China – Certain Measures Affecting Electronic Payment Services

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Canada – Autos	Panel Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043
China – EPS	Preliminary Ruling by the Panel, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413, issued 7 September 2011
China – Publications and Audiovisual Products	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010
China – Publications and Audiovisual Products	Panel Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
EC – Asbestos	Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
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US – Section 301 Trade Act	Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, adopted 27 January 2000, DSR 2000:II, 815

I. INTRODUCTION

1. Operating from a protected home market monopoly position, China UnionPay, Co. Ltd. ("CUP") has thrived since its creation nearly a decade ago. With competitors shut out of China, CUP has solidified its complete domestic market dominance. CUP has also experienced explosive growth abroad. While serving as China's domestic champion, CUP, has been expanding its payment card issuance and acceptance internationally and enjoys full and unencumbered access to the domestic payment card market in a growing number of foreign countries in which it has chosen to operate (now numbering more than 110).

2. Back in 2001, China made important commitments with respect to electronic payment services ("EPS") for payment card transactions[1] when it joined the World Trade Organization ("WTO"). EPS enable, facilitate, and manage the transfer of funds between cardholders and merchants and are essential to processing the several hundred million card-based electronic payment transactions that occur daily around the world. In the financial services sector, as set out in China's Schedule of Specific Commitments on Services, China undertook to provide by December 2006 both market access and national treatment for "all payment and money transmission services, including credit, charge and debit cards."[2]

3. Yet, at the same time as CUP expands aggressively abroad, China maintains a government-mandated domestic monopoly, enabling only CUP to provide these services in China. China refuses to allow foreign suppliers of EPS to process payment card transactions in China denominated and paid in China's domestic currency, renminbi ("RMB"). China has also enacted and maintains numerous barriers to prevent foreign suppliers of EPS from establishing the processing infrastructure, network, rules, and procedures that are essential to the processing of card-based electronic payment transactions in China. In addition, China maintains measures that also impact the other key entities in payment card transactions, including the institutions that issue payment cards ("issuing institutions"), acquiring institutions (those that seek to "acquire" transactions using payment cards and that have relationships with merchants), and merchants in terms of requirements pertaining to payment card-processing equipment and point-of-sale ("POS") terminals. These measures have entrenched CUP's monopoly position in China and accord less favorable treatment to foreign suppliers of EPS.

4. In particular, China maintains the following measures:

- ***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.*** China requires that all transactions denominated and paid in RMB in China be processed and cleared in

[1] *See* U.S. Request for the Establishment of a Panel, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/2, February 11, 2011 ("U.S. panel request"), page 1, including notes 1 and 2.

[2] Section II, 7 (Financial Services), B (Banking and Other Financial Services) of the Schedule (circulated in WT/ACC/CHN/49/Add.2 and WT/MIN(01)/3/Add.2), item (d).

RMB through CUP, and that where there is a choice, all domestic transactions on dual currency cards be routed in RMB through CUP.[3]

- ***Requirements that RMB denominated payment cards issued in China bear the CUP logo.*** China requires that any bank cards issued in China for RMB purchases in China, including dual currency payment cards issued in China, must bear the CUP logo.[4] This means that issuers – the institutions that issue payment cards to consumers – must have access to the CUP system, and must pay CUP for that access.

- ***Requirements that all automated teller machines ("ATM"), merchant card processing equipment, and POS terminals in China accept CUP cards.*** China requires that all ATMs, merchant card processing equipment, and POS terminals in China be capable of accepting CUP cards.[5] There are no equivalent requirements for non-CUP cards.

- ***Requirements on acquiring institutions to post the CUP logo and be capable of accepting all payment cards bearing the CUP logo.*** China requires that all acquiring institutions – the institutions that sign up merchants to accept payment cards – in China post the CUP logo and be capable of accepting all payment cards bearing the CUP logo.[6] An acquiring institution, often a bank, provides POS terminal and processing equipment to merchants so it can process payment cards, maintains the merchant's account, handles relations with the merchant, and ensures that payments are properly credited to the merchant.

- ***Broad prohibitions on the use of non-CUP cards.*** China prohibits the use of domestically issued non-CUP payment cards where the issuing bank and acquiring bank are different.[7] China also requires that all inter-bank transactions for all bank cards be handled through CUP.

- ***Requirements pertaining to card-based electronic transactions in China, Macao and Hong Kong.*** China requires that CUP be used to handle all RMB transactions in Macao or Hong Kong using bank cards issued in China.[8] China also requires that CUP be used to handle any RMB transactions in China using RMB cards issued in Hong Kong or Macao.

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[3] *See China – Certain Measures Affecting Electronic Payment Services*, WT/DS413, Submission of the United States of America in Response to China's Request for a Preliminary Ruling, July 29, 2011 (including Exhibits US-1 - US-62) ("U.S. July 29 Response"), sections V.B, V.C, V.D.

[4] *See* U.S. July 29 Response, sections V.B, V.C, V.E.

[5] *See* U.S. July 29 Response, sections V.B, V.C, V.F.

[6] *See* U.S. July 29 Response, sections V.B, V.C, V.G.

[7] *See* U.S. July 29 Response, sections V.B, V.C, V.H.

[8] *See* U.S. July 29 Response, sections V.B, V.C, V.I.

5. These measures are inconsistent with China's obligations under Articles XVI:1 and XVI:2 of the *General Agreement on Trade in Services* ("GATS") not to adopt or maintain measures of the types listed in Article XVI:2. These measures are also inconsistent with China's obligations under GATS Article XVII to accord to services and service suppliers of any other Member treatment no less favorable than that it accords to its own like services and service suppliers, in respect of all measures affecting the supply of services.

II. PROCEDURAL HISTORY

6. On September 15, 2010, the United States requested consultations with China pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), and Article XXII of the *General Agreement on Trade in Services* ("GATS") with respect to certain restrictions and requirements maintained by China pertaining to electronic payment services for payment card transactions and the suppliers of those services. The United States and China held consultations on October 27 and 28, 2010, but those consultations did not resolve the dispute.

7. The United States submitted its request for the establishment of a panel on February 11, 2011. The Dispute Settlement Body ("DSB") established a panel on March 25, 2011, with standard terms of reference to examine the complaint by the United States. Australia, Ecuador, the European Union, India,[9] Guatemala, Japan, and Korea subsequently reserved their rights as third parties. The Panel was composed on July 4, 2011.[10]

8. On July 5, 2011 China filed a request for a preliminary ruling on the consistency of the U.S. panel request with DSU Article 6.2.[11] On July 29, 2011, the United States filed a submission in response to China's request for a preliminary ruling.[12] On September 7, 2011, the Panel issued its preliminary ruling in which it rejected all of China's claims that the U.S. panel request failed to satisfy the requirements of Article 6.2 of the DSU.[13]

III. FACTUAL BACKGROUND

9. The United States hereby incorporates into this submission the Submission of the United States of America in Response to China's Request for a Preliminary Ruling, dated July 29, 2011, in its entirety and including all of the exhibits attached thereto ("U.S. July 29 Response").[14] The U.S. July 29 Response provides a detailed factual background regarding the nature of the

[9] On July 11, 2011, three months after the Panel was established, and one week after the Panel was composed, India filed a letter seeking to reserve its rights as third party in this dispute.

[10] WT/DS413/3.

[11] Request for Preliminary Ruling by China, 5 July 2011.

[12] U.S. July 29, 2011 Response.

[13] *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413, Preliminary Ruling by the Panel, 7 September 2011, paras. 56-58.

[14] U.S. July 29, 2011 Response.

services at issue "electronic payment services for payment card transactions" (U.S. July 29 Response, Section IV) and the specific measures of China that maintain CUP's monopoly on the supply of EPS and that affect the supply of EPS by foreign suppliers (U.S. July 29 Response, Section V).

A. Electronic Payment Services for Payment Card Transactions

10. The United States will not repeat all of the factual information it provided in the U.S. July 29 Response. In providing a comprehensive overview of "electronic payment services for payment card transactions," section IV of the U.S. July 29 Response includes:

- a background discussion of the transition from paper-based payments to card-based electronic payments;[15]

- a comprehensive overview of electronic payment services, including: the central role of the EPS supplier in card-based electronic payment transactions, and the roles that other entities (*i.e.*, the issuing institution, the acquiring institution, merchant, and the settlement bank) play in a payment card transaction;[16]

- a description of "front-end" EPS processing authorization and "back-end" EPS processing (including a flow chart that depicts EPS processing);[17] and

- EPS industry statements, including from CUP, demonstrating the intense competition (outside of China) to provide EPS for card-based electronic payment transactions. EPS suppliers explain that they compete "in the global payment marketplace against all forms of payment, including paper-based forms (principally cash and checks)" and "card-based payments (including credit, charge, debit, ATM, prepaid, private-label and other types of general purpose and limited use cards)."[18]

B. The Evolution of China's Payment Card System and the Creation of CUP

11. The United States refers the Panel to the U.S. July 29 Response, which includes a discussion of the evolution of China's payment card market and the creation of CUP.[19]

C. China's Measures that Maintain CUP's Monopoly on the Supply of EPS and that Affect the Supply of EPS by Foreign Suppliers

12. China maintains a monopoly structure that ensures that CUP is the sole entity that can provide EPS for RMB transactions in China – the vast majority of all payment card transactions

[15] U.S. July 29 Response, paras. 35-37.

[16] U.S. July 29 Response, paras. 38-48.

[17] U.S. July 29 Response, paras. 49-54, and page 19 (EPS processing flow chart).

[18] U.S. July 29 Response, paras. 55-61.

[19] U.S. July 29 Response, paras. 64-76.

in China. Chinese 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 transactions, and include the following:

- ***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.*** China imposes requirements that all transactions denominated and paid in RMB in China be processed and cleared in RMB through CUP, and that where there is a choice, all domestic transactions on dual currency cards be routed in RMB through CUP.[20] For a description of these measures, the United States refers the Panel to sections V.B, V.C, and V.D of the U.S. July 29 Response.

[20] *See* 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); 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); 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); 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); 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); 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); 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); 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); 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); 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 Station 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"), Article III (Exhibit US-1); 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); 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); 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); 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); 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); 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-63).

- ***Requirements on issuers that payment cards issued in China bear the CUP logo.*** China imposes requirements that any bank cards[21] issued in China for RMB purchases in China, as well as any dual currency cards issued in China, must bear the CUP logo. In practice, this means that issuers must pay CUP for access to the CUP system.[22] For a description of these measures, the United States refers the Panel to sections V.B, V.C, and V.E of the U.S. July 29 Response.

- ***Requirements that all ATM and POS terminals in China accept CUP cards.*** China requires that all ATM, merchant card processing equipment, and point-of-sale terminals in China be capable of accepting CUP cards. There is no equivalent requirement for non-CUP cards.[23] For a description of these measures, the United States refers the Panel to sections V.B, V.C, and V.F of the U.S. July 29 Response.

- ***Requirements on acquiring institutions to post the CUP Logo and be capable of accepting all bank cards bearing the CUP logo.*** China requires that all acquiring institutions in China post the CUP logo and be capable of accepting all bank cards bearing the CUP logo.[24] For a description of these measures, the United States refers the Panel to sections V.B, V.C, and V.G of the U.S. July 29 Response.

- ***Broad prohibitions on the use of non-CUP cards.*** China maintains broad prohibitions on the use of non-CUP cards for cross-region or inter-bank (cross-bank) transactions. China also requires that all inter-bank transactions for all bank cards be handled through CUP.[25] For a description of these measures, the United States refers the Panel to sections V.B, V.C, and V.H of the U.S. July 29 Response.

- ***Requirements in China, Macao, and Hong Kong.*** China also requires that CUP be used to handle all RMB transactions in Macao or Hong Kong using bank cards issued in China. In addition, China also requires that CUP be used to handle any RMB transactions in China using RMB cards issued in Hong Kong or Macao.[26] For a

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[21] *See* 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), Document No. 17, Article 5, states that "Bank cards are classified into credit cards and debit cards" and "Bank cards may be classified into RMB cards and foreign currency cards." In turn, Document No. 17 provides that "Debit cards" include "cards for transferring accounts… cards for special purpose and stored value cards. Document No. 17, Articles 7-10) (Exhibit US-52).

[22] *See* Document No. 37 (Exhibit US-40); Document No. 57 (Exhibit US-41); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 129 (Exhibit US-53); Document No. 219 (Exhibit US-47).

[23] *See* Document No. 17 (Exhibit US-52); Document No. 37 (Exhibit US-40); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43).

[24] *See* Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 153 (Exhibit US-49); Document No. 149 (Exhibit US-50).

[25] *See* Document No. 37 (Exhibit US-40); Document No. 57 (Exhibit US-41); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43).

[26] *See* Document No. 16 (Exhibit US-44); Document No. 8 (Exhibit US-46); Document No. 219 (Exhibit US-47); Document No. 254 (Exhibit US-48).

description of these measures, the United States refers the Panel to sections V.B, V.C, and V.I of the U.S. July 29 Response.

IV. CHINA'S SPECIFIC COMMITMENTS IN ITS GATS SCHEDULE

A. China's Schedule of GATS Commitments Covers "All payment and money transmission services, including credit, charge and debit cards…" (item d)

13. In Sector 7B, under the Banking and Other Financial Services heading of its Services Schedule,[27] China undertook market access and national treatment commitments with respect to "[a]ll payment and money transmission services," which includes the electronic payment services supplied in connection with "credit, charge and debit cards," and other payment card transactions.

14. Sector 7B of China's Services Schedule provides, in relevant part:

[27] Section II, 7 (Financial Services), B (Banking and Other Financial Services) of the Schedule (circulated in WT/ACC/CHN/49/Add.2 and WT/MIN(01)/3/Add.2).

Modes of supply: (1) Cross-border supply (2) Consumption abroad (3) Commercial presence (4) Presence of natural persons			
Sector or sub-sector	Limitations on market access	Limitations on national treatment	Additional commitments
7. FINANCIAL SERVICES			
B. Banking and Other Financial Services (excluding insurance and securities) *** d. All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement);	(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. (2) None (3) A. <u>Geographic coverage</u> For foreign currency business, there will be no geographic restriction upon accession. For local currency business, ... {w}ithin five years after accession, all geographic restrictions will be removed. B. <u>Clients</u> For foreign currency business, foreign financial institutions will be permitted to provide services in China without restriction as to clients upon accession. For local currency business, within ... five years after accession, foreign financial institutions will be permitted to provide services to all Chinese clients. Foreign financial institutions licensed for local currency business in one region of China may service clients in any other region that has been opened for such business. C. <u>Licensing</u> Criteria for authorization to deal in China's financial services sector are solely prudential (i.e., contain no economic needs test or quantitative limits on licenses). Within five years after accession, any existing non-prudential measures restricting ownership, operation, and juridical form of foreign financial institutions, including on internal branching and licenses, shall be eliminated. Foreign financial institutions who meet	(1) None (2) None (3) Except for geographic restrictions and client limitations on local currency business (listed in the market access column), foreign financial institution may do business, without restrictions or need for case-by-case approval, with foreign invested enterprises, non-Chinese natural persons, Chinese natural persons and Chinese enterprises. Otherwise, none.	

	the following condition are permitted to establish a subsidiary of a foreign bank or a foreign finance company in China: - total assets of more than US $10 billion at the end of the year prior to filing the application. Foreign financial institutions who meet the following condition are permitted to establish a branch of a foreign bank in China: - total assets of more than US $20 billion at the end of the year prior to filing the application. Foreign financial institutions who meet the following condition are permitted to establish a Chinese-foreign joint bank or a Chinese-foreign joint finance company in China: - total assets of more than US $10 billion at the end of the year prior to filing the application. Qualifications for foreign financial institutions to engage in local currency business are as follows: - three years business operation in China and being profitable for two consecutive years prior to the application, otherwise, none. (4) Unbound except as indicated in horizontal commitments.	(4) Unbound except as indicated in horizontal commitments.	

15. The first column of China's Services Schedule sets out China's particular commitments. As indicated in Sector 7B, the services listed include:

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

16. Services that are supplied internationally can take various forms. Under the GATS, the "modes" of supply are defined based on the relationship between the origin of the supplier of the service and the consumer. Four different modes of supply are defined in the GATS Article I:2. The four modes of supply consist of: (1) cross-border (where the services are supplied from the territory of one Member into the territory of another Member); (2) consumption abroad (where the service is supplied to the consumer outside the territory of the Member where the consumer resides); (3) commercial presence; and (4) presence of natural persons of a Member in the territory of another Member. When a Member undertakes a commitment on a sector or subsector, it must indicate for each mode of supply what limitations, if any, it maintains on market access and/or national treatment.

17. China undertook both market access and national treatment commitments for modes (1) and (3) with respect to item (d), "All payment and money transmission services, including credit, charge and debit cards…"

18. The second column of China's Services Schedule sets out the terms, limitations, and conditions with respect to this market access commitment related to "All payment and money transmission services, including credit, charge and debit cards…" that China has undertaken. The Second column provides as follows with respect to mode (1):

(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.

19. Under the market access commitments for mode (3), China scheduled certain limitations regarding geographic presence, potential clients, and licensing, all of which were to be eliminated within five years after China's accession. The fifth anniversary of China's accession was December 11, 2006. Therefore, after December 11, 2006, China's Services Schedule provides no market access limitations under mode 3 for financial services with respect to electronic payment services.

20. With regard to national treatment restrictions related to item (d), China has no limitations under mode (1). With regard to mode (3), China's schedule explicitly provides for no limitations other than the geographic and client restrictions provided for in the market access column. In other words, because China's national treatment restrictions referenced and incorporated its market access limitations, the expiration of those market access restrictions on December 11, 2006 also means there are no longer any national treatment limitations on these services for mode (3). Accordingly, there are no national treatment limitations on either mode (1) or mode (3).

21. Nor do China's inscriptions under its horizontal commitments create any limitations on China's commitments in Sector 7B of its specific commitments that would cover the measures identified in the U.S. panel request. The terms, limitations, conditions, and qualifications scheduled in China's horizontal commitments do not cover Chinese measures that prohibit foreign-invested enterprises from providing electronic payment services. China's inscriptions

under its horizontal commitments likewise do not extend to the measures at issue on the provision of electronic payment services in China.[28]

B. EPS Fall Within the Ordinary Meaning of "All payment and money transmission services, including credit, charge and debit cards…" (Item d)

22. China's commitments pertain to "*all* payment and money transmission services, including credit, charge and debit cards," indicating that the scope of the commitment covers any service that is essential to "payment and money transmission" including "credit, charge, and debit cards" payment transactions. EPS suppliers are at the heart of this service.

23. The Appellate Body has confirmed that the customary rules of treaty interpretation reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ("*Vienna Convention*") apply to the interpretation of specific commitments in a Member's GATS Schedule.[29] Article 31(1) of the *Vienna Convention* requires a treaty to 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." As the Appellate Body has explained, "In order to identify the ordinary meaning, a Panel may start with the dictionary definitions of the terms to be interpreted. But dictionaries alone are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words – be those meanings common or rare, universal or specialized."[30]

24. The Appellate Body has further stated that "the structure of the GATS necessarily implies two things. First, because the GATS covers *all* services except those supplied in the exercise of governmental authority, it follows that a Member may schedule a specific commitment in respect of *any* service. Second, because a Member's obligations regarding a particular service depend on the specific commitments that it has made with respect to the sector or subsector within which that service falls, a specific service cannot fall within two different sectors or subsectors. In other words, the sectors and subsectors in a Member's Schedule must be mutually exclusive."[31]

25. As summarized in the U.S. July 29 Response:

> EPS are at the center of all payment card transactions and without these services the transactions could not occur. EPS fall within the ordinary meaning of payment and money transmission services, within item (d) of China's Schedule. The language of item (d) itself makes this abundantly clear. First, as detailed extensively in this submission [the U.S. July 29 Response], EPS involve the services through which transactions involving payment cards are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated. EPS clearly fall within the ordinary

[28] China's Services Schedule, Part I: Horizontal Commitments, WT/MIN(01)/3/Add.2, page 2.

[29] Appellate Body Report, *United States – Gambling Services*, paras. 159-160.

[30] Appellate Body Report, *United States – Gambling Services*, para. 164 (footnotes omitted).

[31] Appellate Body Report, *United States – Gambling Services*, para. 180.

> 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. EPS suppliers such as Visa, MasterCard, and American Express are names recognized around the world as credit cards and charge cards. The reference to debit cards covers suppliers of EPS for debit card transactions like Visa, MasterCard, Discover, First Data, Pulse, NYCE, STAR, and PLUS.[32]

26. The United States refers the Panel to the U.S. July 29 Response, which provides a detailed analysis of the ordinary meaning of key terms in China's Schedule – "All payment and money transmission services, including credit, charge, and debit cards." That discussion demonstrates that the service identified by the United States – "electronic payment services for payment card transactions" – clearly falls within the scope of China's commitment, as one type of "*all* payment and money transmission services, including credit, charge, and debit cards."[33]

27. The U.S. July 29 Response also provides extensive evidence that demonstrates that description of the service as set out in the U.S. panel request and at issue in this dispute – "electronic payment services for payment card transactions[34] – is drawn from industry sources and reflects the broad and common understanding of these services within this sector.[35] As explained in the U.S. July 29 Response, suppliers of the services at issue in this dispute are described as supplying, or characterize themselves as supplying, "electronic payment services" for "payment card" transactions and as operating within the "global payments industry."[36]

28. The U.S. July 29 Response also demonstrates that, outside of China, the competition to provide services for card-based electronic payment transactions is intense. EPS suppliers explain that they compete "in the global payment marketplace against all forms of payment, including paper-based forms (principally cash and checks)" and "card-based payments (including credit, charge, debit, ATM, prepaid, private-label and other types of general purpose and limited use cards)."[37]

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[32] U.S. July 29 Response, para. 149.

[33] U.S. July 29 Response, section VI, including paras. 147-163.

[34] U.S. panel request, page 1, including notes 1 and 2.

[35] *See* U.S. July 29 Response, paras. 55-61, 164-178.

[36] *See* U.S. July 29 Response, paras. 55-61, 164-178.

[37] U.S. July 29 Response, para. 55, citing Visa 2008 IPO Prospectus, page 147 (Exhibit US-3).

V. CHINA'S MEASURES SHOULD BE CONSIDERED BOTH INDIVIDUALLY AND IN CONJUNCTION WITH OTHER MEASURES

29. In assessing the consistency of the challenged measures with China's WTO obligations, the United States requests the Panel to review each of the measures it has identified both individually and in conjunction with other measures.[38]

30. As set forth in detail in the U.S. July 29 Response, China maintains a monopoly structure that ensures that CUP is the sole entity that can provide EPS for RMB transactions in China – the vast majority of all transactions in China. Chinese measures that provide for the monopoly structure and restrict the supply of EPS by foreign suppliers affect every aspect of a payment card transaction and all of the key participants in such transactions.

31. As the Panel confirmed in its preliminary ruling, the United States has challenged measures that establish or maintain requirements that fall within six categories.[39] The United States requests the Panel to 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:

- *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.*[40]
- *Requirements on issuers that payment cards issued in China bear the CUP logo.*[41]
- *Requirements that all ATM and POS Terminals in China Accept CUP cards.*[42]
- *Requirements on acquiring institutions to post the CUP logo.*[43]
- *Broad prohibitions on the use of non-CUP cards.*[44]

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[38] The United States notes that this discussion applies to the Panel's assessment of the U.S. market access and national treatment claims.

[39] *See* Panel's Preliminary Ruling, para. 15.

[40] *See* Document No. 37 (Exhibit US-40); Document No. 57 (Exhibit US-41); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 16 (Exhibit US-44); Document No. 66 (Exhibit US-45); Document No. 8 (Exhibit US-46); Document No. 219 (Exhibit US-47); Document No. 254 (Exhibit US-48); Document No. 103 (Exhibit US-1; Document No. 153 (Exhibit US-49); Document No. 149 (Exhibit US-50); Document No. 53 (Exhibit US-129).

[41] *See* Document No. 17 (Exhibit US-52); Document No. 37 (Exhibit US-40); Document No. 57 (Exhibit US-41); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 129 (Exhibit US-53); Document No. 219 (Exhibit US-47).

[42] *See* Document No. 37 (Exhibit US-40); Document No. 94 (Exhibit US-41); Document No. 272 (Exhibit US-43).

[43] *See* Document No. 94 (Exhibit US-41); Document No. 272 (Exhibit US-43); Document No. 153 (Exhibit US-49); Document No. 149 (Exhibit US-50).

- *Requirements in China, Macao and Hong Kong.*[45]

32. The objective of WTO dispute resolution and findings by panels and the Appellate Body is to "assist the DSB in making sufficiently precise recommendations and rulings so as to allow for prompt compliance, in order to ensure effective resolution of the dispute."[46] In this case, Panel findings with respect to both the individual measures and the measures considered in conjunction, as identified by the United States, will help to ensure the effective resolution of this dispute.

33. It is also useful to recall that the covered agreements do not define the term "measure." The content of a measure may vary from case to case. The Appellate Body has suggested that "instruments of a Member containing rules or norms could constitute a 'measure', irrespective of how or whether those rules or norms are applied in a particular instance."[47] In using the term "could constitute," the Appellate Body clearly indicated that this is not intended to be a definition of "measure," but rather one starting point for analysis. Of course the United States recognizes that not all "instruments" are measures and that not all measures are "instruments."[48]

34. In past disputes, such as *Japan – Apples*, *EC – Asbestos*, and *US – Export Restraints*, several legal requirements or legal provisions were treated as a single measure. Although the nature of the inquiry is similar (whether to treat several instruments, requirements or provisions as a single or multiple measures), the analysis is ultimately fact-specific to each dispute. Accordingly, past panels and the Appellate Body have considered different factors in examining the issue.[49] Among the factors considered by Panels and the Appellate Body in examining this question are the manner in which the complainant presented its claims with respect of the

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[44] *See* Document No. 37 (Exhibit US-40); Document No. 57 (Exhibit US-41); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43).

[45] *See* Document No. 16 (Exhibit US-44); Document No. 8 (Exhibit US-46); Document No. 219 (Exhibit US-47); Document No. 254 (Exhibit US-48).

[46] Panel Report, *Japan – Apples*, para. 8.10 (referring to the Appellate Body's statement in *Australia – Salmon* (para. 223)).

[47] Appellate Body Report, *United States – Corrosion-Resistant Steel Sunset Review*, para. 82

[48] The Appellate Body has observed that "In the practice established under the GATT 1947, a 'measure' may be any act of a Member, whether or not legally binding, and it can include even non-binding administrative guidance by a government. A measure can also be an omission or a failure to act on the part of a Member." Appellate Body, Report, *Guatemala – Cement I*, note 47 (internal citations omitted).

[49] In *EC – Asbestos* the issue before the Appellate Body was whether it was appropriate for the panel to consider the measure at issue in two parts in assessing the applicability of the TBT Agreement to the measure. The Appellate Body found that "the proper character of the measure at issue [could not] be determined unless the measure [was] examined as a whole." In *Turkey – Rice*, the United States claimed that the concerned measures were in violation of the covered agreements, both considered separately and in conjunction. As the panel found that the measures were each individually inconsistent with Turkey's obligations under covered agreements, it did not see the need to reach a separate conclusion on those measures considered jointly, for the resolution of that dispute. Panel Report, *Turkey – Rice*, paras. 7.280-7.281.

instruments identified,[50] and the legal status of the requirements or instruments, including the operation of, and the relationship between, the requirements or instruments, including whether a certain requirement or instrument has autonomous status.[51]

35. As the Panel in *US – Section 301 Trade Act* noted, where the instruments at issue are "inseparable" they "should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations."[52] The Panel further elaborated that "in examining the relevant provisions of Sections 301-310 we first look at the statutory language itself, severed from all other elements of the law. We then look at the other elements of Sections 301-310 which, in our view, constitute an integral part of the Measure in question and make our final evaluation based on all elements taken together."[53]

36. As set out in detail in the U.S. July 29 Response,[54] and discussed below, the United States explains the manner in which each of the measures individually operates. In addition, the United States has also identified where it would be appropriate for the Panel to analyze certain measures operating in conjunction.

VI. CHINA'S MEASURES ESTABLISHING AND SUPPORTING CHINA UNIONPAY'S MONOPOLY ON THE SUPPLY OF EPS ARE INCONSISTENT WITH ARTICLE XVI OF THE GATS

A. GATS Article XVI (Market Access)

37. The measures imposed by China on the supply of electronic payment services are inconsistent with Article XVI of the GATS because they limit the number of suppliers of EPS for RMB-denominated transactions that are paid in RMB. Article XVI states, in relevant part:

> 1. With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.
>
> 2. In the sectors where market access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a

[50] In *US – Export Restraints*, the panel describes Canada's, the complainant in that dispute, arguments as follows: "each of the elements that [Canada] cites (the statute, the SAA; the Preamble, and U.S. practice) individually constitutes a measure that is susceptible to dispute settlement, and that, 'taken together' as well, these elements constitute a measure.... these measures individually *and* collectively require a particular treatment of export restraints." Panel Report, *US – Export Restraints*, paras. 8.82-8.131.

[51] Appellate Body Report, *EC – Asbestos*, para. 64; Panel Report, *US – Export Restraints*, para. 8.85. The panel in *US – Export Restraints* explains that "it would have to *do* something concrete, independently of any other instruments, for it to be able to give rise independently to a violation of WTO obligations." It then examined the status of each measure under U.S. law to determine whether such measure is operational on its own.

[52] Panel Report, *US – Section 301 Trade Act*, paras. 7.26 and 7.27.

[53] Panel Report, *US – Section 301 Trade Act*, para. 7.28.

[54] U.S. July 29 Response, section V, paras. 62-134.

> regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
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> * * *
>
> (a) limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
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> ***

38. The Appellate Body has explained that the chapeau of Article XVI:2:

> define[s] the measures which a Member shall not maintain or adopt for sectors *where market access commitments are made*. The chapeau thus contemplates circumstances in which a Member's Schedule *includes* a commitment to allow market access, and points out that the function of the sub-paragraphs in Article XVI:2 is to define certain limitations that are prohibited unless specifically entered in the Member's Schedule.[55]

39. In analyzing the types of "limitations" that fall within the scope of Article XVI:2(a), the Appellate Body has also stated that "we are of the review that limitations amounting to a zero quota are quantitative limitations and fall within the scope of Article XVI:2(a)."[56]

40. Article XVI:2(a) provides that where a Member has made a market access commitment in its Services Schedule, that Member is prohibited from imposing limitations on the number of service suppliers, including through the use of monopolies, quotas, and exclusive service suppliers, unless the Member has included that limitation in its Schedule. Thus, in order to show that a measure is inconsistent with Article XVI:2, it is necessary first to demonstrate that a Member has undertaken a market access commitment and then establish that the measure in question imposes the type of limitation prohibited by Article XVI:2.[57]

B. China Made Extensive Market Access Commitments Covering the Supply of Electronic Payment Services

41. As detailed above, China made mode (1) and mode (3) market access commitments with respect to "All payment and money transmission services, including credit, charge and debit cards…," a category that encompasses electronic payment services for payment card transactions.

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[55] Appellate Body Report, *US – Gambling*, para. 233 (original emphasis).

[56] Appellate Body Report, *US – Gambling*, para. 238.

[57] Appellate Body Report, *US – Gambling*, para. 143.

42. With respect to mode (3) the only limitations on market access for EPS listed by China in its Schedule are temporal in nature – certain areas of market access would not be permitted until a specified amount of time had lapsed. Even assuming *arguendo* that the terms of these limitations could have some bearing on the types of market access at issue here, all of China's limitations expired by December 11, 2006.

43. China's own pronouncements confirm its recognition that its WTO accession commitments included providing market access for foreign suppliers of EPS and that any purported limitations on such access were to be eliminated by 2006. Specifically, multiple Chinese government agencies, including, but not limited to, 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, the China Banking Regulatory Commission, and the State Administration of Foreign Exchange issued a joint opinion that noted in pertinent part that:

> By 2006, the RMB bank card operation shall be opened to the outside world in an all-around manner, and accordingly the bank card industry of our country is facing a comparatively big challenge and we should make use of the limited time to enhance the international competitiveness of our industries.[58]

44. The language is notable in two respects. First, the term "shall" signifies a sense of legal duty, compulsion, obligation, and that something "must" be done "according to command or instruction."[59] Second, the explicit recognition of its obligation to open access is coupled with a temporal reference (i.e., "we should make use of the limited time"). The language appears to confirm that China recognized that by 2006 it was required to provide market access for foreign EPS suppliers despite the "big challenge" that its domestic industry was likely to face as a result. Rather than open its market consistent with its commitments, China not only failed to dismantle the monopoly favoring its domestic champion, CUP, but also instituted additional measures to reinforce and entrench CUP's monopoly position.

C. China's Measures Related to China UnionPay and the Use of CUP Payment Cards Operate to Limit The Number Of Foreign Suppliers of EPS

45. In accordance with its GATS schedule, China committed not to maintain any limitations on the number of foreign suppliers of EPS, including limitations that arise through the imposition of a domestic monopoly.

46. China, however, maintains numerous measures that ensure CUP's privileged position by explicitly and effectively limiting the number of foreign EPS suppliers. As an initial matter, China's State Council and the PBOC approved and authorized only one entity, CUP, to process

[58] Document No. 103, Section III (Exhibit US-1).

[59] *New Shorter Oxford English Dictionary*, page 2808 (1993) (Exhibit US-57).

inter-bank card-based payment transactions.[60] CUP's Articles of Association, which had to be approved by the PBOC and the State Council in order for CUP to engage in business, explicitly sets forth some of CUP's objectives:

> Upon being registered according to law, the business scope of the Company is as follows: (1) To establish and operate a single nationwide inter-bank card information and switching network; (2) to provide advanced electronic payment technologies and specialized services in connection with the inter-bank bank card information switching; (3) to engage in bankcard technological innovation; (4) to manage and operate the brand of "UnionPay"; (5) to formulate the code and technical standards for inter-bank card transactions, and to mediate and arbitrate any business disputes arising out of inter-bank transactions; (6) to organize trainings for the industry, business seminars and international exchange programs, and to conduct related researches and consulting services; and (7) to conduct such other businesses as may be approved by the People's Bank of China.[61]

47. China has issued several measures to secure the realization of CUP's stated objectives. The terms of certain measures are explicit in their requirements or prohibitions that establish CUP as the exclusive supplier of EPS for RMB denominated and paid domestic payment card transactions in China. Other measures establish requirements or prohibitions that effectively preclude foreign EPS suppliers from being in the market.

48. China has established and maintains a monopoly structure that ensures that CUP is the sole entity that can provide EPS for domestic purchases paid and denominated in RMB in China – the vast majority of all transactions in China. Chinese measures that create the monopoly structure and restrict the supply of EPS by foreign suppliers affect every element of the electronic payment system and all of the key participants (issuers, acquiring institutions, merchants, and EPS suppliers themselves) and card-based electronic payment transactions and include the following measures.

49. *First*, China imposes 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. These measures require that all transactions denominated and paid in RMB in China must processed and cleared in RMB through CUP, and where there is a choice, all domestic transactions on dual currency cards must be routed in RMB through CUP.[62] For a detailed description of these

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[60] The People's Bank of China, The Reply of the People's Bank of China on the Opening of China UnionPay Co., Ltd., Yin Fu No. [2002] 64, para.1 ("We approve the opening of China UnionPay Co. Ltd and the Articles of Association of China UnionPay Co., ltd.").

[61] The Articles of Association of China UnionPay Co., Ltd., Article 12 (emphasis added) (Exhibit US-20).

[62] *See* Document No. 37 (Exhibit US-40); Document No. 57 (Exhibit US-41); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 16 (Exhibit US-44); Document No. 66 (Exhibit US-45); Document No. 8 (Exhibit US-46); Document No. 219 (Exhibit US-47); Document No. 254 (Exhibit US-48); Document No. 103 (Exhibit US-1); Document No. 153 (Exhibit US-49); Document No. 149 (Exhibit US-50); Document No. 53 (Exhibit US-51).

measures, the United States refers the Panel to sections V.B, V.C, and V.D of the U.S. July 29 Response.

50. *Second*, China imposes requirements on issuers of payment cards that any payment cards issued in China must bear the CUP logo. No other payment card logo benefits from such a mandate. Any dual currency card issued in China also must bear the CUP logo. This means that issuers *must* have access to the CUP system, and pay CUP for that access.[63] For a detailed description of these measures, the United States refers the Panel to sections V.B, V.C, and V.E of the U.S. July 29 Response.

51. *Third*, China requires that all ATM, merchant card processing devices, and POS terminals in China post the CUP logo and be capable of accepting CUP cards. These requirements extend to all such processing equipment and POS terminals in China and there is no equivalent requirement mandating acceptance for any other card.[64] For a detailed description of these measures, the United States refers the Panel to sections V.B, V.C, and V.F of the U.S. July 29 Response.

52. *Fourth*, China imposes requirements on acquiring institutions that they post the CUP logo and be capable of accepting all bankcards bearing the CUP logo.[65] For a detailed description of these measures, the United States refers the Panel to Sections V.B, V.C, and V.G of the U.S. July 29 Response.

53. *Fifth*, China imposes broad prohibitions on the use of non-CUP cards for cross-region or inter-bank (or cross-bank) transactions. China also requires that all inter-bank (or cross-bank) transactions for all bankcards be handled through CUP.[66] For a detailed description of these measures, the United States refers the Panel to sections V.B, V.C, and V.H of the U.S. July 29 Response.

54. *Finally*, China requires that CUP be used to handle all RMB transactions in Macao or Hong Kong using bankcards issued in China. China also requires that CUP be used to handle any RMB transactions in China using RMB cards issued in Hong Kong or Macao.[67] For a detailed description of these measures, the United States refers the Panel to sections V.B, V.C, and V.I of the U.S. July 29 Response.

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[63] *See* Document No. 37 (Exhibit US-40); Document No. 57 (Exhibit US-41); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 129 (Exhibit US-53); Document No. 219 (Exhibit US-47).

[64] *See* Document No. 37 (Exhibit US-40); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43).

[65] *See* Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 153 (Exhibit US-49); Document No. 149 (Exhibit US-50).

[66] *See* Document No. 37 (Exhibit US-40); Document No. 57 (Exhibit US-41); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43).

[67] *See* Document No. 16 (Exhibit US-44); Document No. 8 (Exhibit US-46); Document No. 219 (Exhibit US-47); Document No. 254 (Exhibit US-48).

55. As the following discussion demonstrates, certain measures explicitly establish CUP as the exclusive supplier of EPS for domestic payment card transactions in China. Other measures establish requirements or prohibitions that effectively preclude foreign EPS suppliers from being in the market.

56. Document No. 66 provides that only CUP may provide EPS with respect to all RMB-denominated transactions:

> China UnionPay Joint Stock Co., Ltd. (hereinafter referred to as "China Unionpay") shall arrange for the clearing in Renminbi in connection with the domestic transactions under domestic and foreign currency cards. The issuing financial institutions must submit the card bins of domestic and foreign currency cards to China UnionPay for download by acquiring financial institutions from the platform of China UnionPay. The acquiring financial institutions shall make proper system setup for bankcards, under which, Renminbi cards shall precede others when being read. Each issuing financial institution shall, on a monthly basis, submit for archival purpose to China UnionPay the amount of transactions processed by mistake or mis-switch and the list of the acquiring institutions making such mistake or mis-switch.[68]

57. Document No. 66 designates CUP as the sole entity that must clear RMB transactions for both domestic and foreign currency cards, effectuates that designation by requiring issuing institutions to cooperate with CUP by submitting bank identification numbers (bin), and permits CUP itself to review any transactions that were mistakenly not submitted through its systems, allowing CUP an enforcement position in protecting its monopoly.

58. China's prohibition on processing RMB transactions extends to Hong Kong and Macau as well. The PBOC has issued announcements in Document No. 16 and Document No. 8 stipulating that in "matters in relation to individual RMB bank card clearance shall be organized and handled by the clearance banks and China Union Pay…"[69] The PBOC in Document No. 219 mandates that acquiring institutions in border areas such as Hong Kong and Macau shall ensure that no merchant "authorize a third party to handle the Renminbi card business or transfer such business to the third party."[70] A subsequent announcement, Document No. 254, by the PBOC reinforced this requirement – and CUP's monopoly position – by requiring that all transactions arising from RMB cards issued in Hong Kong or Macau and used in China or RMB transactions in Hong Kong or Macau arising from bank cards issued in China be processed through CUP.[71]

59. Document No. 53 states in pertinent part that:

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[68] Document No. 66, Article 7.3 (Exhibit US-45).

[69] Document No. 16, Article 6 (Exhibit US-44); Document No. 8, Article 6 (Exhibit US-46).

[70] Document No. 219, Article 3 (Exhibit US-47).

[71] Document No. 254, Articles 3, 4, and 17 (Exhibit US-48)

> Domestic card transactions inside China shall be settled in RMB through domestic clearing channels after subtracting the amount of cash in foreign currencies withdrawn over the counter. Any overdraft arising from domestic transactions shall be paid by the cardholder in RMB.[72]

60. Document No. 53 reinforces existing measures and forecloses doubt, to the extent there was any, that an overdraft could be settled in a currency other than RMB and thus eliminates the possibility that it could be processed by an entity other than CUP. Accordingly, it reinforces CUP's monopoly.

61. Document No. 66, Document No. 16, Document No. 8, Document No. 219, Document No. 254, and Document No. 53 ensure CUP's exclusive monopoly position in connection with EPS for RMB transactions, and are inconsistent with China's obligations not to place any limitations on the number of foreign suppliers under Article XVI of the GATS.

62. China's measures also explicitly exclude any party other than CUP from providing EPS for interbank and cross-region transactions. Document No. 37 issued by the PBOC in 2001 regarding bankcard interoperability states that from 2004 onwards "all bank cards not bearing a CUP logo will not be used for cross-region or inter-bank transactions."[73] The PBOC strengthened the exclusivity of CUP for interbank transactions through another circular, Document No. 272, issued in 2002, which provides in part that "All inter-bank transactions of bank cards must be achieved through the internal systems of the commercial banks and the networks of China UnionPay."[74]

63. These provisions create a system in which CUP is the only entity that can supply EPS for RMB transactions among unrelated issuers and acquirers in China. It is the only entity that can "organize" RMB clearing work for double currency cards, which are the only kind that foreign suppliers may issue. CUP is the only entity that may conduct "cross-bank transactions of bank cards" among different entities. Cross-bank or inter-bank transactions are essential to most card-based electronic payment transactions. Domestic transactions in RMB must go through "domestic channels" – and CUP is the only one. In short, the measures detailed above ensure and consolidate CUP's monopoly position.

64. CUP is not merely the beneficiary of policies that ensure a monopoly status for interbank transactions. The PBOC through a 2002 circular, Document No. 94, granted CUP the ability to oversee the regulation of interbank transactions, including fee-setting. Articles 3.1(iii) and 4.2 provide in part:

> China UnionPay shall complete the formulation of the regulations on error and complaint handling regarding bank cards interoperability as soon as possible and ensure the implementation of such regulations, and regulate fee charging methods

[72] Document No. 53, Article V.2 (Exhibit US-51).

[73] Document No. 37, Article 2, Section 2.2(i) (Exhibit US-40).

[74] Document No. 272, Article 4.1 (emphasis added) (Exhibit US-43).

> and standards for inter-bank transactions at all city centers as soon as possible. In accordance with unified standards, commercial banks shall within their respective banks complete the formulation of the rules on settlement, error and complaint handling, etc. regarding interoperation of bank cards and ensure the implementation of such rules.
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> ***
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> All commercial banks shall be responsible for interoperability related work and business opening, processing system transformation, terminal transformation, promotion and popularization of bank cards bearing the CUP logo and ensure network operation quality in the 300 cities. The local branches of PBOC shall be responsible for organizing and driving forward the interoperation of bank cards and clean-up and rectification of POS equipments in the 100 cities, the specific implementation of which shall be all commercial banks' responsibility. PBOC and the headquarters of commercial banks shall be responsible for organizing and implementing the popularization of bank cards bearing the CUP logo in the 40 cities. China UnionPay shall be responsible for construction, operation, management of inter-bank exchange network of bank cards and industry disciplinary work related to interoperability of bank cards.

65. The unique privileges provided to CUP permit it to entrench its preferential position for inter-bank card-based transactions even were other measures to be lifted. In particular, CUP can set standards and fees such that it could, and in fact does, exclude all potential suppliers of EPS seeking to compete in providing services for card-based electronic payment transactions. The language of Article XVI:2(a) prohibits "monopolies" as well as "exclusive service providers." Consistent with a basic principle of treaty interpretation, every term must be given effect. Accordingly, the term monopoly must have a meaning that is distinct from that of "exclusive service supplier." As the dictionary definition of monopoly makes clear, a monopoly can be, *inter alia*, "exclusive possession or control of the trade in a commodity or service… the condition of having no competitor in one's trade or business …." or "an exclusive privilege to carry on a business, traffic, or service, granted by a government."[75] Accordingly, the types of privileges afforded CUP by the measures, including the ability to set prices, fall within the definition of both "monopoly" and "exclusive service supplier" and are thus proscribed by Article XVI:2(a).

66. Beyond these explicit bans, China has also denied market access by imposing measures that make it in fact impossible for foreign suppliers of EPS to participate in China's market. Specifically, these measures limit the number of foreign suppliers (to effectively zero) by providing CUP, and CUP alone, with unique privileges that make it economically unviable for any foreign supplier of EPS to participate in China's market.

[75] *New Shorter Oxford English Dictionary*, page 1819 (1993) (Exhibit US-57).

67. For example, China maintains requirements mandating that any bank card for RMB transactions in China that is issued in China must bear the CUP logo. Illustrative is Document 37, which provides:

> Bank cards issued by all commercial banks with inter-bank usability in China must bear the CUP logo at the specified position on the front of the cards, and all RMB credit cards issued solely for domestic use must also bear the CUP special anti-counterfeiting logo at the specified position, provided that special cards issued solely for specific regions or for specific usage shall not use the CUP logo;
>
> 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; and
>
> All 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.[76]

68. Document No. 272 provides that:

> All commercial banks must further specify their measures and working plans for promoting and using bank cards bearing the CUP logo, and must ensure that all newly issued bank cards conform to the unified requirements of bank cards bearing the CUP logo. Starting on October 1, 2002, all commercial banks shall not issue bank cards that do not bear the CUP logo in cities where they have completed the system transformation, terminal equipment transformation and opening to inter-bank business, and must launch the overall replacement work in relation to all categories of current bank cards that do not bear the CUP logo." [77]

69. Document Nos. 37, 57, 94, 272, 129, and 219 contain requirements that banks that issue payment cards in China must bear the CUP logo at a specified position, and that all ATMS and POS terminals must be capable of processing cards that bear the CUP logo. No foreign suppliers are eligible for this privilege. As banks and processing parties are already required to provide CUP such access (as well as pay for it), it makes no economic sense for such banks to pay for the additional privilege of using a foreign EPS. In other words, these types of privileges do not simply discriminate against foreign suppliers in the marketplace, they effectively deny them access altogether. As these measures effectively establish a quantitative limitation (and leave CUP as a monopoly), then they too should also be found inconsistent with Article XVI of the GATS.

70. GATS Article XVI:2 provides that "[i]n sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt . . . are defined as follows:

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[76] Document No. 37, Article 2, Section 2.1 (Exhibit US-40).

[77] Document No. 272, Article 3 (Exhibit US-43).

(a) limitations on the number of service suppliers, whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test." China has, through a number of measures listed above, granted CUP a monopoly in the supply of EPS for RMB-denominated transactions in its territory.

71. As is evident from the above, China's measures maintain a system in which CUP is the only entity that can supply an EPS for RMB transactions among unrelated issuers and acquirers in China. It is the only entity that can "organize" RMB clearing work for double currency cards, which are the only kind that foreign suppliers may issue. CUP is the only entity that may conduct "inter-bank" or "cross-bank" transactions of cards among different entities. Domestic transactions in RMB must go through "domestic channels" – and CUP is the only such channel. In short, China UnionPay is a monopoly.

72. The measures at issue impose market access restrictions on foreign EPS supplies. Moreover, the measures at issue are not justified by any limitations, conditions, or qualifications on market access in China's schedule. Thus, the measures at issue are inconsistent with China's obligations under Articles XVI:1 and XVI:2(a) of the GATS.

VII. CHINA'S MEASURES ESTABLISHING AND SUPPORTING CHINA UNIONPAY'S MONOPOLY ON THE SUPPLY OF EPS ARE INCONSISTENT WITH ARTICLE XVII OF THE GATS BECAUSE THEY ACCORD LESS FAVORABLE TREATMENT TO FOREIGN EPS SUPPLIERS

A. GATS Article XVII (National Treatment)

73. The measures imposed by China affecting suppliers of electronic payment services are also inconsistent with Article XVII of the GATS. Article XVII provides as follows:

> 1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[10]
>
> 2. A Member may meet the requirement of paragraph 1 by according to services and services suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
>
> 3. Formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

[10] Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantage which result from the foreign character of the relevant services or service suppliers.

74. A national treatment commitment under Article XVII of the GATS obligates a WTO Member to accord services and service suppliers of other Members "treatment no less favorable than that it accords to its own like services and services suppliers." Article XVII:2 specifies that a Member may accord foreign services or suppliers different treatment to achieve this objective. Article XVII:3 defines treatment as "less favorable" if it "modifies the conditions of competition in favour of services or service suppliers of the Member." In the *China – Publications and Audiovisual Products* dispute, the panel used a three-step analysis to identify whether measures were inconsistent with national treatment commitments: (1) whether China's commitments cover the activity in question; (2) whether the measures are "affecting" trade in services; and (3) whether the entities affected by the measure are "service suppliers of another Member" that have been subject to less favorable treatment than "like" Chinese suppliers.[78]

75. Consistent with the approach of the panel in that dispute, in examining a claim under Article XVII, three distinct elements are relevant to establishing a breach:

- the Member whose measure(s) is at issue has made a commitment in its services schedule in the relevant sector and mode of supply, and has not inscribed any relevant limitation to that commitment;

- the Member has adopted or applied a measure affecting the supply of services in that sector and/or mode of supply; and

- the measure accords to any other Member's service suppliers treatment less favorable than that accorded to its own like service suppliers.[79]

76. The United States demonstrates each of these elements below. China's measures regarding electronic payment services are inconsistent with China's GATS Article XVII commitments, as they treat foreign suppliers of these services less favorably than CUP.

B. China Made National Treatment Commitments Regarding The Supply of Electronic Payment Services

77. As discussed above, China made mode (1) and (3) national treatment commitments with respect to "All payment and money transmission services, including credit, charge and debit cards…" which clearly encompass the electronic payment services at issue here. China thereby committed to provide national treatment within the meaning of Article XVII to foreign suppliers of EPS.

[78] Panel Report, *China – Publications and Audiovisual Products*, paras. 7.962, 7.970, 7.and 972.

[79] *See, e.g.*, Panel Report, *China - Publications and Audiovisual Products*, para 7.956; Panel Report, *EC – Bananas III*, para. 7.314.

C. China's Measures Affect the Supply of Electronic Payment Services

78. As demonstrated in this submission and the U.S. July 29 Response, China maintains numerous measures affecting the supply of electronic payment services under modes (1) and (3). The measures operate to prevent market access irrespective of the mode. As a threshold matter, the terms "affecting" and "supply of services" have been construed broadly. The Appellate Body in *EC – Bananas III* explained that:

> [i]n our view, the use of the term "affecting" reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing". We also note that Article I:3(b) of the GATS provides that "'services' includes *any service* in *any sector* except services supplied in the exercise of governmental authority" (emphasis added), and that Article XXVIII(b) of the GATS provides that the "'supply of a service' includes the production, distribution, marketing, sale and delivery of a service". There is nothing at all in these provisions to suggest a limited scope of application for the GATS.[80]

79. The measures at issue affect the supply of services in two principal ways. First, there are measures that impose a limitation such that CUP is the sole entity that can process certain transactions, such as domestic RMB transactions. This of course means that foreign suppliers of EPS are prevented from supplying the service at all. Second, there are measures that promote CUP's position in the marketplace such as by imposing certain requirements on every key player in a card-based electronic payment transaction, including issuers (all cards issued in China for domestic RMB transactions must bear the CUP logo), merchants (all merchant card processing equipment and POS terminals must accept CUP cards), and acquiring institutions (which must post CUP logo and accept CUP cards).

80. To summarize, the following measures affect every aspect of a card-based electronic payment transaction and the key players – issuers, acquiring institutions, merchants, and EPS suppliers – involved in such transactions.

- China's measures ensure that CUP is the sole supplier of certain transactions such as interbank transaction, transactions denominated and paid in RMB, and transactions in certain border areas such as Hong Kong and Macau.[81] These provisions discriminate against foreign suppliers of EPS by either categorically precluding their participation in

[80] Appellate Body Report, *EC – Bananas III (AB)*, para. 220 (footnote omitted).

[81] *See* Document No. 37 (Exhibit US-40); Document No. 57 (Exhibit US-41); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 16 (Exhibit US-44); Document No. 66 (Exhibit US-45); Document No. 8 (Exhibit US-46); Document No. 219 (Exhibit US-47); Document No. 254 (Exhibit US-48); Document No. 103 (Exhibit US-1); Document No. 153 (Exhibit US-49); Document No. 149 (Exhibit US-50); Document No. 53 (Exhibit US-51).

the market, and/or by adversely modifying the conditions of competition among the key participants – issuers, acquiring institutions, merchants, and the EPS supplier – in card-based electronic payment transactions.

- China's measures requiring that any payment cards used only for RMB purchases in China, as well as any dual currency cards issued in China, bear the CUP logo.[82] No other EPS provider is afforded such a privilege. Since any issuer of payment cards in China is required to have access to the CUP system (and to pay for that privilege), the issuer has no reason to seek an alternative supplier of EPS. The requirement also means that even if a card was issued for a foreign EPS supplier, CUP would also gain as the CUP logo would be on the card as well.

- China's measures requiring all automatic teller machines, merchant card processing equipment and point of service terminals accept CUP cards.[83] No foreign EPS supplier is afforded a similar privilege. To the extent a foreign supplier of EPS was to create or secure access to a POS, then CUP would also gain as well because of this requirement.

- China's measures requiring that all acquiring institutions in China post the CUP logo and to accept all bankcards bearing that logo.[84] No foreign EPS supplier is afforded a similar privilege.

81. These measures affect the supply of electronic payment services within the meaning of Article XVII because they directly regulate the terms on which they may be provided in China.

D. China's Measures Treat Suppliers of Electronic Payment Services of Other Members Less Favorably than CUP, China's Supplier of Like EPS

82. As an initial matter, it is important to consider that the measures at issue provide disparate treatment solely according to the identity of the EPS supplier: CUP or not CUP. The Panel in *China - Publications and Audiovisual Products* found that:

[82] *See* Document No. 37 (Exhibit US-40); Document No. 57 (Exhibit US-41); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 129 (Exhibit US-53); Document No. 219 (Exhibit US-47).

[83] *See* Document No. 37 (Exhibit US-40); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43).

[84] *See* Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 153 (Exhibit US-49); Document No. 149 (Exhibit US-50).

> When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the "like service suppliers" requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin. We note that similar conclusions have been reached by previous panels. We observe that in cases where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required to determine whether suppliers on either side of the dividing line are, or are not, "like." [85]

83. Here, it is self-evident from China's own documents that China was concerned about the potential competition its domestic supplier of EPS faced from foreign suppliers of EPS and was determined to enhance its industry's position:

> By 2006, the RMB bank card operation shall be opened to the outside world in an all-around manner, and accordingly the bank card industry of our country is facing a comparatively big challenge and we should make use of the limited time to enhance the international competitiveness of our industries.[86]

84. Therefore, it is unsurprising that the measures at issue here are meant to favor the domestic Chinese entity and accordingly discriminate on that basis.

85. Outside of China, with the ability to operate from its protected home market, CUP has become a significant and increasingly active participant in this competition and EPS suppliers describe CUP as a competitor.[87] CUP's Articles of Association are explicit that the company is "to provide advanced electronic payment technologies and specialized services in connection with the inter-bank bank card information switching."[88] CUP itself recently noted the global reach of its "payment services" around the world:

> As the bankcard association in China, China UnionPay operates the national inter-bank clearing and settlement system, develops the worldwide UnionPay Card acceptance network, promotes the issuance and usage of the UnionPay Card as well as other innovative payment solutions, so as to provide quality, efficient and safe payment services to cardholders. To date, the total number of the UnionPay

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[85] Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

[86] Document No. 103, Section III (Exhibit US-1).

[87] *See* U.S. July 29 Response, paras. 55-61; *see also, e.g.*, Visa 2008 IPO Prospectus, page 147 ("In certain countries, our competitors have leading positions, such as JCB in Japan and China UnionPay in China, which is the sole domestic payment processor and operates the sole domestic acceptance mark in China due to local regulation.") (Exhibit US-3); MasterCard 2009 Annual Report, page 20 ("some of competitors such as JCB in Japan and China UnionPay have leading positions in their domestic markets... China UnionPay is the sole domestic processor designated by the Chinese government and operates the sole national cross-bank information switch network in China due to local regulation.") (Exhibit US-5).

[88] The Articles of Association of China UnionPay Co., Ltd., Article 12 (Exhibit US-20).

> Card issued both at home and aboard has exceeded 2.5 billion. The UnionPay network has been extended to all the cities and rural areas in China. In addition, China UnionPay has enabled the UnionPay Card acceptance over 110 countries and regions through extensive cooperation with about 400 financial institutions around the world.

86. CUP's success in the global market for card-based electronic payment transactions reflects and is in accord with the "purpose of the company," which is to foster "and promote the rapid development of China's bank card industry."[89]

87. It is clear that CUP provides services for payment card transactions "like" those provided by foreign suppliers of EPS for payment card transactions and that the basis for the differential treatment by China in its measures is ultimately one of origin, and the "like service suppliers" requirement of Article XVII is therefore satisfied.

88. The Panel in *China – Publications and Audiovisual Products* explained:

> a measure that prohibits foreign service suppliers from supplying a range of services that may, subject to satisfying certain conditions, be supplied by the like domestic supplier cannot constitute treatment 'no less favourable,' since it deprives the foreign service supplier of any opportunity to compete with like domestic suppliers. In terms of paragraph 3 of Article XVII, such treatment modifies conditions of competition in the most radical way, by eliminating all competition by the foreign service supplier with respect to the service at issue.[90]

1. Requirements that mandate the use of CUP and/or establish CUP as the sole supplier of EPS for domestic RMB transactions in China

89. On their face, many of the measures at issue explicitly prohibit any entity other than CUP from supplying services in the Chinese market. China's measures thus categorically exclude foreign suppliers of EPS from providing EPS on RMB and interbank transactions. For example, Document No. 66 by the State Administration of Foreign Exchange provides that only CUP may provide EPS with respect to all RMB-denominated transactions: "China UnionPay Joint Stock Co., Ltd. (hereinafter referred to as "China UnionPay") shall arrange for the clearing in Renminbi in connection with the domestic transactions under domestic and foreign currency cards."[91] And because Document 272 requires that "[a]ll cross-bank transactions of all bankcards must be achieved through the internal systems of the commercial banks and the networks of China UnionPay," CUP becomes the only entity that can supply an EPS for RMB

[89] The Articles of Association of China UnionPay Co., Ltd., Article 11 (Exhibit US-20).

[90] Panel Report, *China - Publications and Audiovisual Products*, para 7.979.

[91] Document No. 66, Article 7.3 (Exhibit US-45).

transactions among unrelated issuers and acquirers in China, including dual currency cards, the only kind foreign suppliers may issue.[92]

90. Because these measures categorically prohibit foreign EPS suppliers from participating in certain transactions, their treatment is less favorable than that afforded CUP, a Chinese entity, and therefore inconsistent with China's obligations under GATS Article XVII.

91. The Panel in *Canada – Autos* noted that:

> Article XVII requires each Member to accord to services and service suppliers of any other Member treatment no less favourable than it accords to its own like services and service suppliers, and that it defines treatment less favourable as formally different or formally identical treatment which modifies the conditions of competition in favour of domestic services and service suppliers.[93]

92. As explained above, China's measures include those that prevent competition against CUP altogether in regards to certain transactions. Other measures, however, while not *per se* banning competition modify the conditions of competition to disfavor foreign suppliers of EPS as opposed to CUP.

2. CUP logo requirements

93. First, China maintains measures that ensure payment cards bear the CUP logo. In particular, the PBOC has issued a circular, Document No. 57, mandating several requirements for bank cards issued by commercial banks. Document No. 57 1, 2, 3, and 5 respectively requires 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. Commercial banks have the discretion to decide whether to place the CUP holographic logo on their RMB debit cards issued solely for domestic use, but shall not use any anti-counterfeit logo other than the CUP holographic anti-counterfeit logo.[94]

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[92] Document No. 272, Article 4.1 (Exhibit US-43).

[93] Panel Report, *Canada – Autos*, para. 10.304.

[94] Document No. 57, Article 1 (Exhibit US-41).

> 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.[95]
>
> ***
>
> From the issuance date of this Circular, bank cards which are newly issued by commercial banks upon application with cross-region or inter-bank use function must comply with the unified 'Business Specifications for Interoperable Service of Bank Cards' and relevant technical standards. The commercial banks must submit to PBOC a card sample which complies with the use requirements of CUP logo in accordance with the requirements of this Circular.[96]
>
> ***
>
> 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. [97]

94. Similarly, Document No. 37 provides that "By the end of this year, 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."[98] Article 2 of Document No. 37 provides that all ATM and point-of-sale ("POS") terminals in China must be capable of accepting CUP cards and prohibits the use of non-CUP cards for cross-region or cross-bank transactions.

95. In addition, Document No. 129 requires that all newly issued bankcards must bear the CUP logo and "must conform to the unified business specifications and technical meet CUP standards.[99] Document No. 219 provides for both the use of CUP to process authorized card transactions and also that no supplier of EPS can process a card transaction that is not authorized.[100]

96. Document No. 272 details additional requirements relating to the use and promotion of cards bearing the CUP logo and provides that "all commercial banks" must "further specify their measures and working plans for promoting and using bank cards bearing the CUP logo, and must ensure that all newly issued bank cards conform to the unified requirements of bank cards

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[95] Document No. 57, Article 2 (Exhibit US-41).

[96] Document No. 57, Article 3 (Exhibit US-41).

[97] Document No. 57, Article 5 (Exhibit US-41).

[98] Document No. 37, Article 1, Section 1.2(i) (Exhibit US-40).

[99] Document No. 219, Article III (Exhibit US-47).

[100] Document No. 129, Article 3.2 (ii) (Exhibit US-53).

bearing the CUP logo." [101] As of October 1, 2002, all commercial banks are prohibited from issuing "bank cards that do not bear the CUP logo in cities where they have completed the system transformation, terminal equipment transformation and opening to inter-bank business." And for cities where such systems are not in place the commercial banks "must launch the overall replacement work in relation to all categories of current bank cards that do not bear the CUP logo."[102] Document No. 272 further specifies that "All inter-bank transactions of bank cards must be achieved through the internal systems of the commercial banks and the networks of China Unionpay ("UnionPay Networks")."[103]

97. Document No. 94 establishes additional requirements relating to "card interoperability" and highlights the importance of the CUP logo requirements to "further improve development of the bank card processing market, promote interoperability of bank card and popularization and application of bank cards bearing the CUP logo."[104]

98. Document No. 94 references the "unified arrangement made in 2001" and mandates that "commercial banks shall continue to carry out standardization transformation of branch business process systems and terminal equipment such as ATM, POS etc., and make sure to complete standardization transformation of equipment of those 40 cities where the bank cards bearing the CUP logo are being popularized and promoted." [105] China UnionPay is charged with responsibility "for transformation of the POS equipment which are managed and operated by city centers." [106]

99. Document No. 94 provides direction to commercial banks that highlights the importance of interoperability for all cards bearing the CUP logo in terms of "processing system transformation, terminal transformation, promotion and popularization of bank cards bearing the CUP logo…China Unionpay shall be responsible for construction, operation, management of inter-bank exchange network of bank cards and industry disciplinary work related to interoperability of bank cards."[107]

100. Through these measures China imposes requirements that any bank cards issued in China only for RMB purchases in China, as well as any dual currency cards issued in China, must bear the CUP logo. This means that issuers must have access to the CUP system, and pay CUP for that access, and these requirements have served to promote and help establish the exclusive use of CUP cards for RMB purchases in China, as well as any dual currency cards issued in China, for RMB purchases in China.

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[101] Document No. 272, Article 3 (Exhibit US-43).

[102] Document No. 272, Article 3 (Exhibit US-43).

[103] Document No. 272, Article 4.1 (Exhibit US-43).

[104] Document No. 94, Article 2 (Exhibit US-42).

[105] Document No. 94, Article 3(i) (Exhibit US-42).

[106] Document No. 94, Article 3(ii) (Exhibit US-42).

[107] Document No. 94, Article 4.2 (Exhibit US-42).

101. These requirements have significant implications. Issuing banks may not use the CUP logo unless they have paid for access to the CUP network and meet CUP's technical standards. These measures have three competitive effects – they guarantee CUP an income stream from every credit card issued for domestic use within China, they give issuers an incentive to control costs by using CUP as their exclusive supplier, and they provide free branding to CUP. In contrast, foreign suppliers of EPS are forced to secure such access and promote their brand on their own. Even if a foreign supplier of EPS was to convince an issuer to issue a card, these requirements ensure that it will not be able to compromise CUP's prominent logo or obtain any market share to the certain exclusion of CUP. In any event, because only CUP can handle inter-bank or cross-region card-based electronic transactions, the value, if any, of co-branding or having a non-CUP supplier of EPS is extremely limited.

3. ATMs, merchant card processing devices, and POS terminals

102. China's measures also require that all ATMs, merchant processing devices, POS terminals, as well as acquiring institutions, be capable of accepting CUP cards. This treatment gives a competitive advantage to CUP, as it is guaranteed access to all merchants in China who accept credit cards, while foreign EPS must market themselves to each POS terminal user.

103. Issued in 2001, Document No. 37 provides that "By the end of this year, 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."[108] Document No. 37 further specifies that that all ATM and POS terminals in China to be capable of accepting CUP cards:

> 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.[109]

104. Document No. 37 further specifies that "All 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."[110]

105. Similarly, in 2002, Document No. 272 confirmed requirements relating to "system transformation, terminal equipment transformation and opening to inter-bank business":

> All commercial banks must further specify their measures and working plans for promoting and using bank cards bearing the CUP logo, and must ensure that all newly issued bank cards conform to the unified requirements of bank cards bearing the CUP logo. Starting on October 1, 2002, all commercial banks shall

[108] Document No. 37, Article 1, Section 1.2(i) (Exhibit US-40).

[109] Document No. 37, Article 1, Section 1.2(i) (Exhibit US-40).

[110] Document No. 37, Article 1, Section 2.1 (Exhibit US-40).

> not issue bank cards that do not bear the CUP logo in cities where they have completed the system transformation, terminal equipment transformation and opening to inter-bank business, and must launch the overall replacement work in relation to all categories of current bank cards that do not bear the CUP logo.[111]

106. Document No. 94 provides additional direction with respect to "bank card interoperability related work in 2002." Document No. 94 states:

> Concerning standardization transformation of terminal equipments such as ATM, POS, etc., for the purpose of improving efficiency of interoperability, further improve development of the bank card processing market, promote interoperability of bank card and popularization and application of bank cards bearing the CUP logo. On this basis, gradually expand the coverage of bank card acceptance, improve service environment and increase the ratio of spending by consumers using bank cards in total retail sales.[112]

107. Document No. 94 also details additional requirements and guidance regarding "Relevant Work Requirements" and specific directions for "implementation of unified business specifications and technical standards" for CUP cards:

> (i) In compliance with the unified arrangement made in the 2001 national bank card work conference, commercial banks shall continue to carry out standardization transformation of branch business process systems and terminal equipment such as ATM, POS etc., and make sure to complete standardization transformation of equipment of those 40 cities where the bank cards bearing the CUP logo are being popularized and promoted. The standardization transformation of bank card business processing systems of all banks and terminal equipments such as ATM, POS etc. in the 40 cities shall be collectively conducted phase by phase in accordance with the unified schedule defined in Appendix 1 hereto.
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> (ii) The transformation of terminal equipment shall be conducted with a system where a bank is responsible for its own equipment. China UnionPay Joint Stock Co., Ltd (China UnionPay) shall be responsible for transformation of the POS equipment which are managed and operated by city centers. The transformation of those POS equipment outsourced to be managed and operated by third parties shall be the responsibility of the bank which originally owned such equipment.
>
> (iii) China UnionPay shall complete the formulation of the regulations on error and complaint handling regarding bank cards interoperability as soon as possible and ensure the implementation of such regulations, and regulate fee charging

[111] Document No. 272, Article 3 (Exhibit US-43).

[112] Document No. 94, Article 2 (Exhibit US-42).

> methods and standards for inter-bank transactions at all city centers as soon as possible. In accordance with unified standards, commercial banks shall within their respective banks complete the formulation of the rules on settlement, error and complaint handling, etc. regarding interoperation of bank cards and ensure the implementation of such rules.[113]

108. Elsewhere Document 94 speaks in terms of "processing system transformation, terminal transformation, promotion and popularization of bank cards bearing the CUP logo" as noted below:

> All commercial banks shall be responsible for interoperability related work and business opening, processing system transformation, terminal transformation, promotion and popularization of bank cards bearing the CUP logo and ensure network operation quality in the 300 cities. The local branches of PBOC shall be responsible for organizing and driving forward the interoperation of bank cards and clean-up and rectification of POS equipments in the 100 cities, the specific implementation of which shall be all commercial banks' responsibility. PBOC and the headquarters of commercial banks shall be responsible for organizing and implementing the popularization of bank cards bearing the CUP logo in the 40 cities. China Unionpay shall be responsible for construction, operation, management of inter-bank exchange network of bank cards and industry disciplinary work related to interoperability of bank cards. [114]

109. As the above measures demonstrate, China imposes requirements that all ATM, merchant card processing equipment, and point-of-sale or "POS" terminals in China be capable of accepting CUP cards. There is no equivalent requirement for other cards.

110. The requirement that all ATMs and POS terminals be capable of using CUP cards also modifies the conditions of competition in favor of CUP. The main value that an EPS has to offer issuing banks and cardholders is the ability to use a card at a large number of locations, and the larger the network of merchants that use the card, the greater the attractiveness of the EPS to its customers. In China, a foreign EPS must build that network by marketing itself to merchants and acquiring banks. Thus, CUP's access to every ATM and POS in China at no cost modifies the conditions of competition in favor of CUP, making the measures inconsistent with any national treatment commitment that China has.

4. Requirement that all acquiring institutions in China post the CUP logo and be capable of accepting all payment cards bearing the CUP logo

111. China also imposes requirements that all acquiring institutions in China post the CUP logo and be capable of accepting all payment cards bearing the CUP logo.

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[113] Document No. 94, Article 3.1 (Exhibit US-42).

[114] Document No. 94, Article 4.2 (Exhibit US-42).

112. 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."[115]

113. Document No. 149, from 2009, 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."[116]

114. Document No. 94 references the need for "transformation of terminal equipments such as ATM, POS, etc., for the purpose of improving efficiency of interoperability, further improve development of the bank card processing market, promote interoperability of bank card and popularization and application of bank cards bearing the CUP logo."[117]

115. Document No. 94 further specifies requirements pertaining to "standardization transformation of branch business process systems and terminal equipment such as ATM, POS" and provides as follows:

> All commercial banks shall be responsible for interoperability related work and business opening, processing system transformation, terminal transformation, promotion and popularization of bank cards bearing the CUP logo and ensure network operation quality in the 300 cities. The local branches of PBOC shall be responsible for organizing and driving forward the interoperation of bank cards and clean-up and rectification of POS equipments in the 100 cities, the specific implementation of which shall be all commercial banks' responsibility. PBOC and the headquarters of commercial banks shall be responsible for organizing and implementing the popularization of bank cards bearing the CUP logo in the 40 cities. China Unionpay shall be responsible for construction, operation, management of inter-bank exchange network of bank cards and industry disciplinary work related to interoperability of bank cards.[118]

5. Prohibition on the use of non-CUP cards for inter-bank or cross-region transactions; and requirement that all inter-bank transactions must be handled by CUP

116. This treatment afforded by the measures in Document No. 37, Document No. 57, Document No. 94, Document No. 272, Document No. 16, Document No. 66, Document No. 8, Document No. 219, Document No. 251, Document No. 103, Document No. 153, Document No. 149, and Document No. 53 operate individually and together and give CUP advantages at every step of the EPS process. China has steadfastly refused to allow foreign electronic payments services providers to issue their own branded RMB-denominated bank cards, build merchant

[115] Document No. 153, Article 2.2 (Exhibit US-49).

[116] Document No. 149, Section 2(5)(iii) (Exhibit US-50).

[117] Document No. 94, Article 4.2 (Exhibit US-42).

[118] Document No. 94, Article 4.2 (Exhibit US-42).

acceptance networks to support such cards, and process inter-bank point-of-sale transactions involving such cards in China. Indeed, from the issuance of cards, to their use in the marketplace and requirements on merchants and acquiring institutions, to the constraints on interoperability and inter-bank transfers, CUP operates in a fully protected market with significant advantages that potential competitors lack. China's measures provide less favorable treatment to EPS and EPS suppliers from the United States because they modify the conditions of competition in favor of CUP as compared to foreign EPS suppliers.

117. In sum, for the reasons set forth above, the measures described above in Section VII are inconsistent with Article XVII of the GATS because they accord less favorable treatment to foreign suppliers of EPS than to CUP.

VIII. CONCLUSION

118. The United States respectfully requests, for the reasons set forth in this submission, that the Panel find that China's measures, as set out above, are inconsistent with China's obligations under Article XVI:1 and XVI:2(a) and Article XVII of the GATS. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with its WTO obligations.