

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

**U.S. COMMENTS ON CHINA’S ANSWERS TO QUESTIONS FROM THE PANEL
FOLLOWING THE SECOND SUBSTANTIVE MEETING**

1. The United States appreciates this opportunity to comment on the Answers of the People’s Republic of China to Questions from the Panel Following the Second Substantive Meeting. Many of the points that China raises have already been addressed by the United States in its prior written and oral submissions or are not relevant to the claims raised by the United States and the Panel’s resolution of this dispute. In the comments below, the United States focuses principally on points that China raises that may be pertinent and have not been addressed in prior U.S. submissions. The absence of a U.S. comment on an aspect of China’s response to any particular question should not be understood as agreement with China’s response.

II. THE SERVICES AT ISSUE

Question 75. Could China elaborate on how Exhibit CHI-103 supports its assertion (made at the second substantive meeting) that the clearing and settlement aspect of a payment card transaction is provided by service suppliers that are different from those suppliers that perform the other components of the EPS as described by the United States?

2. China continues to point to the presence in the market of competitive “national payment networks” in some European countries (France, Germany, and Italy are specifically cited by China) and other non-European countries (Australia and Canada are specifically referenced by China) as somehow supporting its position. China’s reliance on these entities is misplaced, and its response to the question contains factual inaccuracies.

3. First, as the United States outlined in its response to question 73, references to “national payment networks” are both legally and factually irrelevant. Irrespective of the existence of such entities, this does not alter the fact that, notwithstanding its WTO commitments, China prevents competition and blocks the ability of foreign providers to supply EPS for payment card transactions.

4. Second, China is simply incorrect in asserting that the mere fact that two separate corporate entities may in some cases provide different elements of EPS means that EPS for payment card transactions does not constitute one integral service. The fact that two separate entities may provide different elements of EPS is not inconsistent with the U.S. position that each of the elements is integrated and necessary to facilitate a payment card transaction, and as such constitute a single service. Put differently, EPS could not be effectuated through the provision of the service provided by STET only or the service provided by CB only. It is the combination that enables the payment card transaction to occur. Even as a factual matter, China’s characterization of the relationships between the entities providing the service is incorrect. Carte Bancaire partners with STET Interbank Payment Services in France to supply

EPS for payment card transactions (all five banks that own STET are also represented on the board of Carte Bancaire). In each of the other cases cited by China (Girocard in Germany, Pago Bancomat in Italy, Interac in Canada, and EFTPOS in Australia), a single entity provides all aspects of EPS.

5. More importantly, however, in none of the country examples cited by China, are there measures that mandate that a particular provider supply EPS or a component of EPS. Every EPS supplier operating in these countries, including CUP, is free to provide EPS or to partner with others in supplying EPS. For example, in Australia at a POS terminal, a card holder has the option to select EFTPOS (national network) routing or to select Visa routing. The EFTPOS network uses a set of bilateral links and a "Single Message" system, which includes the authorization, clearing and settlement system that are similar to most major suppliers of EPS. Therefore, China's claim that EFTPOS operates the "authorization" element independently of the clearing and settlement elements is not correct.

Question 76. In the view of the Parties, what would be the relevance of CPC version 1.1 and CPC version 2 under Article 31 and Article 32 of the Vienna Convention?

6. China's arguments regarding the U.N. Central Product Classification Versions 1.1 and 2.0 are misplaced. In its written response to this question through a detailed examination of Exhibit US-105, the United States explained that the CPC Provisional and CPC Version 1.0 are relevant as supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention of the Law of Treaties:

[I]n terms of the interpretive relevance of the CPC versions, the United States would note that CPC Provisional and CPC Version 1.0 are relevant as supplementary means of interpretation within the meaning of Article 32 of the Vienna Convention of the Law of Treaties. The CPC Provisional was approved in 1989 and was used extensively in preparing Document W/120 and CPC Version 1.0 was approved in 1997, and both of these CPC versions were contemporaneous with China's GATS Schedule negotiations and pre-dated China's accession to the WTO.

See U.S. Answers to Panel's Second Set of Written Questions, para. 39; see also Exhibit US-105.

7. With respect to the CPC Provisional (approved in 1989), as the United States explained, Document W/120 includes a correspondence between the services sectors it identifies and the corresponding CPC Provisional classification codes. Document W/120, Item 7.B(b) ("Lending of all types, incl., inter alia, consumer credit, mortgage credit, factoring and financing of commercial transactions") corresponds to CPC provisional classification 8113 (Other credit granting services), and sub-classification 81133 (*Credit card services*). The services described in classification 81133, "financing the purchase of products by granting point-of-sale credit using plastic cards," is placed within category 7.B.b of Document W/120. "[G]ranting point of sale credit using plastic cards." This is, of course, clearly a description of the issuance of credit cards, and again, is a service that falls within category 7.B.b of Document W/120. China has

argued that the issuance of credit cards is the only service related to payment cards that its falls within subsector (d) of China’s Schedule, “all payment and money transmission services, including credit, charge, and debit cards.” The CPC Provisional and Document W/120 are in direct conflict with China’s assertion. *See* U.S. Answers to Panel’s Second Set of Questions, paras. 29-33, and Exhibit US-105.

8. With respect to CPC Version 1.0 (approved in 1997), as the United States explained, the CPC provisional code for classification 81339, corresponding with category 7.B.d of Document W/120 corresponds, to classification 71553 in CPC version 1.0. *See* U.S. Answers to Panel’s Second Set of Questions, paras. 34-35, and Exhibit US-105, pages 6, 7 and 8. The United States further explained in paragraphs 34-35:

CPC version 1.0 classification 71553 was also expanded to include a subclass of “financial transactions processing and clearinghouse services.” *See* page 8 of Exhibit US-105. The “Explanatory note” describes the service in the subclass “financial transactions processing and clearinghouse services” as follows:

This subclass includes:

- *services of processing financial transactions such as verification of financial balances, authorization of transactions, transfer of funds to and from transactor’s accounts, notification of banks (or credit card issuers) of individual transactions and provision of daily summaries*
- *services of clear cheques, drafts and other payment orders.”*

See Exhibit US-105, page 8. This description is an apt description of EPS for payment card processing. This is inescapable when one simply compares CPC version 1.0 classification 71553, subclass of “financial transactions processing and clearinghouse services,” and the “Explanatory note” (*see* Exhibit US-105, page 8), with the U.S. description of EPS for payment card transactions (*see* U.S. Panel Request, page 1, note 1; U.S. July 29 Response, paras. 38-54; U.S. First Written Submission, para. 10; U.S. Second Written Submission, paras. 11-41). Thus, it is clear that retail payment transaction processing associated with credit card transactions was included in item 7.B(d) of Document W/120.

Significantly, the “Explanatory note” for classification code 71553 also explains that services of processing securities transactions are not included in this classification:

This subclass does not include:

- *services of processing securities transactions, cf. 71523.”*

See Exhibit US-105, page 8. The explicit exclusion of the service of “processing of securities transactions” confirms that it is fundamentally different from retail payment transactions, including payment card transactions processing.

9. Accordingly, the CPC can be used in at least two ways consistent with Article 32 of the Vienna convention. The Provisional and Version 1.0 of the CPC as set out in Exhibit US-105 “serve to confirm the meaning of” subsector (d) “resulting from the application of Article 31 [of the Vienna Convention].” Specifically, CPC Provisional and CPC Version 1.0 confirm that EPS for payment card transactions is a single service that falls within the scope of “all payment and money transmission services, including credit, charge and debit cards” and that no element of EPS for payment card transactions falls within item (xiv) of the Annex on Financial Services. If they are not used “to confirm the meaning” of subsector (d), the CPC Provisional and CPC Version 1.0 can certainly assist to determine the meaning of subsector (d) to the extent that the Panel would consider there to be ambiguity (Article 32 (a)) or where, as here, China’s interpretation would lead to a result that is unreasonable (Article 32(b)).

10. In this regard, as Exhibit US-105 clearly demonstrates, the CPC Provisional and CPC Version 1.0 are in complete accord with the U.S. position that EPS for payment card transactions is a service that is one type of “all payment and money transmission services” that falls within classification 7.B.d of Document W/120, item (viii) of the Annex on Financial Services, and subsector (d) of China’s Schedule of Specific Commitments. Moreover, the evolution of CPC shows that credit card issuance services may be appropriately classified as lending and consumer credit and, hence, classification 7.B.(b) of the W/120, item (vi) in the Annex, and subsector (b) in China’s Schedule. This in turn, provides further support for the ordinary meaning of the terms in the illustrative list of “credit, charge, and debit cards” in subsector (d) of China’s Schedule. As the United States has explained, as this list appears as part of “all payment and money transmission services, logically, the list refers to the processing of these types of payment card transactions – and the evolution of the relevant CPC classification bar this out. The issuance of credit cards (China’s interpretation of the illustrative list) is more of a credit granting service, which the evolution of a different classification demonstrates is covered separately.

11. With respect CPC Version 1.1 and CPC Version 2.0, the United States explained that additional support for the U.S. interpretation of subsector (d) of China’s Schedule could be found by reference to these later versions of the CPC. The United States recognized that temporal considerations were also relevant:

While CPC Version 1.1 was approved in 2002 and CPC Version 2.0 was approved in 2006, after China’s accession to the WTO, these later versions of the CPC demonstrate that retail payment transaction processing associated with credit card and debit card transactions was intended to be included in item 7.B(d) of W/120, item (viii) of the Annex and 7.B.(d) of China’s Schedule. They also demonstrate that the specific exclusionary references to the “processing of securities transactions” shows that it is fundamentally different and a different service than processing of retail payment transactions, including payment card transaction processing.

U.S. Answers to Panel’s Second Set of Written Questions, para. 41.

12. Nothing in the U.S. response is inconsistent with the position of the United States in *China – Publications and Audiovisual Products* – there the United States explained that CPC

Version 1.1 was not a supplementary means of interpretation for purposes of Article 32. While the United States has discussed CPC Version 1.1 as additional support in connection with other versions of the CPC (as China did in *China – Publications and Audiovisual Products*), the U.S. response to question 76 does not assert that it constitutes a supplementary means of interpretation. Indeed, China’s assertion that CPC Version 1.1 is “categorically irrelevant” is at odds with its own position in *China – Publications and Audiovisual Products*. Nor is the U.S. position inconsistent with the Appellate Body’s observations in *US – Gambling*.

III. SCOPE OF CHINA'S COMMITMENTS

Question 79. Could China clarify whether the example given in Exhibit CHI-103, i.e. payment instruments processed in the retail system, is classifiable under subsector (d)?

13. China’s answer in paragraph 15 in many ways concedes that payment cards are payment instruments for which some element of the processing of a payment card transaction falls under item (viii) of the Annex (and hence, subsector (d) of China’s Schedule). China refers to data related to STET and CORE, including the information referenced in the pie chart in CHI-103 to support an assertion these are “the types of payment and money transmission services that banks and other financial institutions provide to their customers...” (China’s Answers to Panel’s Second Set of Questions, para. 15). This statement is in direct tension with China’s very next sentence that baldly asserts that STET services are actually covered by item (xiv) of the Annex.

14. China’s claim in paragraph 13 that the CORE system in France is “the exclusive mechanism in France ‘for the exchange, clearing and settlement of all dematerialized payment instruments’” is also inaccurate. In fact, several banks in France issue payment cards that are supported by suppliers of EPS that are completely independent of CORE or CB. For example, the website of French bank BNP Paribas shows card offerings that are independent from CB/STET

http://www.bnpparibas.net/banque/portail/particulier/Fiche?type=folder&identifiant=Decouvrir_toutes_nos_cartes_20040526144616.

15. Moreover, the fact that CORE may “clear and settle” all of the types of payment instruments included in the pie chart in Exhibit CHI-103 does not mean that other suppliers of EPS are precluded from supplying EPS for payment card transactions. They have the ability and indeed do so. This is further evidenced by the important qualifier in footnote 15 in China’s answers to the second set of Panel questions: “In France, retail payment flows ...are exchanged bilaterally via a common facility *like* CORE payment system.” The word “like” confirms that the CORE is not the exclusive supplier.

Question 81. In paragraph 12 of its opening oral statement, China states that interbank credit card claims for payment are financial assets within the ordinary meaning of that term. Leaving aside the analogy to checks as negotiable instruments, do the parties consider that interbank claims for payment are negotiable instruments?

16. China’s response ignores several key elements of context involving subsector (d) of China’s Schedule. One key contextual element is that China’s Schedule sets out *services* that are subject to China’s commitments. And as the United States has explained, the “payment service”

provided for retail payment instruments such as credit and debit cards is fundamentally different from settlement and clearing services for financial assets such as securities and derivative products.

17. Article 31(1) of the Vienna Convention requires that the terms “settlement and clearing services for financial assets, including securities, derivatives and other negotiable instruments” 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.” It is without doubt that interpretation does not stop with “ordinary meaning” but that the interpreter needs to consider the other interpretive elements described in Article 31. See Draft Articles on the Law of Treaties with Commentaries (1966), page 219 (“The Commission, by heading the article ‘General rule of interpretation’ in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation.”) (Exhibit US-77); see also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, page 427 (2009) (Exhibit US-78); see also Richard K. Gardiner, *Treaty Interpretation*, page 165 (2008) (“the role of the ordinary meaning of the terms of a treaty was not understood as producing an interpretation divorced from context”) (Exhibit US-79).

18. As the United States has consistently argued, in addition to the context provided from the fact that China’s Schedule sets forth commitments with respect to services, interpreting the meaning of “financial assets” in item (xiv) “settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments” must take into account the context, which the United States has argued includes the entire sentence in item (xiv), the illustrative list of financial assets in item (xiv), and all of the Annex, including item (viii) and item (x). See U.S. Second Written Submission, paras. 42-102.

19. With respect to illustrative lists, the United States has argued that they may be 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. Therefore, in order to determine the proper interpretation, it is particularly important to examine the context and structure of the category list and individual descriptions. In practical terms, this means that particular attention should be given to the illustrative lists that appear in several sector descriptions to help define the scope of a particular sector or sub-sector. The illustrative lists in both item (viii) (subsector (d) of China’s Schedule) and item (xiv) are important in this regard.

20. Contrary to what China asserts in paragraph 19 of its response, nowhere has the United States “contended” that it is applying *ejusdem generis*. In this regard, China mischaracterizes the U.S. argument as urging the Panel to apply the legal maxim of *ejusdem generis*. The United States has not done so, and indeed China’s assertion is based solely on the use of that term in the *quotation* from a GATT 1947 panel report. As a result, China’s entire response directed at that doctrine is misplaced. Rather, the United States has explained that the illustrative list is useful context. China has not denied that the list is context. China’s citations to U.S. submissions in this regard are simply incorrect, and its discussion of the concept is in either event flawed. As noted, the United States has duly applied the tools of treaty interpretation reflected in the Vienna Convention, assessing the provisions at issue based on their ordinary meaning, in context, and in

light of the object and purpose of the GATS. This is fully consistent with the panel and Appellate Body reports cited by China in its response

21. By contrast, in classifying parts of EPS under item (xiv) of the Annex, China ignores the ordinary meaning of item (xiv), the scope of which is limited to services related to tradable, investment instruments, such as securities, derivatives, and other negotiable instruments. Nor can China’s argument be reconciled with the ordinary meaning of subsector (d). This was plainly evident in China’s interventions during the second meeting of the Panel with the Parties, as reiterated in China’s response to question 83 from the Panel, in which China further confirmed that China’s Schedule explicitly includes certain claims for payments between banks that fall within subsector (d) as one of the payment services covered by this subsector. See U.S. Answers to the Panel’s Second Set of Questions, paras. 48-51.

Question 82. The Panel notes that, in discussing the ordinary meaning of key terms at stake, both Parties quote various industry sources, such as company brochures, annual reports or websites. Are the Parties of the view that such material constitutes a relevant source for the purpose of (i) establishing the ordinary meaning of treaty terms under Article 31 of the Vienna Convention or (ii) otherwise interpreting GATS Schedules of commitments?

22. Both parties have cited international sources, including source documents from the Bank for International Settlements and the BIS Committee on Payment and Settlement Systems. These sources can be used, consistent with the customary rules of interpretation reflected in the Vienna Convention, in determining the ordinary meaning of key terms in China’s Schedule and the service at issue in this dispute. China has not argued differently, nor can it, given its own reliance on these documents.

23. The industry sources cited by the United States are in complete accord with the international sources and are relevant sources for determining ordinary meaning under Article 31 and in interpreting China’s Schedule. To provide support for the position that EPS for payment card transactions falls within the ordinary meaning of subsector (d) of China’s Schedule, the United States started with dictionary definitions of the key terms in subsector (d), including “payment”, “pay”, “money”, and “transmission.”

24. China’s response ignores the clear guidance from the Appellate Body, which has explained, that dictionary definitions alone may not be capable of resolving complex questions of interpretation (*See Appellate Body Report, US-Gambling*, para. 164). The industry sources provided by the United States confirm the ordinary meaning of the terms at issue and demonstrate that EPS is a payment service that is one type of “all” “payment and money transmission service” falling within subsector (d). It is also useful to recall that the common usage of terms provides the basis for dictionary definitions. In many instances, the common usage of a term is as that term is used within a particular industry or sector. Consequently, it is appropriate and may be helpful to look at how those involved with the service at issue would understand the terms used in a GATS Schedule.

25. In this regard, China argues that “industry sources have the potential to be biased and self-serving” (see para. 27 of China’s answer to this question). However, there is no basis for this concern with respect to the sources referenced in the context of this dispute. Indeed, in many instances the materials cited by the United States pre-date this dispute. Moreover, even where they do not, they are in many cases information that has been provided to U.S. federal regulators to fulfil reporting requirements under U.S. law, and the materials were not prepared so as to promote a particular viewpoint regarding the legal issues in this dispute.

Question 83. The Panel notes that subsector (d) in China's Schedule refers to "bankers drafts (including import and export settlement)" (emphasis added). Taking into account the principle of effective treaty interpretation, could the Parties elaborate on the meaning, and relevance to the present case, of the reference to "(including import and export settlement)"? How can this be reconciled with China's statement in response to question 39(a) that "[s]ince it is beyond any reasonable dispute that the clearing and settlement of negotiable instruments is encompassed by item (xiv), it would be arbitrary and illogical to conclude that clearing and settlement services for certain types of retail payment instruments are covered by item (xiv), while clearing and settlement services for other types of retail payment instruments are covered by item (viii)"?

26. China’s response to this question, and its intervention during the second meeting of the Parties with the Panel on this point, expose the weakness of China’s argument and confirm that China’s interpretation is baseless. China’s written response and its oral intervention tried to reconcile the reference to “settlement” in the description of subsector (d) with China’s position that the clearing and settlement aspects of the service for payment card transactions do not fall within subsector (d), but rather should be classified as item (xiv) in the Annex on Financial Services. China’s argument fails. Indeed, China’s response on this point only confirms that the reference reflects China’s intention for certain claims for payments between banks to fall within subsector (d) as one of the payment services covered by this subsector. The contention that this reference is limited and only refers to typical import/export transactions or certain letter of credit arrangements is devoid of merit. There is no basis for China’s narrow reading. China failed to articulate any logical reason for the explicit use of “settlement” and China’s example of the letter of credit arrangement and resulting claims for payments between banks arising out of letter of credit arrangements only serves to undermine China’s position and support the U.S. definition and classification of the service at issue.

27. China’s response directly contradicts the statement it made that was quoted by the Panel in its question, as well as China’s assertion during the second panel meeting that the explicit reference to “settlement” within the sectoral description of the services covered by subsector (d) and China’s Schedule includes examples of import/export transactions and letter of credit arrangements resulting in claims for payment between banks arising out of those transactions.

28. In short, the parenthetical phrase “(including import and export settlement)” does not appear in item (viii) of the Annex on Financial Services. China added this phrase to the description of the services covered by subsector (d) in China’s Schedule. The explicit use of “settlement” here is in accord with the fact that for retail payment services there is an element of settlement and clearing that occurs as part of the payment service, and that these services

nonetheless fall within subsector (d). EPS is integral to the processing of credit, charge, debit, and other payment card-based electronic payment transactions.

29. China's assertion in paragraph 30 that bank card network operators do not "possess the funds at some point in the process" is also incorrect. A supplier of EPS operator comes into possession of settlement funds because they flow through settlement bank accounts. Providing the specific funds transfer instructions and facilitating the transfer of payments is central to EPS for payment card transactions. Visa's 2010 10-K (Exhibit US-4) makes this clear. *See*, for example, the following:

- Page 7: "Payments network management is a core part of our operations, as it ensures that our payments system provides a safe, efficient, consistent and interoperable service to cardholders, merchants and financial institutions worldwide."
- Page 18: "Working Capital Requirements: Payments settlement due from and due to issuing and acquiring clients generally represents our most consistent and substantial working capital requirement, arising primarily from the payments settlement of certain credit and debit transactions and the timing of payments settlement between financial institution clients with settlement currencies other than the U.S. dollar. These settlement receivables and payables generally remain outstanding for one to two business days, consistent with industry practice for such transactions. We maintain working capital sufficient to enable uninterrupted daily settlement. During fiscal 2010, we funded average daily net settlement receivable balances of \$129 million, with the highest daily balance being \$386 million."
- Page 54: "Uses of Liquidity: Payments settlement. Payments settlement due from and due to issuing and acquiring clients represents our most consistent liquidity requirement. U.S. dollar settlements are settled within the same day and do not result in a net receivable or payable balance, while settlement currencies other than the U.S. dollar generally remain outstanding for one to two business days, consistent with standard market conventions for domestic transactions and foreign currency transactions."
- Page 68: Settlements payable and receivable are specific assets and liabilities on Visa's balance sheet.

IV. CLAIMS UNDER ARTICLES XVI AND XVII OF THE GATS

Question 98. China argues that the United States misinterprets Document No. 53 "where it interprets the terms 'domestic clearing channels' and 'domestic RMB clearing organizations' to refer exclusively to CUP" (see paragraph 100 of China's rebuttal submission). Could China explain to the Panel what the plural form ("channels" and "clearing organizations") refers to in practice? Who are these "domestic clearing channels" and "domestic RMB clearing organizations" other than CUP? Please provide the Panel with the specific names of these channels and organizations.

30. China refers to the Rural Credit Banks Funds Clearing Center (RCBFCC) and states that that “in relation to payment card transactions” the RCBFCC and CUP are “domestic clearing channels.” There is no basis for China’s assertion. In fact, RCBFCC’s website shows that it does not clear and settle payment card transactions. See <http://www.nongxinyin.com/index.htm>. Rather, it is a clearing and settlement center used by rural commercial banks in China. The United States understands that payment cards issued by these institutions still carry the CUP logo and issuing institutions must therefore be members of CUP and follow all applicable CUP rules and regulations. <http://www.nongxinyin.com/index.htm>. This is evident from the RCBFSC’s website.

31. According to its website, RCBFCC’s principal services are “information services”; “electronic remittance services”; bank draft services; and “deposit and withdrawal services.” Based on a review of the description of each of these services, there is nothing to indicate that the RCBFCC engages in EPS for payment card transactions. Again, as noted, the United States understands that payment cards issued by institutions using the RCBCC for other services still carry the CUP logo and issuing institutions must therefore be members of CUP and follow all applicable CUP rules and regulations.

32. It is also worth repeating that the United States was unable to locate any mention of the Rural Credit Banks Funds Clearing Center in any of the instruments that maintain and reinforce CUP’s monopoly or exclusive supplier position.

33. Finally, please also see U.S. Answers to Panel’s Second Set of Questions, paras. 78-80, and U.S. comments on China’s Answers to question 104 and question 113 below.

Question 100. According to China's provided translation, Document No. 153 (Exhibit US-49, Exhibit CHI-66) provides as follows: "When dual currency credit cards and dual-currency debit cards are used in Hong Kong, Macao and foreign countries and regions where the UnionPay network has been established, the domestic card-issuing banks shall be capable of switching them through the UnionPay network, open transaction processing and clearing services for RMB accounts to the UnionPay network, and no institution may set any obstacle and intervene thereto." Could China indicate the meaning and purpose of the concluding phrase, "no institution may set an obstacle and intervene thereto"?

34. As a threshold matter, regarding China’s assertion that the document is not relevant, China’s position is premised on an incorrect understanding of the interrelationship between the Macao/Hong Kong restrictions and China’s market, discussed at length in previous U.S. submissions.

35. China’s attempt to justify the quoted provision of Document No. 153 as a response to policies maintained by Visa is misplaced and simply reveals an acknowledgement on China’s part that its measures prevent competition. Regarding Visa’s actions, an individual market actor requiring adherence to its particular operating requirements in connection with a particular transaction in a market (where the relationship between customer and EPS supplier has been established on the basis of choice and competition) is very different from a government

mandating a monopoly that permits no competition for the supply of EPS and requires the use of a sole supplier.

36. China references “behaviour” that is “anti-competitive and should not be condoned” and asserts that Article VI of Document No. 153 purportedly seeks to address (see para. 42 of China’s answers) that behavior. This statement is highly ironic (and reminiscent of its earlier assertion that it established the CUP monopoly as a solution to alleged anticompetitive behavior in other markets). Document No. 153 is one of the key instruments establishing CUP’s monopoly over the processing of RMB payment card transactions in China, and establishes CUP as “the domestic clearing organization.” China’s answer essentially concedes that measures that prevent other EPS suppliers from processing payment card transactions are “anti-competitive.” China’s measures establish and maintain CUP’s monopoly. They clearly prevent competition and are inconsistent with China’s commitments.

Question 101. Article 2, Section 2.1, of Document No. 37 (Exhibit US-40) says that all terminals that 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. Do all terminals in China have to join the nationwide bank card inter-bank processing network?

37. There are a small number of POS terminals, mostly if not entirely deployed by foreign acquirers such as HSBC, which can only accept foreign-issued bank cards. Such terminals are not required (have no reasons) to be connected to the CUP system. However, these terminals are not capable of processing cards denominated in RMB, and contrary to China’s assertion the terminal requirements imposed by China do indeed maintain and entrench CUP’s monopoly on the processing of RMB payment card transactions.

38. Foreign currency only POS terminals are provided when foreign acquiring banks are not CUP members and, consequently, are not approved to acquire RMB transactions. These banks can only acquire foreign currency payment card transactions. Also, in some cities, the PBOC local branch requests CUP and/or CUP merchant service company to be the sole RMB acquirer. In that circumstance, banks who wish to acquire card transactions can only deploy the foreign currency terminal for merchants to accept foreign currency card transactions and that bank’s “on-us” transactions. These merchants typically have a large amount of foreign tourist business and will use a foreign currency only terminal.

Question 103. In Exhibit US-51, Article V:2 reads: "Domestic card transactions inside China shall be settled in RMB through domestic clearing channels.." What is the precise meaning of a domestic clearing channel? Is CUP presently the only domestic clearing channel that could fulfil this purpose? Can a foreign payment card company establish a "domestic clearing channel" in China in order to clear RMB-denominated transactions?

39. As an initial matter and to reiterate, there is no basis for the assertion that the RCBFCC clears payment card transactions in China. See U.S. comments on China’s answer to question 98 above.

40. With respect to Document No. 53 (Exhibit US-51), as the United States has explained, this instrument deals with foreign currency transactions. Mandating that all domestic transactions inside China (whether pursuant to foreign denominated currency cards issued in China or DBDC issued in China, and foreign currency cards issued outside of China), these transactions in China “shall be” settled in RMB “through domestic clearing channels.” This mandate effectively renders the foreign currency component of the DBDC cards not useable in China (except in “special circumstances”). This effectively makes both the foreign currency function of DBDC card as well as pure foreign currency cards issued in China not useable inside China because issuers would otherwise face foreign exchange exposure of settling such foreign currency cards’ domestic transactions with the cardholders in RMB. Furthermore, by not being able to issue RMB denominated bank card products, foreign EPS suppliers have no reason or opportunity to operate a clearing and settlement business for RMB denominated payment cards’ domestic transactions because RMB payment cards are only issued in CUP brand and CUP has exclusive right to process them domestically.

Question 104. The Panel has the following questions regarding the comments made by China in Exhibit CHI-74:

- (a) ***Document No. 153, Exhibit CHI-66: The Panel understands China's comment as saying that other payment card companies are allowed to establish a cross-bank switching network for RMB bankcards independently from CUP. Can China confirm this understanding?***
- (b) ***Document No. 149, Exhibit CHI-70: China's comment indicates that this provision "does not prohibit accepting cards that also bear other logos...". Does this provision allow acquiring institutions to accept payment cards issued in China by foreign payment card companies for RMB-denominated transactions if these payment cards bear only their own logo? Or must these payment cards also bear the "Yin Lian" logo in all circumstances? If so, could China please address whether the obligation for all banks to bear the "Yin Lian" logo amounts to granting CUP an exclusive right in that all banks would be obliged to "buy" services from CUP?***

41. China is wrong in its characterization of Document No. 153. For inter-bank transactions, the instruments identified by the United States, including Document No. 153 and Document No. 149, operate to limit the number of suppliers of EPS in China and together establish and maintain CUP’s monopoly on EPS for RMB payment card transactions in China. See, e.g., U.S. Second Submission, paras. 137-168. No other organizations (including the RCBFCC) currently perform this service. Document No. 149 does require RMB cards to bear the CUP logo and to be able to be processed over the CUP network (e.g., “The acquiring organizations may not allow the non-CUP and non-PBOC pre-payment cards to be accepted at any POS terminals). Moreover, CUP’s Operating Regulations, Section 2.5.3.2 (Exhibit US-115), which implement the mandate in Document No. 76 (Exhibit US-56/63) prohibit logos from appearing on a CUP card if the “Name/logo/trademark of credit card or debit card of the companies and their subsidiaries” “are deemed to have competitive relationship with UnionPay by UnionPay Board of Directors.”

CUP’s operating regulations that implement the mandate in Document No. 76 also explicitly enable CUP to prohibit the placement on a CUP card of any “Other logo and character that may impose negative impact on UnionPay logo.” Section 2.5.3.2 (Exhibit US-115).

Question 105. China indicated in its comments on United States’ translations of Chinese instruments that the term “Yin Lian” should not be translated as meaning “CUP”. In this regard, the Panel would appreciate clarification as follows:

- (a) ***Is China saying that when the relevant logo appears on a bankcard, the logo is used to indicate the bankcard’s interoperability?***
- (b) ***In the case of China Union Pay, is the same logo used as a trade name/corporate identity symbol? If so, how could a holder of a non-CUP bankcard that bears the “Yin Lian” logo tell the difference between the interoperability symbol and the China Union Pay symbol?***
- (c) ***Do China Union Pay cards have one logo to indicate interoperability and another to identify the company?***

42. China’s responses these questions (see paras. 54-57 of China’s answers) are inconsistent with evidence on the record. As indicated in the U.S. rationale regarding outstanding translation issues submitted on January 4, 2012, the logo that appears on all China UnionPay cards is as appears below:



43. China’s own exhibits confirm the visual image on each card that bears the logo of China UnionPay. See, for example, Exhibit CHI-105 which contains several different China UnionPay cards each with the same image of the logo as set out above. Nor does China contest that “CUP” is an acronym for, or is a short-hand reference to, China UnionPay.

44. In addition, the correct English translation of the logo is also plainly evident from China UnionPay’s own operating regulations, which refer to “CUP” as China UnionPay, and to the logo as the “CUP logo”. For example, China UnionPay Operating Regulations, Volume I, Institution Management, September 2009, Section 4.1.2 (“Obligations”), F (Exhibit US-106), provides the following as an obligation: “Use CUP logo in accordance with CUP Regulations and shall not permit in any manner any other organization or individual to use CUP logo without CUP’s approval.” Moreover, as the United States noted in its rationale on translations submitted on January 4, 2012, internet translation engines such as Google Translate, commonly translate “银联” as “CUP.” <http://translate.google.com/#zh-CN|en|%E9%93%B6%E8%81%94>.

Question 106. The United States contends in paragraph 172 of its second written submission that “[b]ecause CUP has exclusive control over the UnionPay logo, it may refuse permission for the logo to appear on any cards that carry the logo of a

competing EPS supplier. If CUP refuses permission to use the UnionPay logo, then the cards carrying the logo of the competing supplier cannot be issued (because all cards must carry the [sic] UnionPay logo) and the competing supplier is effectively barred from the market. This means that CUP can (and does) leverage the logo requirements to preserve its monopoly position." Is it permissible for CUP to refuse permission to use the UnionPay logo, and if so, on what basis? Has CUP refused permission to date?

45. China's response in paragraph 58 does not answer the Panel's question. China simply asserts that "the United States has failed to identify anything in the measures at issue that would give CUP the 'negative' power to prevent banks from placing other logos on a bankcard that bears the Yin Lian logo."

46. As the United States has explained, the requirements in the Business Practices Appendix in Document 76, Chapter I (Basic Provisions), Articles 4.1-4.4 (Exhibit US-56/63) establish the UnionPay logo and define the rights to use the UnionPay logo. These requirements would of course be incompatible with the logo usage and requirements for other networks such as MasterCard and Visa. Chapter II (Market Rules), Article 2 mandates the posting of the UnionPay logo at merchants. This requirement is incompatible with competing network requirements that do not use the UnionPay logo.

47. The mandate to apply CUP's rules and procedures to all EPS transactions, in combination with the mandate that all cards denominated in RMB must bear the CUP logo (as explained in the U.S. response to Panel question no. 87; see U.S. Answers to Panel's Second Set of Questions, paras. 66-69) and the mandate that all merchants and acquirers must be capable of accepting CUP cards (as explained in response to question no. 92; see U.S. Answers to Panel's Second Set of Questions, paras. 86-90) work together to establish and entrench CUP's monopoly over transactions involving cards issued and used in China.

48. CUP's Operating Regulations, Volume III, Rules on UnionPay Card, BIN and Logo, April 2011, Section 2.5.3.2 (Exhibit US-115) implement the mandate regarding the requirements related to the use and non-use of the CUP logo in the following manner and prohibit logos from appearing on a CUP card if the "Name/logo/trademark of credit card or debit card of the companies and their subsidiaries" "are deemed to have competitive relationship with UnionPay by UnionPay Board of Directors." CUP's operating regulations that implement the mandate in Document No. 76 also explicitly enable CUP to prohibit the placement on a CUP card of any "Other logo and character that may impose negative impact on UnionPay logo." Section 2.5.3.2 (Exhibit US-115).

Question 107. With reference to Document No. 37 (Exhibit CHI-54), and assuming that non-CUP RMB bankcards could be issued in China and they would need to bear the CUP logo pursuant to Article 1, Section 1.2(i), of Document No. 37, could the cardholder or merchant choose the bank card clearance organization that would process the transaction (i.e. non-CUP vs. CUP)? Also, if a merchant accepted only CUP cards, could a non-CUP card nonetheless be used because it would bear the CUP logo?

49. In paragraph 59 of its answer China appears to confirm that there are no “non-CUP RMB cards” given that the entire focus of China’s answer refers to DBDC cards. There is no RMB denominated payment card, whether single currency or dual currency card, that can be issued in China without bearing the CUP logo (and with the approval of CUP). Any issuer that wants to issue a RMB-denominated payment card in China must have the CUP logo on the card, which can only happen with CUP’s approval and which requires approval to join CUP and remain a member in good standing. China later unequivocally confirms in paragraph 68 of its answer to question 110 that “*all interoperable payment cards denominated in RMB must bear the Yin Lian logo and be capable of being processed over the CUP network*” (emphasis added).

Question 108. The Panel has the following question regarding China's oral response to question 75 from the Panel: the Panel understands China's comment as saying that any foreign bank issuing an RMB-denominated credit card in China is allowed to establish a cross-bank switching network for RMB bank cards independently from CUP. Can China confirm this understanding?

50. China provides no confirmation that “a foreign bank issuing an RMB-denominated credit card in China is allowed to establish a cross-bank switching network for RMB bank cards independently from CUP” as the Panel requested. Instead, China returns to its mantra that the United States “has failed to identify anything in the measures at issue...” (see para. 64). The United States has provided evidence and a detailed analysis that demonstrates that CUP is the sole supplier of EPS for RMB payment card transactions in China. See U.S. July 29, 2011 Response, paras. 77-134; U.S. First Written Submission, paras. 12, 29-36, 45-72, 89-117; U.S. Answers to First Set of Panel Questions, paras. 15-21; U.S. Second Written Submission, paras. 130-215. Moreover, as noted in the U.S. comment above in paragraph 47, China confirms in paragraph 68 of its answer to question 110 that “all interoperable payment cards denominated in RMB must bear the Yin Lian logo and be capable of being processed over the CUP network.”

Question 109. With reference to Exhibit CHI-74 and Article I.3 of Document No. 153 (Exhibit CHI-66), China explains that "[t]he context in which this provision appears makes it clear that this provision prohibits operators of interbank payment card networks (such as CUP) from outsourcing their switching functions to third-party service providers...". Could China please further explain what this "context" is and, more specifically, why it should be inferred from this context that this provision refers to "outsourcing functions"?

51. Document 153 (Exhibit US-49): Article 2, Section 2.2 states 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.” Document No. 219, Article III (Exhibit US-47) prohibits processing of payment card transactions by third-parties, mandating that “no merchant shall... authorize a third party to handle Renminbi card business or transfer such business to a third party”. Contrary to China’s arguments, these provisions confirm that no supplier other than CUP may supply EPS for RMB payment card transactions in China.

Question 110. *With reference to Exhibit CHI-74 and Article 2(5)(iii) of Document No. 149 (Exhibit CHI-70) China explains that this provision "... does not prohibit accepting cards that bear other logos...". The Panel understands that the expression "cards that bear other logos" refers to dual-logo cards. Could China confirm the Panel's understanding?*

52. China concedes that “all interoperable payment cards denominated in RMB must bear the Yin Lian logo and be capable of being processed over the CUP network” and that “those requirements are not in dispute (see para. 68 of China’s answers to the panel’s questions). Contrary to China’s assertion that these requirements do not establish a limitation, the CUP logo requirements are inconsistent with Article XVI because they help entrench the CUP’s position as the sole service supplier in the market. See, e.g., U.S. Second Written Submission, paras. 169-173.

Question 111. *With reference to Article V.2 of Exhibit CHI-71, China comments that "[t]he purpose of this provision is to avoid unnecessary foreign exchange transactions". Could China please explain what are "unnecessary foreign exchange transactions", since this expression does not appear in the Document No. 53? How does this provision aim to avoid these "unnecessary" transactions?*

53. Paras. 70 and 71 of China’s answer essentially confirm that there is no acceptance of any domestically issued card that does not bear the CUP logo. Because any payment cards for RMB transactions must bear the CUP logo, including dual currency cards, issuers can only issue foreign currency denominated cards (for use outside of China) that do not bear the CUP logo. Document No. 53 mandates that when DBDC payment cards are used domestically, they should be processed by CUP to avoid “unnecessary foreign exchange transaction.”

Question 112. *What specific legal and procedural requirements must be met to establish a card payment network providing payment services similar to CUP in China? For instance, what would be the competent authority for processing the application and granting the authorization? To what extent could this network establish its own operating rules and standards?*

54. See U.S. comments in response to China’s answers to question 108.

Question 113. *Why is the domestic entity Rural Credit Banks Funds Clearing Centre (referred to by China at the second substantive meeting of the Panel) not mentioned as an addressee in any of the legal instruments before the Panel while CUP is frequently referred to as an addressee in these provisions?*

55. See U.S. comments regarding China’s answer to question 98.

Question 116. *What are the first two digits appearing on the dual logo credit cards issued in China for RMB-denominated transactions? Do these digits automatically determine which network will process the RMB-denominated transactions paid with such cards in China? If not, could you explain what determines which network processes such transactions?*

56. First, foreign branded DBDC payment card transactions are processed by CUP as CUP transactions, and not as transactions on the foreign-branded network. Contrary to China's assertion in para. 79 in its answer, foreign suppliers of EPS, such as Visa, assess fees not because they are processing the transactions but because the transactions involve their branded cards (but the processing is conducted under a different brand, i.e., CUP).

57. What is missing in China's response, of course, is that everywhere else where Visa and other suppliers of EPS allow "domestic transactions" to be "processed outside of" proprietary networks, it is pursuant to commercial considerations and mutual agreement with their institutional clients. This is in stark contrast to China where there is no opportunity for such commercial decisions due to the measures that China has in place. China's asks in footnote 41 that "It is unclear what grievance Visa might have in relation to the Chinese market, considering that its international operating regulations expressly contemplate this situation." The "grievance," as set out in the U.S. claims in this dispute, is that China's measures, rather than competitive factors, dictate how payment card transactions in China are processed.

Question 117. The United States asserts in paragraph 172 of its second written submission that "[b]ecause CUP has exclusive control over the UnionPay logo, it may refuse permission for the logo to appear on any cards that carry the logo of a competing EPS supplier." Are the parties aware of any case where CUP has refused permission for the logo to appear on a card carrying the logo of another payment card company?

58. China's answer is nonresponsive and ignores the question from the Panel regarding whether CUP has refused permission to place the CUP logo on a DBDC card. As the United States explained in our response to this question and in our comments on China's response to question 106, CUP can and does deny issuers approval to place the CUP logo on DBDC cards. See U.S. Answers to the Panel's Second Set of Written Questions, paras. 113-115, and Exhibits US-115, US-119, US-120, US-121, US-122, and US-123.

Question 118. The United States alleges that China maintains a monopoly for CUP in respect of all transactions where a payment card is "issued in China and used in China" (United States' second written submission, paragraph 1 (emphasis added)). With regard to the "requirements pertaining to card-based electronic transactions in China, Macao and Hong Kong" (e.g. United States' second written submission, paragraph 189), is the above-quoted phrase correct?

59. The United States would refer the Panel again to the U.S. answer to this question. China points to Exhibit CHI-98, but the images in that exhibit do not in any way change the mandate in Document No. 8, Document No. 16, Document No. 254, and Document No. 219, that 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. China has established and maintains a monopoly for CUP on these transactions. CUP also has a monopoly with respect to RMB payment card transactions and foreign currency card denominated transactions where the card is issued in China and used in China as the United States has explained.

Question 119. With reference to footnote 191 of the United States' second written submission, where it is stated that Document No. 94 and Document No. 272 have been repealed which instruments, if any, currently require the use of the Business Practices Appendix?

60. Document No. 76 (Exhibit US-56/US-63), paragraph 5 of the Notice, makes it clear that all inconsistent “bank card business rules” must be abolished. The Business Practices Appendix in Document No. 76 are binding with the force of law (unlike, for example, the rules adopted by Visa or MasterCard). They very clearly state how transactions must be processed. While China argues that “one set of business rules does not preclude compliance with another” the fact that the Business Practices were intended to specify the exclusive means for processing inter-bank transactions is reinforced by the constant refrain throughout the document that the purpose of the measure is to establish a “single” and “unified” or “standardized” system. As noted, Article 4.1 of the Business Practices indicates that the logo is “unified.” (China interprets Article 4.1 as stating that purpose of the logo is to “standardize” the domestic bankcard acceptance market). Article 2.1 defines the “[b]ank card united association” as a “countrywide bank card united operational organization.” According to China, Article 1.1 of the Business Specifications states that the purpose of the Specification is to “standardize the cross-bank business operations of bankcards.” This phraseology makes it clear that the procedures set forth in the Business Specifications are the exclusive procedures.

Question 121. With reference to Exhibit US-20 (Article 12) and Exhibit US-29 (Article 29), what is the meaning of the word "single" in the phrase "single nationwide inter-bank card information and switching network"?

61. These documents are evidence that support the U.S. claims. China's assertion that the United States has not challenged these measures as such is not relevant. It is relevant that the use of the word “single” is consistent with the fact that CUP's network is intended to be the exclusive network for all payment card transactions where the card is issued in China and is used in China. China's use of CUP's foundational documents to help position CUP as the monopoly supplier of EPS is highly relevant evidence that supports the U.S. claims. CUP's Articles of Association (Exhibit US-20) and a business license issued to CUP by the Shanghai Municipal Administration of Industry and Commerce (Exhibit US-29) are each dated 2002. Contrary to China's contention, the use of the phrase “single nationwide inter-bank card information and switching network” and specifically the inclusion of the word “single” is very significant.

62. If the contemplated scope of CUP's service simply envisaged the establishment and operation of a “nationwide inter-bank card information and switching network,” there would be no need for including the word “single” in this phrase. Thus, these two documents confirm that CUP was established to operate an exclusive “nationwide inter-bank card information and switching network” and CUP is in fact the only one permitted in China for RMB-payment card transactions in China, and foreign currency denominated payment card transactions where the card is issued in China and used in China.

Question 122. Document No. 17 (Exhibit US-52) in its Article 64 contains the phrase "except those with the mark of any international credit card organization". Does this

mean that commercial banks in China can issue such cards for RMB-denominated transactions and that they need not implement the technical standards prescribed by the state in respect of such cards? If not, what is the importance of the relevant phrase?

63. See U.S. comments in response to China’s answers to question 108.

Question 125. Is there currently a foreign bank card clearance organization established in China that is engaged in foreign currency business?

64. The United States provided the following response to question 125:

The United States understands “foreign bank card clearance organization” to mean internationally-branded card brands such as Visa, MasterCard, Discover, American Express, and JCB, and “foreign currency business” to be the processing of bank card transactions associated with an account denominated in a foreign currency for use outside of China. Several foreign bank card clearance organizations process the foreign currency card portion of transactions on dual brand/dual currency cards and a much smaller number of cards that have only a foreign currency denominated account and function. Processing of foreign currency bank card transactions does not include conversion of the foreign currencies to RMB and foreign bank card organizations are not allowed to process RMB denominated bank card transactions, which are the vast majority of the transactions processed in China.

65. The United States answered the question in the manner it did based on what it understood the panel’s reference to “foreign currency business,” in the context of the question, as the processing of foreign denominated currency card transactions outside of China. The United States did not interpret that reference to mean a reference to a commercial presence in China, as China’s answer suggests.