suppliers of EPS. To provide such services, the issuer and acquirer processors handle or transmit electronic payment information to or from an EPS supplier. Issuers and acquirers may choose to perform these services in-house or may choose to outsource these services to issuer and acquirer processors. As such, issuer and acquirer processors are optional entities for card based electronic payment transactions. This is in contrast to an EPS supplier which provides necessary infrastructure and services for card-based electronic payment transactions. That said, issuer and merchant processors do provide services that would fall within “all” payment or money transmission services as set forth in subsector (d). Therefore, the services provided by these processors are within the scope of the U.S. claims.

(b) Where the activities undertaken by issuer and merchant processors would be classified in the list provided in section 5 of the Annex to the GATS on Financial Services.

94. Issuer and merchant processors are included within the definition of item (viii) of section 5 of the Annex to the GATS on Financial Services because services of issuer and

acquirer processors involve the transmission of payment and money transmission services for credit, debit and other payment cards.

Question 37. With regard to "pre-paid" or stored-value bank cards (see paragraph 37 of the United States' response to China's preliminary ruling request and Exhibit US-52, Article 10), could the United States and China provide their views as to whether such cards would constitute "financial assets" within the meaning of item (xiv) of the Annex on Financial Services?

95. Neither “pre-paid” nor stored-value bank cards would constitute “financial assets” within the meaning of item (xiv) of the Annex on Financial Services because these products and the underlying service they represent do not contain characteristics similar to the other items listed in item (xiv) – *i.e.* tradeability, transferability and non-fungibility – that therefore require a specialized “settlement and clearing services for financial assets” and institutional framework and service providers that are separate and distinct from payment and money transmission services. See the U.S. answer to questions No. 24 and No. 38(a).

Question 38. With reference to item (xiv) of the Annex on Financial Services, please answer the following questions:

(a) Is any portion of a credit card transaction a financial asset? For instance, is the underlying claim between the issuer and the acquirer such an asset?

96. No. No portion of a credit card transaction, including the underlying claim between the issuer and the acquirer, can be considered a financial asset with reference to item (xiv) of the Annex on Financial Services. As discussed in response to question 24 above, the term “financial asset” as used in item (xiv) refers to tradeable investment instruments like securities and derivatives.

97. Claims between issuers and acquirers are settled on a net basis each day. Throughout each day the net position of each issuer and each acquirer is constantly changing as transactions occur. However, at the beginning of each day and at the end of each day no outstanding claims exist between issuers and acquirers and there is no “asset” that would appear on a bank’s balance sheet. To the extent that an EPS payment card transaction results in a deposit into a merchant’s bank account, this does not occur until after the completion of the payment and money transmission process – that is, once it appears on a commercial bank’s balance sheet as a liability to the depositor (merchant).

(b) In a case where different underlying claims are bundled together and securitised, would this be a financial asset?

98. Yes. The contractual obligation to pay is only with respect to the issuing bank. For this reason, only the issuing bank can securitize receivables. It is at this point that a credit card receivable could be deemed a financial asset. Underlying claims to payment between issuing banks and their cardholders could be bundled together and securitized. This security itself might be considered a financial asset whose settlement would require the services described in item (xiv) because the bundled, completed transactions would then meet the criteria outlined in response to question 38 (a) above – specifically, that the bundled claims are transferrable and when transferred, the clearing and settlement results in a transfer of ownership and is guided by the institutional framework outlined with the Bank for

International Settlement’s *Recommendations for Securities Settlement Systems*. See Exhibit US-68 (definitions associated with securities settlement systems drawn from this document). However, it is also important to note that when such bundling would occur, it would be totally independent of the EPS service supplied in connection with a card based payment transaction, and would be securitized by the bank providing the line of credit – not the supplier of EPS.

Question 39. In reference to the term "negotiable instruments" in item (xiv) of the Annex on Financial Services, please also address the following:

(a) Are the items mentioned in the illustrative list of item (viii) (i.e. credit, charge and debit cards, travellers cheques and bankers drafts) "negotiable instruments"?

99. Not as that term is used in item (xiv). Again, item (xiv) refers to “settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments.” There are many types of negotiable instruments (e.g., checks). Some are used for payments, while others are used as investment vehicles (e.g., commercial paper). The reference to “negotiable instruments” in item (xiv) does not include “all” such instruments. Item (xiv) only indicates that there are negotiable instruments that settle and clear like securities and derivative products. However, item (xiv) cannot be read properly to mean that all negotiable instruments are settled and cleared like securities and derivative products. Thus, to the extent a negotiable instrument appears in item (viii), it is not a negotiable instrument referred to in item (xiv). And, in any event, card-based payment transactions do not involve negotiable instruments. See, e.g. The System of National Accounts (2008) explanation of “negotiability” (Exhibit US-70).

100. As explained in response to questions 24 and 38(a), the key characteristic of the illustrative list of “financial assets” given in item (xiv) – “... securities, derivative products and other negotiable instruments” – is transferability. That is to say that ownership of the financial assets referenced in item (xiv), unlike individual claims on a bank credit card, can be exchanged between unrelated parties. The net payment facilitated by a supplier of EPS for payment card transactions is not transferable or negotiable.

(b) In reference to Exhibit US-66, page 33, where it is stated that "[t]here is no market for the sale of card-holder transactions", could the parties comment on the applicability of this statement to the issues in this case?

101. That statement reinforces the position of the United States that payment cards such as credit, debit, charge and prepaid, are not considered “financial assets” within the meaning of item (xiv) of the Annex on Financial Services. The “financial assets” in item (xiv), such as securities and derivatives, are transferable between a buyer and seller and thus require separate settlement and clearing mechanisms to transfer the asset. Many securities and derivatives have a marketplace or exchange that enables the free transfer of such assets. In contrast, the obligations between financial institutions within a payment system established by an EPS supplier based on cardholder transactions are not transferable, and thus there is no market for such transactions. Thus, the court decision in Exhibit US-66 at page 33 properly concludes that “[t]here is no market for the sale of cardholder transactions.”

(c) ***Could the parties elaborate on the link between the concepts of financial asset and negotiable instrument?***

102. Please see the U.S. responses to questions 24 and 39(a). The use of “negotiable instrument” (and “securities” and “derivatives”) as an illustrative example of a “financial asset” provides interpretational guidance that supports the conclusion that the phrase “financial asset” as used in item (xiv) refers to tradeable instruments. “Negotiable instruments” for which “settlement and clearing” would be applicable would refer to those negotiable instruments, such as commercial paper or negotiable certificates of deposit, that share the common properties of securities, derivatives and other investment instruments. For example, commercial paper is a short-term promissory note or unsecured money-market obligation that is negotiable. A secondary market also exists for commercial paper. Negotiable certificates of deposit are large-denominated certificates of deposit issued by large commercial banks as interest-bearing time deposits. There is a large secondary market for negotiable CDs of the 25 largest banks. These assets, like securities and derivatives, are transferable and involve additional risk, and, thus, do require distinct settlement and clearing mechanisms (see response question 38(a)) for their transfer. Therefore, the term “negotiable instrument” as an example of a “financial asset” covered by item (xiv) further reinforces the position of the United States that payment cards and payment card transactions, which are non-negotiable, and non-transferrable are not a “financial asset” within the meaning of item (xiv) of the Annex on Financial Services.

Question 40. With reference, inter alia, to paragraphs 22 and 27 of the European Union's third party written submission, could the parties please clarify how and why clearing and settlement services involved in the trading of securities are distinct from the clearing and settlement services that are part of payment and money transmission services (see paragraph 22)?

103. Please see the U.S. answer to question 27 above.

Question 41. For the purpose of classifying services, what determines whether a composite service is one integral (or indivisible) service as opposed to several distinct, but related services provided in conjunction, or in parallel, with each other?

104. The answer will depend on the service and component services in question. Factors that might affect the conclusion:

- Whether the various services are typically supplied or sold in a bundle, or separately;
- Whether the services are part of a coherent whole, like package tracking supplied as part of a delivery service; and
- Whether the service supplier and service consumer are typically the same for the various component services.

105. EPS for payment card transactions constitute one integral, indivisible service. They are sold in a bundle; the service is a coherent whole, very much like package tracking supplied as part of a delivery service, and the service supplier and service consumer are the same for the various component services. EPS suppliers 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. The network, rules and procedures, and operating system that are part of the EPS architecture that allow merchants to be paid the amounts they are owed and ensure that customers pay what they owe. 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. The rules and procedures established by the EPS supplier give the payment system stability and integrity, and enable it efficiently to handle net flows of money among the institutions involved in card payments. Each component is critical to effectuate the payment card transaction and EPS suppliers provide the entire package of services to their customers, the entities that are participating in the payment card transactions.

106. Please also see U.S. answer to question No. 26.

Question 42. Taking into consideration WTO jurisprudence, what is the relevance of an illustrative list for ascertaining the meaning of a term that they illustrate?

107. Under standard principles of treaty interpretation, illustrative lists are not merely non-exhaustive lists of examples but also, and significantly, they may help to inform the overall scope of a provision and the meaning of a term that they illustrate.

108. The Appellate Body and several WTO panels have considered illustrative lists to provide useful context. For example, as the Panel in *US – Cotton (Article 21.5)*, para. 14.45, noted: “Panels and the Appellate Body have, in interpreting the meaning of ‘export subsidies’ in Article 10.1, relied, inter alia, on the relevant provisions of the SCM Agreement (including Articles 1 and 3 and items of the Illustrative List) as ‘context.’ See, e.g., Appellate Body Report, *US – Cotton*, para. 647; Panel Report, *Canada – Dairy (Second Recourse to Article 21.5)* para. 5.153; Panel Report, *Canada – Dairy*, para. 7.125; Panel Report, *Canada – Aircraft (Article 21.5)*, para 5.80. See also GATT Panel Report *U.S.-Softwood Lumber II*, SCM/162, adopted 27 October 1993, para. 171 (discussing an illustrative list in the GATT and noting that “Just as the doctrine of *ejusdem generis* applied as an aid to statutory construction, so this doctrine was equally applicable when interpreting an international agreement, such as the General Agreement.”).

Question 43. With reference to paragraph 101 of China's first written submission, does the United States agree that subsector (d) encompasses the issuance of payment cards and the acquisition of payment card transactions by banks and other financial institutions?

109. As 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. While China asserts that subsector (d) is limited to issuing and acquiring services, China’s interpretation seems to read out the principal clause of subsector (d) – “all payment and money transmission services” and incongruously suggests that commitments under subsector (d) extend to the issuance of “credit, charge and debit cards” yet do not extend to the “payment and money transmission services” that are essential to the use of those cards and that are the heart of the service necessary for payment card transactions.

110. Some evidence supports the conclusion that issuing and acquiring services may fall within subsector (d); however, other evidence may support classification elsewhere, such as in subsector (a) or (b).

111. Finally, and although the United States would agree that payment card issuance and merchant acquiring services are distinct from EPS, that fact would not, of course, prevent them from being part of a single subsector with EPS for purposes of China's Schedule.

Question 44. With reference to paragraph 89 and footnote 58 of China's first written submission, what is the relevance, if any, of the "rule of classification" (CPC Provisional, Rules of Interpretation, Rule 1(a)) referred to by China in the interpretation of the scope of the Chinese commitments at issue?

112. China argues in paragraph 89 of its First Written Submission that “[i]t is a well established rule of classification that the heading or subsector that provides the most specific description shall be preferred to more general headings or subsectors that might otherwise encompass the good or service at issue.” China cites CPC Provisional, Rules of Interpretation, Rule 1(a) (“When services are, prima facie, classifiable under two or more categories ... [t]he category which provides the most specific description shall be preferred to categories providing a more general description.”)

113. The CPC Provisional Rules of Interpretation are not, of course, treaty text. Nor is there is a specific reference to the CPC Provisional rules in China's Schedule. These rules could constitute a supplementary means of interpretation under Article 32 of the Vienna Convention.

114. In any event, with respect to the service at issue – EPS for payment card transactions – the subsector that is the most specific and accurate description for purposes of classifying EPS for payment card transactions is subsector (d) (“All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement”). 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 a type of “payment and money transmission” including “credit, charge, and debit cards” payment transactions. EPS suppliers are at the heart of this service. EPS clearly fall within the ordinary meaning of “payment and money transmission services” as one type of “all” such services. Second, the phrase “all payment and money transmission services” is modified with an illustrative list that explicitly provides that it “include[s] credit, charge and debit cards.” This explicit reference is in line with the recognition that 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.

Question 45. In paragraphs 126 and 158 of its first written submission, China argues that China's market access entry under mode 1 for subsectors (a) through (f) is "unbound", with a "cross-reference" to subsectors (k) and (l). The latter two subsectors are then scheduled under the heading "other financial services" with a full mode 1 commitment ("none"). Could the United States comment on China's argument about the so-called "cross-reference" in its specific commitments?

115. First, the terms of the commitment must be given meaning. Article 31 of the Vienna Convention on the Law of Treaties states that, “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.” The “ordinary meaning” of China's commitment is clear. With respect to the mode 1 supply of “payment and money transmission services,”

China is unbound “except for” the two specified services. With respect to those “excepted” services, China has made a mode 1 commitment.

116. It is plain from the text that China has taken mode 1 commitments for “all payment and money transmission services, including credit, charge and debit cards...” 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) for which China has taken mode 1 commitments. A fundamental tenet of treaty interpretation requires that the qualifying phrase “except for the following” and the further specific elaboration following the word “Unbound” should be given meaning. China focuses solely on the term “Unbound.” If China wished to in fact be fully “Unbound,” that is, not to have any commitments, it would have left the word “Unbound” unqualified. However, as the Schedule reflects, China did not do so.

117. It is simply not credible to argue that this language is merely for greater certainty to repeat China’s commitments in subsectors (k) and (l). Such an argument fails to give meaning to this treaty language.

118. Second, under WTO scheduling conventions, the “sector or sub-sector” description in the left-most column of China’s schedule defines the scope of the relevant service. That scope cannot be altered by the commitments made in the market access or national treatment columns. While a WTO Member may, of course, place limitations on the scope of its commitment with respect to a given sector, the limitation inscribed in the market access and national treatment columns cannot change the scope of the sector description itself. Consequently, 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). As explained in response to question 46, these “excepted” services cover EPS services that are an integral part of the provision of “payment and money transmission” services. Indeed, without the “excepted” services, the vast majority of card based payment transactions simply could not occur.

119. Subsectors (k) and (l) (“provision and transfer of financial information” and “advisory, intermediation and auxiliary”) include services that (a) are wholly unrelated to “payment and money transmission services,” such as information provided by financial analysts or services like Reuters and Bloomberg; and (b) services involving “provision and transfer of financial information” and “advisory, intermediation and auxiliary” that facilitate but are not integral to the provision of EPS, which might include, for example, back office accounting services, or specialized software services, etc.

120. As the United States has explained, much of the activity described by China in its mode 1 commitment involves the transfer of financial information and financial data processing, and much of this occurs on a cross-border basis. It is therefore not surprising that China made cross-border commitments for subsector (d) for EPS for payment card transactions to the extent that the activities entail the provision and transfer of financial information and financial data processing.

Question 46. In paragraph 31 of its first oral statement, the United States concludes, with respect to China's mode 1 market access entry concerning subsector (d), that

Much of the activity described involves the transfer of financial information and financial data processing, and much of this occurs on a cross-border basis. Recognizing this commercial reality, it is not surprising that China made cross-border commitments for subsector (d) for EPS for payment card transactions to the extent that activities entail the provision and transfer of financial information and financial data processing. (emphasis added)

The Panel seeks the following clarifications with respect to this statement:

- (a) *Could the United States clarify, with reference to its description of the five elements included in the EPS "system" (see the United States' preliminary ruling submission, paragraph 39 and United States' first oral statement, paragraphs 30 and 31), which of those elements – or part thereof – would be covered under the mode 1 market access commitment undertaken by China with respect to subsector (d)?*
- (b) *Considering the commitments undertaken by China under subsectors (k) and (l), how would the United States reconcile this statement with the principle that sectors must be scheduled in a mutually exclusive manner?*

121. The United States considers that several aspects of EPS are covered by the mode 1 market access commitment undertaken by China. The following chart correlates each component to the relevant mode 1 commitment:

EPS Component	Mode 1 Commitment
<p>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</p>	<p><i>Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services</i></p> <p>The “processing infrastructure” and “network” includes the provision of the underlying physical network and wiring, <i>i.e.</i>, IT/telecom infrastructure, including VPN, hardware and wiring, mainframe boxes, and operating system. The purpose of this infrastructure is to “<u>transfer financial information</u>” and provide the computing power for “<u>data processing.</u>” The system operates runs according to the “<u>related software.</u>”</p> <p>The “rules and procedures” establish the framework for providing the entire system supplied by the EPS supplier.</p> <p><i>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</i></p> <p>The EPS suppliers also provide fraud protection that goes</p>

	<p>beyond the provision of information (such as charge-backs in case of fraudulent transactions), payment guarantees to their members to ensure that payments are made promptly, and dispute resolution mechanisms.</p>
<p>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</p>	<p><i>Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services</i></p> <p>This aspect of EPS includes the following components:</p> <p>a. Authorization Routing</p> <p>Automated direction of potential payment card transactions to the appropriate issuing financial institution or their agent for decisions and ensuring a response is provided to the requesting acquiring financial institution or their agent. Proper routing is ensured by use of a database that the network maintains which contains information on each party connecting to the network (e.g., location, preferred currency, etc.).</p> <p>This aspect of EPS involves the “<u>provision and transfer of financial information.</u>” The routing occurs in accordance with automated data processing and software.</p> <p>b. Authorization Decision Solutions</p> <p>In certain cases, the EPS supplier automatically intercepts and responds to requests for authorization on behalf of the issuing financial institution based on the pre-defined parameters and instructions (so-called “on-behalf of” services). While “on-behalf of” transactions account for only a small proportion of all transactions carried on a payment network, this service is critical to ensuring the near-100% transaction success rate that is necessary for building and maintaining consumer trust and loyalty to the brand. This aspect involves “<u>provision and transfer of financial information, and financial data processing and related software.</u>”</p> <p>c. Fraud Protection</p> <p>This entails the provision of additional information to issuing financial institutions or their agents regarding the likelihood that a particular payment card transaction attempt is fraudulent. It includes the automated, software-driven analysis of the circumstances of a given transaction, such as value and location. This involves “<u>provision and transfer of financial information, and financial data processing and related software.</u>”</p>
<p>The delivery of transaction information among participating entities</p> <p>The calculation, determination, and reporting of the net financial position of relevant institutions for all transactions that have been authorized</p>	<p><i>Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services</i></p> <p>This aspect of EPS includes the following components:</p> <p>a. Global Clearing Management</p>

	<p>An automated process in which the EPS supplier’s data center receives batches of completed payment card transaction activity from acquiring institutions or their agents and edits, sorts, and re-batches the same activity for delivery to the proper issuing financial institution or their agent. This involves <u>“provision and transfer of financial information, and financial data processing and related software.”</u></p> <p>b. Exception Handling Solutions</p> <p>The automated exchange of information regarding disputed payment card transactions throughout the appropriate life cycle of the exceptions – from chargeback through to arbitration. Given its automated nature, aspect involves the <u>“provision and transfer of financial information, and financial data processing and related software.”</u></p> <p><i>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</i></p> <p>With respect to (b) above, if the dispute cannot be resolved automatically based on an exchange of information in accordance with the network’s rules, the EPS supplier may be required to make specific decisions to resolve a given dispute. This falls within the category of <u>“advisory, intermediation and other auxiliary financial services.”</u></p>
<p>The facilitation management and/or other participation in the transfer of net payments owed among participating institutions</p>	<p><i>Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services</i></p> <p>This aspect of EPS includes the following components:</p> <p>a. 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.</p> <p>b. The creation and execution of the transfer order for each financial institution participating in the value day payment activity.</p> <p>Both of these activities constitute the <u>“provision and transfer of financial information, and financial data processing.”</u> All of this is automated and performed by the EPS supplier’s software.</p>

122. The above description is consistent with descriptions provided by major U.S. and Chinese EPS suppliers in describing the components of EPS for payment card transactions.

123. For example, Chapter 2 of CUP’s Articles of Incorporation, entitled “Purpose and Business Scope” states as follows:

Article 11. The purpose of the Company: by adopting advanced and practical technical means and scientific and flexible operational and managerial methods, to set up and operate a unified, highly efficient and safe inter-bank bank card information exchange network across the country, ensure the inter-bank common use of bank cards and the joint development of bank card businesses, provide specialized services with regard to the inter-bank bank card information exchange, improve the environment for bank card use, and promote the rapid development of China's bank card industry.

Article 12. 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 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) and 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 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 (7) to conduct related researches and consulting services; and to conduct such other related businesses as may be approved by competent authorities. (Emphasis added.)

124. The PBOC Preparatory Group on China UnionPay Co., Ltd. reiterated that the primary function of CUP is the provision of information. Paragraph 1 of the Approval of the People’s Bank of China on the Preparation for the Establishment of China UnionPay Co., Ltd. (Yin Fu No. [2001] 234) and paragraph 2 of the Reply of the People’s Bank of China on the Opening of China UnionPay Co., Ltd. (Yin Fu No. [2002] 64) (Exhibit US-27) both state that the PBOC “approve[s] the preparation for the establishment of China UnionPay Co., Ltd. (“CUP”). This company will be a joint-stock financial institution that provides an inter-bank bankcard information switching network and specialized services in connection therewith.” (Emphasis added.)

125. The Chinese regulatory system similarly describes CUP’s primary activity as exchanging information among financial institutions. In fact, the *Business Practices for the Interoperable Service of Bank Cards*, which required the formation and participation in the entity that evolved into CUP, described the scope of the operation as a “Bank Card Cross-bank Information Exchange System .” Article 2.2 of the measure states as follows:

Bank Card Interoperation means that the Bank-Card Financial Institutions . . . link themselves with the countrywide or regional Bank Card Cross-bank Information Exchange System to achieve the sharing of information, machinery and merchants and bank and cross-bank interoperation. (Emphasis added.)

126. In its 2007 China Payment System Development Report (at 25) (Exhibit US-15), PBOC states that “CUP operates national bankcard cross-bank information exchange network, and provides specialized service on bankcard cross-bank information exchange. It is connected with HVPS, and PBC is responsible for the final settlement.” Emphasis added. Thus, PBOC has recognized that the primary function of CUP is the provision of information, while PBOC is itself responsible for “final settlement,” *i.e.*, the transfer of funds.

Question 46 (b) Considering the commitments undertaken by China under subsectors (k) and (l), how would the United States reconcile this statement with the principle that sectors must be scheduled in a mutually exclusive manner?

127. 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.

128. First, the GATS framework itself recognizes the interrelated aspects of financial services. For example, item (xvi) of the GATS Annex on Financial Services covers services that are “auxiliary” to “the activities listed in subparagraphs (v) through (xv),” indicating that the auxiliary services are related to other services on the list but are nonetheless placed in a different category. The category of services covering “provision and transfer of financial information” applies only to suppliers who provide “other financial services.” 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. In this case, the service of EPS for card based electronic transactions is the heart of “payment and transmission services” in that card-based payment services could not be provided without the service provided by EPS suppliers.

129. As noted in the U.S. response to question 26 above, without co-operation among the various participants, no individual party could offer a similar service as those offered by the system. Without the entire system supplied by the EPS supplier, none of the participants would be able individually to offer a card that is as widely accepted by merchant, or to offer merchants a service that can deliver such a large number of cardholders. This service takes place within the framework of the payment system, a framework composed of a set of rules and standards that are necessary for the system to function. These rules and standards define the obligations that enable the issuer and the acquirer to collaborate in order to benefit mutually from the service provided by the EPS supplier. These rules are established and administered by the EPS supplier.

130. Second, the concept that core services may include aspects of “provision and transfer of financial information, and financial data processing” was recognized, for example, in the Uruguay Round Understanding on Commitments in Financial Services, paragraph 8 of which states:

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.

131. In other words, 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. China is not a signatory to the Understanding. However, the principle stated in paragraph 8 of the

Understanding is nonetheless relevant in that it recognizes that core financial services sectors may include aspects of the “provision of financial information,” but this fact does not transform the core service into “provision of information.”

Question 47. With reference to paragraph 26 of the United States' first oral statement, where the United States notes that China may impose prudential restrictions, could the United States please address the fact that the same paragraph in China's market access column and several of the immediately following paragraphs make reference to foreign financial institutions?

132. The presence of the term “financial institution” in China’s schedule does not create a separate and independent limitation. China argues it may condition the supply of a service on the criteria listed in column 2 and in addition require that another Member’s supplier meet additional (and unspecified) criteria to be recognized as a “financial institution.” However, nothing in China’s Schedule supports this view. As the United States indicated, the Schedule states that “[c]riteria for authorization to deal in China’s financial services sector are solely prudential.” Thus, under China’s Schedule, the only limitations China may impose are in connection with legitimate prudential regulation and the limitations explicitly listed in China’s Schedule – the now defunct restrictions on geographic scope and use of domestic currency, and ongoing requirements applicable to banks.

133. The additional references to the term “financial institution” in the paragraphs that follow the explicit statement that the criteria are “solely prudential” does not alter that unequivocal statement as to the sole criteria for authorization to deal in China’s financial services sector.

134. In addition, it is clear that EPS suppliers qualify as “financial institutions” For example, Black’s Law Dictionary (Exhibit US-67) defines “financial institution” to include “an operator of a credit card system” and the Oxford Online Reference resource contains A Dictionary of Finance and Banking, in which the definition of “financial institution” broadly covers “An organization whose core activity is to provide financial services or advice in relation to financial products.” Indeed, China itself considers CUP to be a “financial institution” in China. For example, the Reply of PBOC on the Opening of CUP, states at paragraph 2 that “China UnionPay Co., Ltd. is a joint-stock financial institution that provides a inter-bank bankcard information switching network and specialized services in connection.” (Exhibit US-27). Paragraph 6 of that document also describes the relevant license as a “Financial Institution Legal Person License.”

Question 48. With reference to paragraphs 30 and 31 of the United States' first oral statement, could the United States please address whether the "commercial reality" demonstrates that motor vehicle financing by non-bank financial institutions involves the provision of the "excepted" services (see China's relevant mode 1 market access entry)?

135. Motor vehicle financing by non-bank financial institutions that are established in China could certainly entail the provision and transfer of financial information that occurs cross-border. In addition, the provision of financing by such entities in China could also entail financial data processing that occurs cross-border. The use of software to process information associated with the financing could also occur on a cross-border basis. In addition, non-bank financial institutions in China may well perform credit reference checks

and other analysis in connection with the financing arrangement and these types of auxiliary services also may occur cross-border.

136. See also the U.S. response to question 28 above.

Question 57. With respect to subsector (d) which is at issue in this dispute, the entry in China's Schedule under mode 1 reads as follows:

"(1) Unbound except for the following:

- ***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."***

Moreover, China has listed, under sub-sectors (k) and (l), two subsectors whose sectoral descriptions repeat nearly verbatim the two subsectors committed under mode 1 of subsector (d). Can the Parties explain whether, in their view, the two subsectors committed, respectively, under mode 1 for subsector (d) and, on the other hand, under (k) and (l) cover (i) the same services, (ii) different services? If they cover different services, what is the difference?

137. As discussed in response to question 46(b), the question of whether the services are the same or different depends on the degree of integration of the services with the core service described in subsector (d). The United States would observe that certain activity that may describe one aspect of a unified and wholly integrated service, may also describe a separate individual service.

138. While the particular activities referenced may be described the same way in the mode 1 market access commitments, as set forth in subsector (d), on the one hand, and the services described in subsectors (k) and (l), on the other hand, it is the context that is very important.

139. When these activities occur in the context of EPS for payment card transactions, they will be classified under subsector (d), but when they are provided as part of a different type of service they may fall under subsectors (a), (b), (c), (e), or (f). If supplied independently of those services they would fall under subsectors (k) or (l).

140. Two interpretive principles should guide the Panel’s analysis on this point.

141. First, the terms of the commitment must be given meaning. Article 31 of the Vienna Convention on the Law of Treaties states that, “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.” The “ordinary meaning” of China’s commitment is clear. With respect to the mode 1 supply of “payment and money transmission services,” China is unbound “except for” the two specified services. With respect to those “excepted” services, China has made a mode 1 commitment.

142. Second, as explained more fully in response to question 45, the “sector or sub-sector” description in the left-most column of China’s schedule defines the scope of the relevant service, and that scope cannot be altered by the commitments made in the market access or national treatment columns.

143. The service covered by (k) and (l) (“provision and transfer of financial information” and “advisory, intermediation and auxiliary”) include services that (a) are wholly unrelated to “payment and money transmission services” and (b) services involving “provision and transfer of financial information” and “advisory, intermediation and auxiliary” that facilitate but are not integral to the provision of EPS.

Question 58. The Panel notes that China's first written submission refers to the 2001 Guidelines, while the panel on China – Publications and Audiovisual Products used the 1993 Guidelines. If the Panel in this case were to consider the Scheduling Guidelines, should it use the 1993 or the 2001 version of the Scheduling Guidelines, or both? Please give the reasons for your view. If the 2001 Guidelines were used, please address whether these should be considered as part of an interpretative analysis under Article 31 or Article 32 of the Vienna Convention in view of their adoption by the Council of Trade in Services (CTS).

144. The United States would agree that the 1993 Guidelines could constitute supplementary means interpretation in accordance with Article 32 of the Vienna Convention on the Law of Treaties. The Panel in *China - Audiovisual Products and Publications* panel gave as its rationale for using the 1993 Guidelines:

“Furthermore, although the document W/120 and the 1993 Scheduling Guidelines were prepared in light of original Members' Schedules that entered into force with the WTO Agreement in 1995, there is no evidence before us that these documents have been any less important in drawing up the GATS Schedules of Members, such as China, that have since acceded to the WTO.”

145. With 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.

Question 59. With regard to section 5 of the Annex on Financial Services and Document W/120, please answer the following questions:

- (a) ***For the purposes of applying the tools of treaty interpretation to China's financial services commitments, what is the difference, if any, between taking account of the classifications provided in section 5 of the Annex on Financial Services and taking account of those contained in Document W/120?***
- (b) ***Is there any difference in the scope of subsector 7.B(d) of W/120 and that of item (viii) of the Annex on Financial Services?***

146. The document MTN.GNS/W/120 (“W/120”) is not treaty text nor is it context (*see* Appellate Body Report, *US – Gambling*, para. 178), but it could be considered to be supplementary means of interpretation for purposes of Article 32 of the VCLT. The Annex

on Financial Services is part of the treaty text. The Annex would be considered part of the context for purposes of Article 31 of the VCLT.

147. The description of Sector 7.B.d in the W/120 classification is simply “All payment and money transmission services. Paragraph 5(a)(viii) of the Annex, on the other hand, also provides an illustrative list “...including credit, charge and debit cards, travellers cheques and bankers drafts”

148. A 1998 background note by the Secretariat (S/C/W/72) noted that “Although the Annex largely follows W/120 in banking and other financial services, there are some improvements, such as an explicit indication of “credit card services” under “all payment and money transmission services.” Background Note by the Secretariat, S/C/W/72, 2 Dec. 1998, para. 12. Notably, at the time, the description of 7.B.j of Document W/120 exists as it does now in the Annex : “settlement and clearing services for financial assets, including securities, derivatives, and other negotiable instruments.”

149. In addition, the Schedules of other Members are context for China’s Schedule. See Appellate Body Report, *US – Gambling*, para. 178 (“There is, however, additional context referred to by the Panel and the participants that we must consider, namely: (i) the remainder of the United States’ Schedule of specific commitments; (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.”)

150. The 1998 background note further indicates that a large majority of Members have based their schedules on either the Annex on Financial Services or the W/120 classification. The Secretariat observed that this fact has made certain cross country comparisons in the Schedule difficult. In this context, the background note indicated that with respect to “credit card services” that “credit card services are either part of “all payment and money transmission services” or they that “they constitute an independent item.” Para. 13 Background Note, S/C/W/72 (Dec. 2. 1998). Significantly, 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.”

Question 60. What is the impact, if any, of the fact that China's subsector (d) commitments appear under a sub-heading "Banking services" that does not include "Other Financial Services"? Would the scope of activities covered by subsector (d) be any different if subsector (d) appeared under a sub-heading that applied to both banking services and other financial services? How?

151. No, the fact that subsector (d) falls under the subheading “Banking services” does not change the analysis. China argues that its mode 3 commitments in subsector (d) apply only to services supplied by banks because subsector (d) falls under the heading of “banking services.” (See China’s First Written Submission, para. 132) The term “banking services” is not limited in this manner.

152. As China has recognized, major U.S. EPS suppliers, as well as CUP, were formerly operated as associations of banks – and from their inception they were clearly performing “banking services.” The nature of the service that an entity supplies does not change merely because that entity assumes a new corporate form. In analyzing a service for purposes of a

GATS commitment, one must look at the characteristics and nature of the service to classify that service. Where the identity of the supplier is relevant, the sectoral description must clearly indicate that to be the case. For example, in China’s Schedule, there are sectors described as “Motor vehicle financing by non-bank financial institutions.” The absence of a qualification in subsector (d) indicates that it covers all of the indicated services, regardless of the type of entity that supplies those services.

153. It is also evident from China’s Schedule itself that the term “banking services” listed in China’s Schedule, including those listed in subsector (d) are not limited to those provided by banks as China claims. 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.

Question 61. Could the Parties please provide additional definitions of the term "financial institution" from any sources that they consider relevant (e.g., BIS, etc.) to inform the Panel's understanding of that term as it appears in China's Schedule?

154. As the United States explained, the definition of “financial institution” offered by China is far too narrow. There are other definitions of the term that are much broader, and . and some explicitly include “an operator of a credit card system.” For example, *Black’s Law Dictionary* (Exhibit US-67) defines “financial institution” to include:

An insured bank; a commercial bank or trust company; a private banker; an agency or branch of a foreign bank in the United States; an insured institution as defined in the National Housing Act; a thrift institution; a broker or dealer registered with the Securities and Exchange Commission; a broker or dealer in securities or commodities; an investment banker or investment company; a currency exchange; an issuer, redeemer, or cashier of travelers’ checks, checks, money orders, or similar instruments; an operator of a credit card system; an insurance company; a dealer in precious metals, stones or jewels; a pawnbroker; a loan or finance company; a travel agency; a licensed sender of money; a telegraph company.

155. Other sources offer an even broader definition to include entities “whose core activity is to provide financial services”. For example, the Oxford Online Reference resource contains *A Dictionary of Finance and Banking*, which provides the following definition of “financial institution”:

An organization whose core activity is to provide financial services or advice in relation to financial products. Financial institutions include state bodies, such as central banks, and private companies, such as banks, savings and loan associations, and also financial markets. At one time there was a clear distinction and regulatory division between deposit-taking institutions, such as banks, and non-deposit-taking institutions, such as brokers or life-insurance companies. This is no longer the case; brokers and other companies now often invest funds for their clients with banks and in the money markets.

A Dictionary of Finance and Banking. Ed Jonathan Law and John Smullen. Oxford University Press, 2008. Oxford Reference Online. Oxford University Press. (Exhibit US-76).

156. Finally, as also noted, it is clear that CUP is considered by China to be a “financial institution” in China. For example, the Reply of PBOC on the Opening of CUP, states at paragraph 2 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.” (Exhibit US-27). Paragraph 6 of that document also describes the relevant license as a “Financial Institution Legal Person License.”

Question 62. The Panel notes that China has made additional commitments concerning financial leasing services. Could the parties please comment on the relevance of the term "foreign financial leasing corporation" for understanding the term "foreign financial institutions" as it is used in sector 7.B?

157. The reference to “foreign financial leasing corporation” in its “Additional commitments” column of its Schedule is additional evidence that China’s commitments in sector 7.B(d) (“All payment and money transmission services, including credit, charge and debit cards...”) is not limited to “foreign financial institutions” as China contends.

158. Moreover, the United States would also point to the explicit references to “foreign finance companies” in the market access column of subsector (d) as additional evidence in this respect. There is no indication that “foreign leasing corporations” or “foreign finance companies” are “foreign financial institutions” for purposes of China’s Schedule. Indeed, the term is not defined in China’s Schedule.

159. Equally important, however, is that although China includes certain limitations with respect to foreign financial institutions, this does not mean that its commitments are limited to foreign financial institutions. Such a limitation would have needed to be imposed explicitly. China’s mode 1 commitment begins with “unbound except for . . .”, while the mode 3 commitment has no such limiting language. Where a Member seeks to limit its commitment it must include in the commitment explicit language indicating the limitation. For example, prefatory language such as “unbound except,” or “the service may only be supplied by . . .” The absence of similar prefatory language used by China shows that the term “financial institution” is not a limitation on the type of service supplier that may benefit from China’s commitment.

160. In addition, even if the term “financial institutions” in item B of China’s mode 3 commitment were found to apply to all instances of supply of the listed services, this could not somehow create a separate and independent limitation that another Member’s supplier meet additional (and unspecified) criteria to be recognized as a “financial institution.” Nothing in China’s Schedule supports this view. In fact, the Schedule states that “[c]riteria for authorization to deal in China’s financial services sector are solely prudential.” Thus, under China’s Schedule, the only limitations China may impose are prudential restrictions and the explicitly listed limitations – defunct restrictions on geographic scope and use of domestic currency, and ongoing requirements applicable to banks.

161. Finally, and again although there is no definition in China’s Schedule, the definition of “financial institution” offered now by China is much too narrow. As the United States has explained, there are many definitions that are much broader, and some explicitly include “an operator of a credit card system,” which would appear to be consistent with China’s view that CUP is a “financial institution” in China. See (Exhibit US-27), the Reply of PBOC on the Opening of CUP, paragraph 2 (“China UnionPay Co., Ltd. is a joint-stock financial

institution that provides a inter-bank bankcard information switching network and specialized services in connection.”).

Question 63. *With reference to China's commitments under sector 7.A (Insurance and Insurance-related Services) could the parties address whether and how the use of the terms "foreign life/non-life insurers" and "other foreign service suppliers" (footnote 7 to sector 7.A) could inform the Panel's interpretation of the term "foreign financial institutions" as it is used in sector 7.B?*

162. China argues that its commitments in Sector 7.B(a)-(f) are limited to “financial institutions” because there is a reference to “foreign financial institutions” in limitations inscribed in its market access commitments. The United States has argued that China’s position is without merit for at least three reasons: (1) China did not use language explicitly indicating such a limitation; (2) according to China’s Schedule, “criteria for authorization to deal in China’s financial services sector are solely prudential;” and (3) even were China’s commitments limited to “financial institutions” (which is not the case), the definition provided by China is too narrow and other definitions “financial institutions” include EPS suppliers. See, e.g., U.S. Opening Statement at the First Panel Meeting, paras. 21-27.

163. In addition, the use of the terms “foreign life insurer” and “foreign non-life insurer” in Sector 7.A of China’s Schedule provide additional support for the U.S. position and can inform the Panel’s interpretation of the term “foreign financial institution” as used in sector 7.B of China’s Schedule. (The United States notes that the reference to “other foreign service suppliers” appears to be footnote 8 – rather than footnote 7.)

164. Subsector 7.A(c) refers to “reinsurance” and subsector 7.A(d) refers to “services auxiliary to insurance.” Accordingly, Sector 7.A explicitly covers insurance and insurance related services that are by definition broader than the services supplied by “foreign life insurers” and “foreign non-life insurers.” In addition, footnote 7 includes references to “foreign insurers” and “other foreign service suppliers.” These references further demonstrate that the reference to “foreign life insurers” and “foreign non-life insurers” in the market access limitations in Sector 7.A do not operate to limit China’s commitments to those entities. For the same reason, the reference to “foreign financial institution” in Sector 7.B is not so limiting.

Question 64. *At paragraph 65 of the United States' first written submission, the United States appears to state that the China UnionPay meets the definition of both the terms "monopoly" and "exclusive service supplier", but also that those two terms must have a distinct meaning. Could the United States explain how these statements can be reconciled?*

165. The United States considers that the terms do not have the same meaning, although it possible for a monopoly supplier to be an exclusive service suppliers. A “monopoly supplier” would be a single supplier (which accords with the definition in Art. XXVIII(h)), while there could be more than one “exclusive service suppliers” (e.g., in circumstances the government says only two or three particular companies can provide the service, thereby excluding others).

166. The United States considers CUP to be both a monopoly supplier and an exclusive service supplier. In this case, CUP enjoys a monopoly and is an exclusive service supplier for EPS payment card transactions related to any card issued in China that is used in China.

For example, pursuant to Document No. 57 (Exhibit US-41), Document No. 153 (Exhibit US-49) and Document No. 53 (Exhibit US-51), a transaction must be processed by CUP when two conditions are met: (1) the card is issued in China; and (2) the card is used in China. CUP is also the exclusive service supplier of EPS for these types of transactions.

Question 65. Do the United States' Article XVI claims that are based on China's mode 3 market access entry concerning subsector (d) relate to foreign or local currency business, or both?

167. Three factors can implicate currency for any payment card transaction. First, card-denomination, which refers to the currency that the cardholder will be billed in by the issuing institution. Second, the transaction currency, which refers to the currency in which a merchant quotes/charges the cardholder. Third, settlement must occur in a currency and that is the currency in which the acquirer pays the merchant for card transactions' settlement.

168. China maintains requirements mandating that all payment card transactions denominated and paid in RMB be handled through CUP. China also imposes prohibitions on the use of non-CUP cards and on the use of foreign EPS suppliers for payment card transactions. In the end, however, whether the purchase is RMB-denominated or whether the payment card is RMB-denominated, a payment card transaction must be processed by CUP when two conditions are met: (1) the card is issued in China; and (2) the card is used in China.

169. See also U.S. response to question 23.

Question 66. Could the Parties elaborate on the similarities and/or differences between the concept of a "monopoly supplier of a service" and "exclusive service suppliers", in particular in the light of the definitions contained, respectively, in Article XXVIII(h) of the GATS and in Article VIII:5 of the GATS?

170. The two concepts share similarities. By definition, a “monopoly supplier” is the sole entity that a Member allows to operate in a particular market, thus excluding competition. There could be one or more “exclusive service suppliers” that enjoy a market that is protected from competition. Like “monopoly suppliers,” “exclusive service suppliers” are provided by a Member with exclusive commercial rights that protect them from competition. Like government-designated monopolists, they may be particularly susceptible to government influence or in a position to use their government-sanctioned commercial leverage to disadvantage suppliers from other members. Article VIII:5 serves to ensure that Members cannot avoid their obligations under paragraphs 1 and 2 where they establish a duopoly or oligopoly – in lieu of a monopoly – in a particular services market.

Question 67. Article XVI:2(a) of the GATS refers to "measures on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive supplier or the requirement of an economic needs test". The definitions for "monopoly supplier of a service" and "exclusive service suppliers" contained, respectively, in Articles XXVIII(h) and VIII:5 of the GATS both refer to suppliers which are "authorized or established formally or in effect" by a Member. Hence, while Article XVI of the GATS by its terms appears to focus only on the form, Articles XXVIII(h) and VIII:5 of the GATS refer to both form and effect. Could the Parties comment on this difference specifically with a view to the proper interpretation of Article XVI?

171. The Appellate Body addressed this question in *US – Gambling*, in which it considered all of the provisions cited in the question and concluded that the “definitions” in Articles XXVIII(h) and VIII:5 “suggest that the 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 services suppliers.” *US – Gambling (AB)*, para. 230 (emphasis in original). The Appellate Body continued to state:

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) 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.

US – Gambling, para. 232 (emphasis in original).

Question 68. Could the United States comment on the argument made by China (paragraph 156 of China's first written submission) that "[c]onsistent with the order of precedence established by Article XX:2 and the principle of effet utile, [Articles XVI and XVII] must be seen as mutually exclusive in their respective spheres of applications"?

172. China’s argument is without merit. Article XX:2 does not render Articles XVI and XVII “mutually exclusive in their respective spheres of applications.” Article XX:2 is a scheduling rule, applying with regard to “measures . . . inscribed in the column relating to Article XVI,” and specifying that “the inscription will be considered to provide a condition or qualification to Article XVII as well.” It exists precisely because there are measures that might be inconsistent with both Article XVI and Article XVII, rather than mutually exclusive.

Question 69. With reference to Article XX:2 of the GATS, which was referred to by China at paragraph 154 of its first written submission, please indicate:

- (a) ***Whether Article XX:2 applies in a situation where a Member's market access column states "Unbound" and its national treatment column states "None".***

173. Article XX:2 applies with regard to “measures . . . inscribed in the column relating to Article XVI,” and specifies that “the inscription will be considered to provide a condition or qualification to Article XVII as well.” In the hypothetical, “Unbound” is not a measure and, therefore, does not provide a condition or qualification to Article XVII through the operation of Article XX:2.

- (b) ***Whether in the situation described under (a) the Member concerned could maintain a market access limitation that at the same time constitutes a national treatment limitation. Please explain whether and how Article XX:2 is relevant to answering this question.***

174. If a Member had no commitments with regard to Article XVI, but a full commitment with regard to Article XVII, that Member could not retain a market access restriction that was simultaneously inconsistent with national treatment. However, that Member could come into its compliance with its obligations by removing the national treatment inconsistency, while leaving the market access limitation in place.