

*China – Certain Measures Affecting Electronic Payment Services*

**(DS413)**

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## TABLE OF CONTENTS

<b>I.</b>	<b>Introduction</b> .....	<b>1</b>
<b>II.</b>	<b>EPS For Payment Card Transactions Is A Single, Integrated Service That Falls Within The Ordinary Meaning of Subsector (d) of China’s Schedule (“All Payment And Money Transmission Services, Including Credit, Charge and Debit Cards...”)</b> <b>5</b>	
A.	Overview.....	5
B.	EPS for Payment Card Transactions is a Single, Integrated Service.....	6
C.	The Ordinary Meaning of Subsector (d) (“All Payment and Money Transmission Services, Including Credit, Charge and Debit Cards...”) Indicates That It Expressly Covers EPS for Payment Card Transactions .....	7
1.	The Ordinary Meaning of “All payment and money transmission services” .....	9
2.	“Credit, charge and debit cards” .....	11
D.	The Context, Including the Annex on Financial Services, Supports the Conclusion that the Ordinary Meaning of Subsector (d) Covers EPS for Payment Card Transactions .....	14
E.	Other Evidence Confirms that Subsector (d) Covers EPS for Payment Card Transactions .....	14
<b>III.</b>	<b>EPS for Payment Card Transactions Does Not Fall Within Item (xiv) (“Settlement and Clearing Services for Financial Assets, Including Securities, Derivative Products and Other Negotiable Instruments”)</b> .....	<b>15</b>
A.	Overview.....	15
B.	The Ordinary Meaning of Item (xiv), Read In Context, Indicates that “Settlement and Clearing Services for Financial Assets, Including Securities, Derivative Products, and Other Negotiable Instruments” Does Not Include EPS for Payment Card Transactions .	17
1.	The Financial Instruments and Value of the Transaction Typically Involved in Item (xiv) .....	19
2.	The Settlement and Clearing Process in Item (xiv) Involves Different Market Participants .....	20
3.	Transaction Processing and Infrastructure Requirements Differ for Item (xiv) “Settlement and Clearing of Financial Assets” .....	21
4.	Regulatory Oversight Differs For Item (xiv) “Settlement and Clearing Services for Financial Assets” .....	24
C.	The Illustrative List of Financial Assets in Item (xiv) Indicates That the Scope of those Assets is Limited to Investment Instruments .....	26
1.	Payment Cards Are Not Similar to “Securities” .....	27

2.	Payment Cards Are Not Similar To “Derivative Products” .....	27
3.	Payment Cards Are Not Negotiable Instruments .....	27
4.	Payment Cards Are Not Similar to other Types of “Negotiable Instruments” Referred to in Item (xiv) .....	30
D.	China’s Interpretation of “Financial Asset” and “Negotiable Instrument” Does Not Accord With How The Term is Used Elsewhere in the Annex .....	31
E.	As Additional Context, Subsector (d) Is the Most Specific and Accurate Description for Purposes of Classifying EPS for Payment Card Transactions .....	32
<b>IV.</b>	<b>China’s Mode 1 and Mode 3 Commitments for Subsector (d) “All Payment and Money Transmission Services, Including Credit, Charge, and Debit Cards...” .....</b>	<b>34</b>
A.	China’s Mode 1 Commitments for “All Payment and Money Transmission Services, Including Credit, Charge and Debit Cards...” .....	34
B.	China’s Mode 3 Commitments for “All Payment and Money Transmission Services, Including Credit, Charge and Debit Cards...” .....	37
1.	The “Banking Services” Subheading in China’s Schedule Does Not Limit China’s Commitments to Banks .....	38
2.	China’s Commitments in Subsector (d) Are Not Limited to “Foreign Financial Institutions” .....	39
3.	China’s Definition of “Financial Institution” Is Too Narrow .....	40
<b>V.</b>	<b>China’s Measures Establishing and Supporting China UnionPay’s Monopoly on the Supply of EPS are Inconsistent With Article XVI of the GATS .....</b>	<b>42</b>
A.	GATS Article XVI (Market Access).....	42
B.	China’s Measures Related to China UnionPay and the Use of CUP Payment Cards Operate to Limit The Number Of Suppliers of EPS .....	43
1.	Requirements that mandate the use of CUP and/or establish CUP as the sole supplier of EPS for all domestic transactions denominated in and paid in RMB. ....	45
a.	Instruments that Designate CUP as Sole Supplier .....	47
b.	Document No. 76 and Requirements to Use Uniform Business Specifications and Technical Standards .....	49
c.	Instruments Which Recognize that CUP Is the Sole Supplier .....	54
2.	Requirements on issuers that payment cards issued in China bear the CUP logo. ....	55
3.	Requirements that all ATM and POS terminals in China accept CUP cards. ....	56
4.	Requirements on acquiring institutions to post the CUP logo and be capable of accepting all bank cards bearing the CUP logo.....	57
5.	Broad prohibitions on the use of non-CUP cards. ....	58

6.	Requirements relating to China, Macao, and Hong Kong that mandate the use of CUP.	59
7.	Conclusion .....	59
C.	China Has Not Rebutted the U.S. Prima Facie Case .....	60
<b>VI.</b>	<b>China's Measures Accord Less Favorable Treatment To Foreign EPS Suppliers...</b>	<b>60</b>
A.	GATS Article XVII (National Treatment) .....	60
B.	China's Measures Treat EPS Suppliers of Other Members Less Favorably than CUP, China's Supplier of the Like Service .....	62
<b>VII.</b>	<b>Conclusion .....</b>	<b>66</b>

## TABLE OF REPORTS CITED

Short Title	Full Case Title and Citation
<i>Canada – Aircraft (Article 21.5)</i>	Panel Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/RW, adopted 4 August 2000, as modified by the Appellate Body Report, WT/DS70/AB/RW
<i>Canada – Autos</i>	Panel Report, <i>Canada – Certain Measures Affecting the Automotive Industry</i> , WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R
<i>Canada – Dairy (Second Recourse to Article 21.5)</i>	Panel Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/RW2, WT/DS113/RW2, adopted 17 January 2003, as modified by the Appellate Body Report, WT/DS103/AB/RW2, WT/DS113/AB/RW2
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>US – Gambling Services</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005, DSR 2005:XII, 5663 (Corr.1, DSR 2006:XII, 5475)
<i>US – Gambling Services</i>	Panel Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R
<i>US – Cotton (Article 21.5)</i>	Panel Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by the Appellate Body, WT/DS267/AB/RW
<i>US – Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005
<i>US – Shirts and Blouses</i>	Appellate Body Report, <i>United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India</i> , WT/DS33/AB/R and Corr.1, adopted 23 May 1997
<i>US-Softwood Lumber II</i>	GATT Panel Report, <i>United States – Measures Affecting Imports of Softwood Lumber from Canada</i> , SCM/162, adopted 27 October 1993

## I. INTRODUCTION

1. China created and maintains a monopoly for China UnionPay, Co. Ltd. (“CUP”) to supply the service necessary for credit, charge, debit and other payment card transactions to occur in China for *all* transactions where the card is issued in China and used in China. Such transactions, whether RMB-payment card transactions or transactions using foreign currency denominated payment cards issued in China, constitute the overwhelming number of all payment card transactions in China.

2. The evidence and arguments advanced by the United States also establish that the service at issue is a single, integrated service falling within subsector (d) of China Schedule of Specific Commitments: “All payment and money transmission services, including credit, charge and debit cards...” China undertook both mode 1 (cross-border) and mode 3 (commercial presence) commitments with respect to subsector (d). Finally, China’s 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, and 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.

3. China continues to assert that “there is neither a need nor a legal basis to proceed to an evaluation of whether the measures that the United States challenged in this dispute are inconsistent with Articles XVI and XVII of the GATS.”<sup>1</sup> This assertion contrasts sharply with China’s apparent recognition of its obligations in 2005, nearly seven years ago, that its “bank card industry” was “facing a comparatively big challenge” because “[b]y 2006, the RMB bank card operation” would be “opened to the outside world in an all-around manner.”<sup>2</sup>

4. Rather than open its market, however, China all but concedes that it created a monopoly for CUP so that the Chinese market would not be “taken over” by foreign EPS suppliers. In its words, “China wanted to achieve the same network effects associated with interbank payment cards, but without having the Chinese market taken over by the same network operators that had come to dominate other markets.”<sup>3</sup> Yet during the Panel’s first meeting with the Parties, China reversed course, asserting that foreign suppliers face no obstacles in China. China also asserted that the United States had failed to demonstrate that foreign electronic payment services (“EPS”) suppliers could not supply EPS for payment card transactions in China. China’s response to the Panel’s direct question is illuminating. The Panel asked:

Could China confirm that operators other than China UnionPay could be authorised to establish their own network and process domestic RMB-denominated payment card transactions independently from China UnionPay's

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<sup>1</sup> China’s First Written Submission, para. 1.

<sup>2</sup> Document No. 103, Section III (Exhibit US-1).

<sup>3</sup> China’s First Written Submission, para. 54.

network? If relevant, please identify legal instruments and provisions that address this.<sup>4</sup>

5. China did not answer the Panel’s question.<sup>5</sup> China’s non-response is not surprising. EPS suppliers other than CUP cannot process domestic RMB-denominated payment card transactions in China, nor can they process any transactions using foreign denominated currency cards issued in China. Nor does China indicate why this question calls for “speculation” or involve measures not within the Panel’s terms of reference. It is clear that the measures that the United States has cited and submitted to the Panel demonstrate that foreign suppliers cannot provide the service. In fact, only CUP can process a payment card transaction in China where the card is issued in China and used in China. The measures that have established and maintain CUP’s monopoly prevent foreign suppliers of EPS for payment card transactions from competing in China.

6. As the United States has indicated, the six separate measures and 19 instruments identified by the United States operate both individually and in conjunction with one another to establish a monopoly for CUP and restrict the supply of EPS by foreign suppliers. The measures affect every aspect of a card-based electronic payment transaction and all of the key participants in a payment card transaction (issuer, acquirer, merchant, and the EPS supplier):

- ***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 RMB-denominated payment card transactions in China be processed by CUP, and that CUP process all foreign currency denominated card transactions where the card is issued in China. In short, China requires that CUP process all payment card transactions where the card is issued in China and used in China.<sup>6</sup>
- ***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.<sup>7</sup>
- ***Requirements that all automated teller machines (“ATM”), merchant card processing equipment, and POS terminals in China accept CUP cards.*** China requires that all

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<sup>4</sup> Questions by the Panel Posed in the Context of the First Substantive Meeting with the Parties, 28 October 2011, Question No. 22(b).

<sup>5</sup> See Answers of the People’s Republic of China to Questions from the Panel Following the First Substantive Meeting, November 11, 2011 (“China’s Answers to Panel’s Questions”), paras. 15-16.

<sup>6</sup> 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, 2011 Response”), sections V.B, V.C, V.D; U.S. First Written Submission, paras. 12, 31, 37-72; 79-92; U.S. Answers to Panel Questions, paras.13-16, 23-36, 62-66. See also sections V.B.1, and VI.B of this submission.

<sup>7</sup> See U.S. July 29, 2011 Response, sections V.B, V.C, V.E; U.S. First Written Submission, paras. 12, 31, 37-72; 93-101; U.S. Answers to Panel Questions, paras.13-15, 17, 23-36, 62-66. See also sections V.B.2, and VI.B of this submission.

ATMs, merchant card processing equipment, and POS terminals in China be capable of accepting CUP cards.<sup>8</sup> 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.<sup>9</sup> 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 any EPS supplier other than CUP for any payment card transaction where the card is issued in China and used in China, and also prohibits suppliers other than CUP from processing inter-bank transactions where the issuing bank and acquiring bank are different.<sup>10</sup> 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.<sup>11</sup> China also requires that CUP be used to handle any RMB transactions in China using RMB cards issued in Hong Kong or Macao.

7. China’s defense thus far has entailed avoidance of the merits regarding the challenged measures, unsubstantiated assertions, and a series of implausible arguments. For example, China argues that it took certain commitments under subsector (d) for “credit, charge and debit cards” but took no commitments for the “payment and money transmission services” that are commonly understood to be intrinsic to the use of those cards and that are the heart of the service. EPS is properly classified in subsector (d) of China’s Schedule and the narrow interpretation of subsector (d) advanced by China – that it only includes issuing and acquiring services – cannot be reconciled with the breadth of its explicit commitments for “all payment and money

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<sup>8</sup> See U.S. July 29, 2011 Response, sections V.B, V.C, V.F; U.S. First Written Submission, paras. 12, 31, 37-72; 102-110; U.S. Answers to Panel Questions, paras.13-15, 18, 23-36, 62-66. See also sections V.B.3, and VI.B of this submission.

<sup>9</sup> See U.S. July 29, 2011 Response, sections V.B, V.C, V.G; U.S. First Written Submission, paras. 12, 31, 37-72; 111-115; U.S. Answers to Panel Questions, paras.13-15, 19, 23-36, 62-66. See also sections V.B.4, and VI.B of this submission.

<sup>10</sup> See U.S. July 29, 2011 Response, sections V.B, V.C, V.H; U.S. First Written Submission, paras. 12, 31, 37-72; 79-117; U.S. Answers to Panel Questions, paras.13-15, 20, 23-36, 62-66. See also sections V.B.5, and VI.B of this submission.

<sup>11</sup> See U.S. July 29, 2011 Response, sections V.B, V.C, V.I; First Written Submission, paras. 12, 31, 37-72; 79-117; U.S. Answers to Panel Questions, paras.13-15, 21, 23-36, 44-51, 62-66. See also sections V.B.6, and VI.B of this submission.

transmission services, including credit, charge, and debit cards.” The extensive evidence provided by the United States demonstrates that EPS is central to payment card transactions and without this service the transactions could not occur.

8. At the same time, China also argues that certain components of EPS for payment card transactions fall within a sector for which, not surprisingly, China has undertaken no commitments. China’s arguments here, however, rest on an exceedingly broad interpretation of item (xiv) of the Annex on Financial Services, “settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments.” The same rules of treaty interpretation that compel the conclusion that EPS for payment card transactions fall within subsector (d) also compel the conclusion that EPS for payment card transactions do not fall within item (xiv), which, based on the ordinary meaning, when read in context and in light of the object and purpose of the GATS, is of which limits its scope “settlement and clearing services for” investment instruments, such as securities.

9. China also asserts that it has *no* mode 1 commitments and no *applicable* mode 3 commitments in subsector (d). China contends that the extensive language qualifying the word “Unbound” under mode 1 for subsector (d) is simply redundant of other subsectors, (k) and (l). Given the difficulty with its position, China now calls on the Panel to embark on a “thought exercise” in which it asks the Panel to disregard the actual text and to “imagine” that China’s Mode 1 market access entry does not contain the wording it does, “but instead said ‘unbound except for subsectors (k) and (l).’”<sup>12</sup> As China’s argument suggests, it would need to rewrite its Schedule to find support for the position it now advances. Indeed, it is the actual terms of China’s commitments – as the words have been inscribed in China’s Schedule – that must be interpreted. For this reason as well, China’s arguments that it restricted its mode 3 commitments to the supply of foreign services to “foreign financial institutions” are similarly without merit. China failed to use language to indicate any such limitation and has an explicit statement in its Schedule that criteria for authorization are solely “prudential.” Finally, China’s arguments are undermined by the fact that China considers CUP – the monopolist supplier of EPS in China – to be, and CUP is, in fact in China, a “financial institution.”

10. Section II of this submission explains further why EPS for payment card transactions is a single, integrated service that falls within the ordinary meaning of subsector (d) of China’s Schedule. Section III shows that EPS for payment card transactions does not fall within the ordinary meaning of item (xiv) of the Annex. Section IV confirms that China has undertaken both mode 1 and mode 3 commitments for subsector (d). Finally, Sections V and VI address, respectively, China’s market access and national treatment violations.

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<sup>12</sup> China’s Answers to Panel’s Questions, note 52.

**II. EPS FOR PAYMENT CARD TRANSACTIONS IS A SINGLE, INTEGRATED SERVICE THAT FALLS WITHIN THE ORDINARY MEANING OF SUBSECTOR (D) OF CHINA’S SCHEDULE (“ALL PAYMENT AND MONEY TRANSMISSION SERVICES, INCLUDING CREDIT, CHARGE AND DEBIT CARDS...”)**

A. Overview

11. As the United States has demonstrated,<sup>13</sup> EPS for payment card transactions is a single, integrated service – one that is supplied and consumed as such. The extensive evidence provided by the United States demonstrates that EPS is at the center of all payment card transactions and without this service the transactions could not occur. EPS fall within the ordinary meaning of payment and money transmission services, within subsector (d) of China’s Schedule. The language of subsector (d) itself makes this abundantly clear. As detailed extensively in the U.S. July 29, 2011 Response and the U.S. First Written Submission, EPS clearly fall within the ordinary meaning of “payment and money transmission services” as one type of “*all*” such services.<sup>14</sup> In addition, 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.”<sup>15</sup> The explicit reference to these types of cards is in line with the recognition that EPS is integral to the processing of credit, charge, debit and other payment card-based electronic payment transactions, and without EPS, payment card transactions could not occur.

12. China argues that the service at issue (EPS for payment card transactions) is not a single service, that it has been incorrectly classified, and that the United States has failed to establish that “any elements of the ‘system’ that it has described – are classifiable under subsector (d).”<sup>16</sup> China tries to delink and disaggregate certain components of EPS that are central to payment card transactions. China combines its disaggregation strategy with an exceedingly narrow interpretation of its commitments, arguing that only issuing and acquiring services are covered by subsector (d).<sup>17</sup> Indeed, China has declined even to provide a response to the question of where – even under its flawed disaggregation theory – remaining elements of EPS should be classified, underscoring the difficulty of its position.<sup>18</sup> Simply, China’s arguments cannot be reconciled with the text of its commitments or how the service at issue operates in practice.

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<sup>13</sup> See U.S. July 29, 2011 Response, paras. 38-61; 147-180; U.S. First Written Submission, paras. 10, 22-28; U.S. Answers to Panel Questions, paras. 37-43, 81-86, 104-105, 121-131.

<sup>14</sup> U.S. July 29, 2011 Response, paras. 38-61; 147-180; U.S. First Written Submission, paras. 10, 22-28.

<sup>15</sup> U.S. July 29, 2011 Response, paras. 38-61; 147-180; U.S. First Written Submission, paras. 10, 22-28.

<sup>16</sup> China’s Answers to Panel’s Questions, para. 23.

<sup>17</sup> China’s First Written Submission, paras. 90-122.

<sup>18</sup> See China’s Answers to Panel’s Questions, paras. 20-25.

B. EPS for Payment Card Transactions is a Single, Integrated Service

13. Contrary to China’s assertions, EPS for payment card transactions constitutes one integral service. The service is supplied as coherent whole. As the United States has explained,<sup>19</sup> a supplier of EPS enables cardholders’ banks to pay merchants’ banks the amount they are owed. Suppliers of EPS supply, directly or indirectly, a system that typically includes the following:

- the processing infrastructure, network, and rules and procedures that facilitate, manage, and enable the transmission of transaction information and payments, and which provide system integrity, stability and financial risk reduction;
- the process and coordination of approving or declining a transaction, with approval generally permitting a purchase to be finalized or cash to be disbursed or exchanged;
- the delivery and transmission of transaction information among participating entities;
- the calculation, determination, and reporting of the net financial position of relevant institutions for all transactions that have been authorized in a given period; and
- the facilitation, management and/or other participation in the transfer of net payments owed among participating institutions.

14. EPS suppliers provide an efficient, timely and reliable means to facilitate the transmission of funds from the holders of payment cards who purchase goods or services to the individuals or businesses that supply them. The network, rules and procedures, and operating system that are part of the EPS architecture allow merchants to be paid the amounts they are owed and ensure that cardholders pay what they owe. EPS suppliers receive, check and transmit the information that the parties need to conduct the transactions, and manage, facilitate, and enable the transmission of funds between participating entities. The rules and procedures established by the EPS supplier give the payment system stability and integrity, and enable it efficiently to handle net flows of money among the institutions involved in card payments. Each component is critical to effectuate the payment card transaction and EPS suppliers provide the entire package of services to their customers, the institutions that are participating in the payment card transactions.<sup>20</sup>

15. China argues that the “system of classifying services would collapse” if what it characterizes as “distinct and separately identifiable services” could be classified in the same sector or subsector as the service to which they are intrinsically linked “because they “manage”, “facilitate”, or relate to the “processing” of that service. According to China, “[t]his conclusion,

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<sup>19</sup> See, e.g., U.S. July 29 Response, paras. 38-54 and page 19; U.S. First Written Submission, para. 10.

<sup>20</sup> See, e.g., U.S. July 29 Response, paras.38-54 and page 19; U.S. First Written Submission, para. 10.

if accepted, would do tremendous damage to the GATS and to the principle of mutual exclusivity.”<sup>21</sup>

16. First, the United States has described the entire package provided by an EPS supplier as “managing,” “facilitating,” or “enabling” the processing of payment card transactions in an effort to capture the intrinsic linkage between EPS and payment card transactions. It should be evident that EPS do not “manage,” “facilitate,” or relate to the “processing” of the service at issue, as China argues. EPS is the service at issue. It is a payment and money transmission service. EPS therefore do not “manage,” “facilitate”, or relate to the “processing” of a payment and money transmission service. EPS “manage,” “facilitate,” and relate to the “processing” of payment card transactions – which is one type of payment service falling within “all payment and money transmission services” in subsector (d) of China’s Schedule.

17. Without the supply of EPS, payment card transactions could not occur. Without the entire system supplied by the EPS supplier, no issuer would be able individually to offer a card that is as widely accepted by merchants, and no acquirer could offer merchants a service that can deliver such a large number of cardholders. All of this supports the conclusion that EPS for payment card transactions is a single service, that it is intrinsically linked to payment card transactions and that for purposes of classification it should be analyzed as a whole.

18. Regarding China’s assertion that the approach described by the United States (and endorsed by several third parties) would somehow undermine the GATS and the principle of mutual exclusivity, this argument is also misplaced. To the contrary, if China’s position were accepted – that a service must first be disaggregated into subcomponents and each subcomponent separately classified – it would render Members’ concessions meaningless for a wide range of services.

C. The Ordinary Meaning of Subsector (d) (“All Payment and Money Transmission Services, Including Credit, Charge and Debit Cards...”) Indicates That It Expressly Covers EPS for Payment Card Transactions

19. In Sector 7B, under the Banking and Other Financial Services heading of its Services Schedule,<sup>22</sup> China undertook market access and national treatment commitments with respect to “[a]ll payment and money transmission services,” which includes EPS supplied in connection with credit, charge, debit, and other payment card transactions.

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

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<sup>21</sup> China’s First Written Submission, para. 108; *see also* China’s Oral Statement at the First Panel Meeting, para. 12; China

<sup>22</sup> 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).

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

21. The Appellate Body has confirmed that the customary rules of treaty interpretation reflected in Articles 31 and 32 of the Vienna Convention apply to the interpretation of specific commitments in a Member's GATS Schedule.<sup>23</sup> 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.”<sup>24</sup>

22. The Appellate Body has also 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.”<sup>25</sup>

23. 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 the U.S. July 29 Response and the U.S. First Written Submission, EPS clearly fall within the ordinary meaning of “payment and money transmission services” as one type of “*all*” such services.<sup>26</sup> 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.”<sup>27</sup> The explicit reference to these types of cards 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 EPS, payment card transactions could not occur.

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<sup>23</sup> Appellate Body Report, *United States – Gambling Services*, WT/DS285/AB/R, paras. 159-160.

<sup>24</sup> Appellate Body Report, *United States – Gambling Services*, WT/DS285/AB/R, para. 164 (footnotes omitted).

<sup>25</sup> Appellate Body Report, *United States – Gambling Services*, WT/DS285/AB/R, para. 180.

<sup>26</sup> U.S. July 29, 2011 Response, paras. 38-61; 147-180; U.S. First Written Submission, paras. 10, 22-28.

<sup>27</sup> U.S. July 29, 2011 Response, paras. 38-61; 147-180; U.S. First Written Submission, paras. 10, 22-28.

1. The Ordinary Meaning of “All payment and money transmission services”

24. As the United States has explained, the ordinary meanings of the key terms, as reflected in definitions from the Oxford English Dictionary, are:

- payment 1 An act, or the action or process, of paying . . . .
- pay . . . 2 *v.t.* a Give (a person) money etc. that is due for goods received, a service done, or a debt incurred; remunerate. Also, hand over or transfer (money etc.) in return for something . . . .
- money . . . 1 A current medium of exchange in the form of coins and (in mod. use) banknotes; coins and banknotes collectively. . . . b Any objects or material serving the same purposes as coin.
- transmission . . . 1 Conveyance or transfer from one person or place to another; the action or process of passing from one person, organism, generation, etc., to another, as by personal contact, stored information, genetic inheritance, etc.<sup>28</sup>

25. Specialized financial sources provide similar definitions. The Bank for International Settlements’ (“BIS”) glossary of terms used in payments and settlements systems defines “payment” as “the payer’s transfer of a monetary claim on a party acceptable to the payee.”<sup>29</sup> Other definitions include “[a] transfer of funds in any form between two parties;”<sup>30</sup> “[t]ransfer of money from one party to another with the assent of both parties;”<sup>31</sup> and “transfer of funds to settle a debt.”<sup>32</sup> The definitions of “payment” and “money transmission” alike establish that subsector (d) covers the action of transferring money from one person to another. Financial sector sources also confirm that EPS qualify as payment or money transmission services, and the BIS 2003 Red Book includes a report on “Payment systems in the United States,” and refers to Visa and MasterCard as “privately operated payment systems” and the “two largest bank card networks operating in the United States.”<sup>33</sup>

26. Suppliers of EPS provide “payment” services in as much as they enable, manage and facilitate the “act, or the action or process, of paying,” which entails “{g}iv{ing} (a person) money etc. that is due for goods received, a service done, or... transfer{ing} (money etc.) in

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<sup>28</sup> *New Shorter Oxford English Dictionary*, pages 1813, 2129, 2130, and 3372 (1993) (Exhibit US-57).

<sup>29</sup> Bank for International Settlements, A glossary of terms used in payments and settlements systems, page 37 (Exhibit US-68).

<sup>30</sup> American Bankers Association, *Banking Terminology*, page 262 (Exhibit US-59).

<sup>31</sup> John V. Terry, *Dictionary for Business & Finance*, page 240 (1990) (Exhibit US-60).

<sup>32</sup> Carolyn N. Gipson, *The McGraw-Hill Dictionary of Internal Trade and Finance*, page 291 (Exhibit US-61).

<sup>33</sup> Exhibit US-11, page 433.

return for something.” EPS suppliers likewise engage in “money transmission” services as they facilitate, manage, and enable, the “conveyance or transfer from one person or place to another” or engage in “the action or process of passing from one person” (i.e., from the cardholder to the merchant, and the issuing institution to the acquiring institution), “money” or a “current medium of exchange in the form of ... banknotes.”

27. China repeatedly asserts that the United States has “failed to prove that *any* of the service at issue in this dispute – much less *all* of the services that might be at issue are encompassed by subsector (d).<sup>34</sup> In fact, the United States has provided extensive evidence that demonstrates that EPS for payment card transactions falls within subsector (d) of China’s Schedule. The evidence provided by the United States demonstrates the accord among international organizations, the customers of EPS, the suppliers of EPS, other industry sources, and independent analysts within the industry, that the service at issue – EPS for payment card transactions – is a “payment service.”

28. For example, the BIS Red Book:

- Includes a report on “Payment systems in the United States,” and includes Visa and MasterCard in its section on “other institutions that provide payment services.” The report includes among “privately operated payment systems” the “nationwide credit and debit card networks.”<sup>35</sup>
- States that “other organizations involved in providing payment services include... bank card companies...”<sup>36</sup> and that “Visa and MasterCard are the two largest bank card networks operating in the United States, but many smaller bank card networks are common throughout the United States.”<sup>37</sup>
- Includes payment cards in its description of “payment media and instruments” and in describing “card payments,” the BIS 2003 Red Book explains that “credit cards” are “the most frequently used electronic payment instrument in the United States” and that “these cards combine a payment instrument with a credit arrangement.”<sup>38</sup> Among the processors of credit card transactions identified specifically are Visa, MasterCard, Discover, American Express as well as limited-use proprietary cards, such as those issued by retail stores and oil and telephone companies.<sup>39</sup>

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<sup>34</sup> China’s First Written Submission, para. 93 (original emphasis); *see also* China’s First Written Submission, paras. 7-11, 76-87, 90-92; China’s Answers to Panel Questions, paras. 11-18.

<sup>35</sup> Exhibit US-11, page 433.

<sup>36</sup> Exhibit US-11, page 437.

<sup>37</sup> Exhibit US-11, page 438.

<sup>38</sup> Exhibit US-11, page 438.

<sup>39</sup> Exhibit US-11, page 438.

29. As the United States explained in its July 29, 2011 Response, suppliers of EPS characterize themselves as providing “electronic payment services” and as operating within the “global payments industry.”<sup>40</sup>

30. The U.S. Federal Financial Institutions Examination Council’s “Retail Payment Systems, IT Examination Handbook (“FFIEC Handbook”) provides additional support:

Card-based electronic payments typically fall into one of three categories, depending on the timing of the payment. “Pay later” payments occur after the receipt of the goods or services and typically refer to credit card payments. “Pay now” payments occur when the goods or services are received and generally are associated with debit card payments. “Pay before” or “pre-pay,” refers to payments for goods or services with prepaid or stored-value cards, which are loaded with buying power before the purchase of goods or services occurs.<sup>41</sup>

31. Other sources contain similar descriptions that comport with the descriptions above regarding the services that the processors of card-based electronic transactions provide in connection with payment card transactions, including credit, charge and debit card transactions.<sup>42</sup>

32. Finally, analysts within this sector have explained that EPS suppliers are central to card-based electronic payment transactions and they provide “order, accountability, and security to the electronic payments system by issuing and administering a common set of ‘rules’ and operating procedures that all participants in the network must adhere to.”<sup>43</sup> The EPS supplier is noted to be an “impartial payments referee” and it ensures that “all parties along the electronic payments system cooperate to make that transaction a success.”<sup>44</sup>

## 2. “Credit, charge and debit cards”

33. As further support for its position, the United States has noted that “credit, charge and debit cards” are explicitly included in the scope of all payment services captured by subsector (d). 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

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<sup>40</sup> See, e.g., U.S. July 29, 2011 Response, paras. 169-177.

<sup>41</sup> Federal Financial Institutions Examination Council (FFIEC), “Retail Payment Systems, IT Examination Handbook,” February 2010, p. 17 (Exhibit US-12).

<sup>42</sup> See, e.g., GAO Report: Payments, Clearance, and Settlement, “A Guide to the Systems, Risks, and Issues” (1997) (see discussion of credit cards and process in Section 3, Retail Payment Systems) (Exhibit US-13); Federal Reserve Bank of Kansas City, “Nonbanks in the Payment System: European and U.S. Perspectives,” Section 2.1 (definitions), Section 2.2 (payment types and payment activities), Table 3 (detailed payment activities), Table 7 (table showing which non-bank payment companies engage in each specific transaction activity relating to payments in the EU), Table 9 (table showing which non-bank payment companies engage in each specific transaction activity relating to payments in the United States) (Exhibit US-14).

<sup>43</sup> UBS Investment Research, Visa Inc., 25 June 2008, page 30 (Exhibit US-10).

<sup>44</sup> UBS Investment Research, Visa Inc., 25 June 2008, page 30 (Exhibit US-10).

of EPS for debit card transactions like Visa, MasterCard, Discover, First Data, Pulse, NYCE, STAR, and PLUS. EPS is integral to the processing of credit, charge, debit and other payment card-based electronic payment transactions, and without this service, payment card transactions could not occur. Merchants would not have the confidence to accept a piece of plastic as payment without the authorization received from the EPS, and funds would not reach their proper destinations without the payment instructions generated by an EPS.

34. The relationship between the “payment services” supplied for “credit, charge and debit” and other payment card transactions is evidenced on multiple fronts and the link is clear and inescapable. For example, evidence provided by the United States includes the following with respect to specific EPS suppliers:

- Visa: “Visa operates the world’s largest retail electronic payments network and manages the world’s most recognized global financial services brand.” The company describes itself as “facilitate{ng} global commerce through the transfer of value and information among financial institutions, merchants, consumers, businesses and government entities,” and providing its primary customers, financial institutions, “with product platforms encompassing consumer credit, debit, prepaid and commercial payments.”<sup>45</sup>
- MasterCard: “The annual report explains that it ‘is a leading global payment solutions company that provides a variety of services in support of the credit, debit and related payment programs of approximately 23,000 financial institutions and other entities that are our customers’ and that it ‘develop{s} and market{s} payment solutions, process payment transactions, and provide{s} support services to our customers and, depending upon the service, to merchants and other clients’ and “manage a family of well-known, widely accepted payment card brands.’ The annual report describes MasterCard as operating in the ‘the global payments industry, which consists of all forms of payment including... cards—credit cards, charge cards, debit cards ... ATM ..., pre-paid cards and other types of cards...’ The annual report ... generally describes itself as providing “payment services and solutions.”<sup>46</sup>
- American Express: “[T]he company’s ‘principal products and services are charge and credit payment card products and travel-related services offered to consumers and businesses’ and that its products and services include: ‘charge and credit card products... stored value products such as... prepaid products... network services’ and ‘merchant acquisition and processing, point of sale, servicing and settlement, and marketing and information products and services for merchants.’ The company describes itself as

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<sup>45</sup> U.S. July 29, 2011 Response, paras. 169-170 (internal footnotes omitted) (citing Visa 2008 IPO Prospectus, pages 1, 129, 135-136 (Exhibit US-3)).

<sup>46</sup> U.S. July 29, 2011 Response, para. 174 (internal footnotes omitted) (citing MasterCard 2009 Annual Report, pages 3-5 (Exhibit US-5); MasterCard 2010 Annual Report, pages 4-7 (Exhibit US-6)).

operating ‘a global general-purpose charge and credit card network for both proprietary Cards and Cards issued under the global network services business.’<sup>47</sup>

- Discover: “The company provides ‘payment services’ and explains that its credit card customers’ operations ‘are processed over the Discover Network.’ Discover also provides debit card payment services through its PULSE network, and its payment services include ‘switching and settling ATM, personal identification number (‘PIN’) POS debit and signature debit transactions initiated through the use of debit cards issued by participating financial institutions.’ With respect to its Diners Club business, the Discover 2010 Annual Report indicates that the company provides ‘payment services’ and provides ‘processing and settlement of cross border transactions’ on its network. Discover provides other payment services through other arrangements related to credit, debit and prepaid cards.”<sup>48</sup>
- First Data: “The company notes that its ‘processing services include authorization, transaction capture, settlement, chargeback handling, and internet-based transaction processing’ and that ‘the vast majority of these services pertain to transactions in which consumer payments to merchants are made through a card association (such as Visa or MasterCard), a debit network, or another payment network (such as Discover).’<sup>49</sup>
- JCB: “[D]escribes its major business areas as including ‘{c}redit card operations, providing credit card operation services.’ JCB has stated that its customer base includes 64.21 million cardholders and that its annual transaction volume is over 8,628.2 billion yen. JCB is also both the largest card issuer and acquirer in Japan. In 1991, JCB launched its Global Systems Network. This network is described as providing current payment functions, such as instant access for non-stop on-line authorizations and data interchange for settlement and transaction processing, as well as a ‘a multilateral, comprehensive communication highway between JCB, cardmembers, merchants, and partner financial institutions for exchanging a variety of data and information essential to support JCB’s high-quality services.’ JCB describes the network as providing ‘the highest levels of efficiency, reliability, and security for cardmembers, merchants and partner financial institutions throughout the world.’”<sup>50</sup>

35. The BIS 2003 Red Book states that “other organizations involved in providing payment services include... bank card companies...”<sup>51</sup> and that “Visa and MasterCard are the two largest

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<sup>47</sup> U.S. July 29, 2011 Response, para. 175 (internal footnotes omitted) (citing American Express Company 2010 Annual Report, pages 1-4 (Exhibit US-7)).

<sup>48</sup> U.S. July 29, 2011 Response, para. 176 (internal footnotes omitted) (citing Discover 2010 Annual Report, pages 2-4 (Exhibit US-8)).

<sup>49</sup> U.S. July 29, 2011 Response, para. 177 (internal footnotes omitted) (citing First Data 2010 Annual Report, page 3 (Exhibit US-9)).

<sup>50</sup> U.S. July 29, 2011 Response, para. 177 (internal footnotes omitted) (citing Exhibits US-16, US-17, US-18, and US-19).

<sup>51</sup> Exhibit US-11, page 437.

bank card networks operating in the United States, but many smaller bank card networks are common throughout the United States.”<sup>52</sup>

36. The BIS 2003 Red Book explains that “credit cards” are “the most frequently used electronic payment instrument in the United States” and that “these cards combine a payment instrument with a credit arrangement.”<sup>53</sup> Visa, MasterCard, Discover, American Express are specifically identified as processors of credit card transactions.<sup>54</sup>

37. The BIS 2003 Red Book includes payment cards in its description of “payment media and instruments” and in describing “card payments,” it includes an explanation of debit card networks and processors of debit card transactions. Specifically, it notes that “approximately 4 billion PIN-based transactions were effected in 2000, processed primarily by Star, Interlink, NYCE and Pulse. Approximately 5.5 billion signature-based transactions were effected in 2000. The sole processors of signature-based debit transactions in the United States during 2000 were Visa and MasterCard.”<sup>55</sup>

D. The Context, Including the Annex on Financial Services, Supports the Conclusion that the Ordinary Meaning of Subsector (d) Covers EPS for Payment Card Transactions

38. The GATS Annex on Financial Services, including item (viii) of the definition of “financial services” in paragraph 5(a), is part of the treaty and as such it provides context within the meaning of Article 31 of the Vienna Convention for purposes of interpreting subsector (d). The only difference between item (viii) in the Annex and subsector (d) of China’s Schedule is that China adds the parenthetical “including import and export settlement,” which does not appear in the GATS definition. This addition provides further evidence that China intended subsector (d) to be comprehensive.

E. Other Evidence Confirms that Subsector (d) Covers EPS for Payment Card Transactions

39. As the United States explained in its response to panel question no. 59,<sup>56</sup> while document MTN.GNS/W/120 (“W/120”) is neither treaty text nor context<sup>57</sup>, it could be considered to be supplementary means of interpretation for purposes of Article 32 of the Vienna Convention. The description of Sector 7.B.d in the W/120 classification is simply “All payment and money transmission services. Paragraph 5(a)(viii) of the Annex, on the other hand, also provides an illustrative list “...including credit, charge and debit cards, travellers cheques and bankers drafts”

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<sup>52</sup> Exhibit US-11, page 438.

<sup>53</sup> Exhibit US-11, page 438.

<sup>54</sup> Exhibit US-11, page 438.

<sup>55</sup> Exhibit US-11, page 438.

<sup>56</sup> U.S. Answers to First Set of Panel’s Written Questions, paras.146-150.

<sup>57</sup> See Appellate Body Report, *US – Gambling*, para. 178.

40. A 1998 background note by the Secretariat noted that “Although the Annex largely follows W/120 in banking and other financial services, there are some improvements, such as an explicit indication of “credit card services” under “all payment and money transmission services.”<sup>58</sup> Notably, at the time, the description of 7.B.j of Document W/120 exists as it does now in the Annex : “settlement and clearing services for financial assets, including securities, derivatives, and other negotiable instruments.”

41. The 1998 background note further indicates that a large majority of Members have based their schedules on either the Annex on Financial Services or the W/120 classification. The Secretariat observed that this fact has made certain cross country comparisons in the Schedule difficult. In this context, the background note indicated that with respect to “credit card services” that “credit card services are either part of “all payment and money transmission services” or they that “they constitute an independent item.”<sup>59</sup> Thus, WTO Members either treated “credit card services” as part of “all payment and money transmission services” or as a separate, independent entry; and no Member included “credit card services” in 7.B.j (item (xiv) of the annex) – “settlement and clearing services for financial assets, including securities, derivatives, and other negotiable instruments.”

### **III. EPS FOR PAYMENT CARD TRANSACTIONS DOES NOT FALL WITHIN ITEM (XIV) (“SETTLEMENT AND CLEARING SERVICES FOR FINANCIAL ASSETS, INCLUDING SECURITIES, DERIVATIVE PRODUCTS AND OTHER NEGOTIABLE INSTRUMENTS”)**

#### **A. Overview**

42. China claims that certain aspects of EPS for payment card transactions are classifiable under Item (xiv) of the Annex on Financial Services, “Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments,” rather than subsector (d) in China’s schedule of commitments.<sup>60</sup> China asserts that it “made no market access or national treatment commitments in respect of item (xiv) in the Annex, ‘settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments’”<sup>61</sup> China then concludes that “the ordinary meaning of this subsector includes the provision of clearing and settlement services for retail payment instruments, including interbank payment cards.”<sup>62</sup>

43. China relies on an exceedingly narrow reading of subsector (d) that essentially reads the qualifying word “all” out of the sectoral description of “all payment and money transmission services, including credit, charge, and debit cards...” and on arguments that fail to account for the fact that EPS are at the heart of credit, charge and debit card transactions. Moreover, China’s

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<sup>58</sup> Background Note by the Secretariat, S/C/W/72, December 2, 1998, para. 12.

<sup>59</sup> Background Note by the Secretariat, S/C/W/72, December 2, 1998.

<sup>60</sup> See, e.g. China’s Answers to Panel Questions, para. 28.

<sup>61</sup> China’s First Written Submission, para. 79.

<sup>62</sup> China’s First Written Submission, para. 84.

exceedingly narrow reading of subsector (d) stands in stark contrast to China’s exceedingly broad interpretation of item (xiv) of the Annex. China’s broad reading is combined with an incorrect understanding of the services in item (xiv) that places China’s interpretation at odds with fundamental, recognized differences in the operation and risk profile of financial services under item (xiv) and services related to retail payment processing, such as EPS for payment card transactions. Furthermore, China’s theory requires that, before classifying the service at issue, one must first break EPS into constituent parts that do not themselves function as independent services, and then classify those individual elements as if they were themselves the service at issue. As discussed, above, this approach is unsupported by the GATS.

44. In interpreting the meaning of “settlement and clearing services for financial assets,” the context-specific nature of the terms “settlement” and “clearing” is further evident from the BIS multilateral framework that establishes separate regimes for payment systems and securities settlement systems, as evidenced by the work of the BIS Committee on Payment and Settlement Systems (“CPSS”), cited by both the United States and China as providing helpful authority in the areas at issue in this dispute.<sup>63</sup> As the CPSS makes clear, payment systems, on the one hand, and securities settlement systems, on the other hand, are separate and distinct systems.

45. The same rules of treaty interpretation that compel the conclusion that EPS for payment card transactions fall within subsector (d) also compel the conclusion that EPS for payment card transactions do not fall within item (xiv). In this regard, Article 31(1) of the *Vienna Convention* requires that the terms “settlement and clearing services for financial assets, including securities, derivatives and other negotiable instruments” be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Various commentaries on the *Vienna Convention* point out that “ordinary meaning” cannot be analyzed independently from the other interpretive elements described in Article 31, including “context.”<sup>64</sup>

46. The Appellate Body has further admonished that in interpreting GATS Schedules, “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.”<sup>65</sup> Finally, in determining the correct classification for EPS for

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<sup>63</sup> See, e.g., U.S. Opening Statement at the First Panel Meeting, paras. 32-40.

<sup>64</sup> Draft Articles on the Law of Treaties with Commentaries (1966), page 219 (“The Commission, by heading the article ‘General rule of interpretation’ in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined operation.”) (Exhibit US-77); see also Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, page 427 (2009) (Exhibit US-78); see also Richard K. Gardiner, *Treaty Interpretation*, page 165 (2008) (“the role of the ordinary meaning of the terms of a treaty was not understood as producing an interpretation divorced from context”) (Exhibit US-79).

<sup>65</sup> Appellate Body Report, *United States – Gambling Services*, para. 164 (footnotes omitted).

payment card transactions, “the sectors and subsectors in a Member’s Schedule must be mutually exclusive.”<sup>66</sup>

47. With these rules in mind, in classifying parts of EPS under item (xiv) of the Annex, China ignores the ordinary meaning not only of subsector (d), but also of item (xiv), the scope of which is limited to tradable, investment instruments, such as securities, derivatives, and other negotiable instruments. Finally, China’s argument cannot be reconciled with the plain language of subsector (d).

B. The Ordinary Meaning of Item (xiv), Read In Context, Indicates that “Settlement and Clearing Services for Financial Assets, Including Securities, Derivative Products, and Other Negotiable Instruments” Does Not Include EPS for Payment Card Transactions

48. In examining the ordinary meaning of the terms used in the different sectoral descriptions in paragraph 5(a) of the Annex, it is particularly important to examine the context and avoid mechanical resort to dictionary definitions, as the Appellate Body has cautioned.<sup>67</sup> Given that the 12 sectors referenced in the Annex are intended to comprehensively capture the entire universe of non-insurance financial services, the words used are necessarily broad and the dictionary definitions of individual words sometimes overlap.

49. The ordinary meaning of “Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments” as set forth in item (xiv) does not include any element of EPS for payment card transactions. China ignores the ordinary meaning of the provision, the scope of which is limited to investment instruments, such as securities, derivatives, and other negotiable instruments. China’s position depends on an exceedingly broad definition of “financial asset” that is completely divorced from the use of the term within its immediate context, i.e., the full sentence in item (xiv), and within its context in paragraph 5(a) of the Annex. While China relies on certain financial dictionaries to argue that “financial assets” includes “[m]oney and claims,”<sup>68</sup> other sources suggest a more limited scope, one that is more consistent with the context in which the term appears.

50. For example, according to the International Monetary Fund (IMF):

In the MFSM (and 1993 SNA) terminology, a financial asset is negotiable if it is actively or inactively traded in a secondary market. To qualify as negotiable, securities other than shares must be designed for prospective trading on an organized exchange or in the over-the-counter market, but demonstration of actual

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<sup>66</sup>Appellate Body Report, *United States – Gambling Services*, para. 180.

<sup>67</sup>Appellate Body Report, *United States – Gambling*, para. 164 (footnotes omitted)

<sup>68</sup> See China’s First Written Submission, para. 86 (using the *Oxford Dictionary of Economics* definition of “financial assets”).

trading is not required. Many securities, though negotiable, are held to maturity by the original creditor.<sup>69</sup>

51. The IMF’s explanation is similar to the definition of “financial asset” in the Uniform Commercial Code (“UCC”), Article 8, Section 8-102(9), which defines the term as follows:

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

(i) a security;

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

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

As context requires, the term means either the interest itself or the means by which a person’s claim to it is evidenced, including a certificated or uncertificated security, a security certificate, or a security entitlement.<sup>70</sup>

52. The BIS CPSS “glossary of terms used in payments and settlement systems” clearly illustrates that the terms “clearing” and “settlement” each have different meanings in the respective payment and securities contexts. The definitions relating to payments systems, including EPS for payment card transactions, are drawn from different source documents than those for securities settlement systems.<sup>71</sup>

53. Against this background, China’s position fails to account for the fact that “settlement and clearing services for financial assets” is a substantially different financial service than EPS for payment card transactions, which is a type of retail payment service. The CPSS has explained that “[r]etail payments are generally classified as cash payments or non-cash

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<sup>69</sup> International Monetary Fund, *Monetary and Financial Statistics Compilation Guide*, section 4.14, page 70 (Exhibit US-80).

<sup>70</sup> UCC, Article 8, Section 8-102(9) (Exhibit US-75). *See also* U.S. Answers to Panel Questions, note 1.

<sup>71</sup> As the United States observed in its opening statement at the first panel meeting “the BIS CPSS glossary defines the concepts of ‘clearance’ and ‘settlement’ with respect to securities settlement systems based on the definitions contained in the ‘Recommendations for securities settlement systems’ and ‘Delivery versus payment in securities settlement systems.’ On the other hand, the BIS CPSS glossary uses ‘Payment systems in the Group of Ten countries’ (the ‘Red Book’), ‘Payment systems in the European Union’ (the ‘Blue Book’), and the ‘Report on electronic money’ as the sources for defining ‘clearance’ and ‘settlement’ in the context of payments systems. Further, the term ‘clearing institution’ is specifically defined as being part of a payment system, not a securities settlement system.’ U.S. Opening Statement at the First Panel Meeting, para. 36 (footnotes omitted).

payments,” which are subclassified into “cheque payments, direct funds transfers and card payments.”<sup>72</sup> Indeed, there are many practical differences between the systems used to settle and clear investment instruments of the kind referenced in item (xiv) and the systems used to settle and clear retail payment instruments, like payment cards.

54. As the United States noted in its response to Question 24 from the Panel, these differences relate to: (1) the financial instruments involved and the value of typical transactions, (2) the market participants involved in the transaction and related processing; (3) the infrastructure needs for such processes to occur safely and efficiently; (4) regulatory oversight and the relative risks presented to the financial system as a whole.<sup>73</sup> Additional discussion of each of these factors is provided below.

1. The Financial Instruments and Value of the Transaction Typically Involved in Item (xiv)

55. **Item (xiv).** The settlement and clearing process in item (xiv) involves various types of investment instruments – *e.g.* securities, derivatives, and other negotiable instruments. As the CPSS has explained, these kinds of instruments are characterized by one or more of the following: they involve large values; they are exchanged among financial market participants; “they are usually urgent and require timely settlement; they are related to important financial market activities such as money market or foreign exchange transactions as well as many commercial transactions.”<sup>74</sup> Because securities, derivatives, and other investment-related financial assets are typically large in value, the settlement and clearing process relies on infrastructure that is capable of handling large-value transactions.<sup>75</sup> These funds transfer systems are often called large-value payment systems or wholesale payment systems. For example, as the CPSS explains, the Real-Time Gross Payment Systems (“RTGS”) is a type of large-value payment system and helps reduce risk in the settlement of securities transactions.<sup>76</sup>

56. **Retail Payment Services.** In contrast, payment cards are non-cash, electronic retail payment instruments that are used in retail payment systems.<sup>77</sup> Retail payment systems are designed to handle “higher volumes . . . and lower average values than wholesale payments and are usually not cleared and settled in the same manner, although in some countries retail payments are sometimes settled across systems designed for both retail and wholesale

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<sup>72</sup> Bank for International Settlements, Committee on Payment and Settlement Systems, Retail payments in selected countries: A comparative study, September 1999, page 3 (providing an overview of retail payment instruments) (“BIS CPSS Retail Payments I”) (Exhibit US-81).

<sup>73</sup> U.S. Answers to the First Set of Panel Questions, paras. 77-79.

<sup>74</sup> Bank for International Settlements, Committee on Payment and Settlement Systems, New Developments in Large-Value Payment Systems, May 2005, page 5 (“BIS CPSS New Developments in Large-Value Payment Systems (Exhibit US-82).

<sup>75</sup> *See, e.g.*, Bank for International Settlements, Committee on Payment and Settlement Systems, Real-Time Gross Payment Systems, March 1997, page 1 (“BIS CPSS Real-Time Gross Payment Systems”) (Exhibit US-83).

<sup>76</sup> BIS CPSS Glossary, page 28 (Exhibit US-68).

<sup>77</sup> BIS CPSS Retail Payments I, pages 3-4 (Exhibit US-81).

payments.”<sup>78</sup> Credit cards provide consumers with the ability to make retail purchases without cash on hand, but credit card purchases entail key processing steps that are not required with cash payments, such as the authorization and authentication of the transaction. The nature of retail card-based electronic payments, therefore, requires EPS suppliers to conduct these key steps in the transaction.

## 2. The Settlement and Clearing Process in Item (xiv) Involves Different Market Participants

57. **Item (xiv).** The participants involved in the settlement and clearing process in item (xiv) and EPS for payment card transactions differ significantly. The service suppliers and consumers implicated in item (xiv) are investors, financial institutions, and specialized financial market participants. They are not merchants and individual consumers. While “the mechanisms for clearance and settlement vary by type of instrument [they] generally involve specialized financial intermediaries, such as clearing corporations and depositories.”<sup>79</sup> Therefore, key participants can include: (i) exchanges on which securities are traded; (ii) broker-dealers; (iii) investors; (iv) clearing corporations; (v) securities depositories; and (vi) settlement service providers.<sup>80</sup>

58. Derivatives transactions can either be executed over exchanges (“exchange-traded” derivatives) or bilaterally (known as “over-the-counter” or “OTC” derivatives). Exchange-traded derivatives involve the following key participants: (i) derivatives exchanges; (ii) investors; (iii) clearing houses; and (iv) settlement banks – either the central bank or private banks.<sup>81</sup> For both securities and derivatives transactions, market participants often have to comply with certain requirements in order to mitigate the risks associated with large-value transactions, such as maintaining capital reserves to cover losses if a participant were to default and well-developed operating procedures for managing risk.

59. The market for other negotiable instruments, such as commercial paper, is also characterized by sophisticated financial market participants. The main participants are typically: (i) issuers and issuer intermediaries; (ii) dealers; (iii) investors; and (iv) settlement banks.<sup>82</sup> Issuers are usually non-bank firms that use commercial paper as a financing substitute for traditional bank credit.<sup>83</sup> Issuing intermediaries include commercial banks, investment banks, and specialized securities firms. The investors in the negotiable instrument market are primarily

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<sup>78</sup> BIS CPSS Retail Payments I, page 2 (Exhibit US-81).

<sup>79</sup> BIS CPSS Red Book, Payment Systems in the United States, Section 4.1, page 446 (Exhibit US-11).

<sup>80</sup> BIS CPSS Red Book, Payment Systems in the United States, Section 4.1.2, page 447 (Exhibit US-11).

<sup>81</sup> See Bank for International Settlements, Committee on Payment and Settlement Systems, Clearing Arrangements for Exchange-Traded Derivatives, March 1997, page 12 (“BIS CPSS Clearing Arrangements for Exchange-Traded Derivatives”) (Exhibit US-84).

<sup>82</sup> J.S. Alworth and C.E.V. Borio, “Commercial Paper Markets: A Survey,” BIS Economic Papers, No. 37, page 9 (April 1993) (“BIS Commercial Paper Markets”), pages 30-50 (Exhibit US-85).

<sup>83</sup> BIS Commercial Paper Markets, pages 9-11 (Exhibit US-85).

financial institutions and corporations, reflecting the “wholesale nature of the investor base” due to the large-value of the instruments.<sup>84</sup>

60. **Retail Payment Services.** For subsector (d), retail payments systems using non-cash payment instruments involve an entirely different set of market participants. The most significant difference is the participation of consumers and retail merchants. If the consumer’s bank and retail merchant’s bank are the same, then the only other participant in the transaction may be the bank, which at times processes the entire transaction.<sup>85</sup> However, if that is not the case, the consumer’s bank and the retail merchant’s bank must interact to complete the payment process. For payment card purchases, that interaction is arranged through an EPS supplier, which conducts the necessary steps to process the transaction between the cardholder’s bank and the retail merchant’s bank.

61. EPS is integral to the processing of credit, charge, debit, and other payment card-based electronic payment transactions. EPS gives merchants the confidence to accept payment cards instead of cash by authorizing and authenticating the transaction. EPS also generates the payment instructions that make sure that the funds are actually transferred according to the transaction. While EPS suppliers perform information transmitting (clearing) and transaction processing (settlement) functions, the EPS suppliers are completely different market participants than the exchanges, clearing houses, and settlement service providers that perform the settlement and clearing functions for transactions of large-value financial assets as described in item (xiv).

3. Transaction Processing and Infrastructure Requirements Differ for  
Item (xiv) “Settlement and Clearing of Financial Assets”

62. **Item (xiv).** The infrastructure requirements for the financial services that fall under item (xiv) differ from the infrastructure for EPS for payment card transactions, covered in subsector (d) of China’s Schedule. The differences reflect the difference in the financial instruments, average values, and market participants taking part in the transactions, as well as the differences in risks related to large scale as opposed to retail transactions. The infrastructure for financial market transactions varies depending on the specific financial asset or instrument; however, the elements are substantially similar. For example, the steps in the process of clearing and settling a securities trade include: (i) confirmation of the terms of the trade; (ii) calculation of the obligations of the counterparties (clearing function); and (iii) the final transfer of securities in exchange for the final transfer of funds (settlement function).<sup>86</sup> For exchange-traded derivatives, the process follows a similar order.

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<sup>84</sup> BIS Commercial Paper Markets, pages 44-45 (Exhibit US-85).

<sup>85</sup> Bank for International Settlements, Committee on Payment and Settlement Systems, “Clearing and Settlement Arrangement for Retail payments in Selected Countries,” page 2, September 2000 (“BIS CPSS Retail Payments II”) (Exhibit US-86).

<sup>86</sup> Bank for International Settlements, Committee on Payment and Settlement Systems, Recommendations for Securities Settlement Systems, pages 37-38 (“BIS CPSS Recommendations for Securities Settlement Systems”) (Exhibit US-87).

63. For securities transactions, the settlement instructions generated by the clearing house are then carried out by central securities depositories (“CSDs”) and custodians, which are responsible for the safekeeping of the physical securities. CSDs provide a central depository in which to hold the security in a dematerialized form, and therefore, the CSD transfers securities through accounting entries on its books, rather than through the physical transfer of the security.<sup>87</sup> An important infrastructure component of securities settlement services is the ability of CSDs to perform the settlement of security transfers on a delivery-versus-payment basis (“DVP”), where discharging the obligation to deliver securities is conditional on the successful discharging of the obligation to transfer cash, and vice versa. DVP allows a simultaneous transfer of the security and the funds to minimize the risk that the transaction will fall through after only one party has discharged its obligation to the other.

64. Settlement of derivatives differs somewhat from settlement of securities because actual assets are usually not exchanged. Instead, settlement is in cash only. Many derivatives contracts require periodic payments, and so the settlement of payments occurs multiple times between counterparties, rather than just once. Settlement of payments is conducted bilaterally for OTC derivatives. For both securities and derivatives, the settlement payment claims are processed through large-value payment systems, which utilize private banks or the central bank to execute funds transfers. There are a variety of large-value payments systems that are classified by the process they use to settle a transaction, *i.e.* on a gross or net basis,<sup>88</sup> or by the entity that owns and operates the system, *i.e.* the central bank or a private entity.<sup>89</sup> Regardless of the specific features, large-value payment systems are designed to handle the size and speed of financial market transactions.<sup>90</sup>

65. **Retail Payment Services.** The infrastructure for processing retail transactions in subsector (d) is different in several ways. First, the retail payments are larger in volume and smaller in value than financial market transactions. Second, the processing of retail transactions when non-cash instruments are being used “necessarily calls for infrastructure arrangements aimed at ensuring, for example, the valid creation of payment instruments by the payer, the exchange of relevant information between the financial institutions of the payer and the payee, and the final exchange of funds between the financial institutions concerned.”<sup>91</sup> Third, the main risk in non-cash retail payments is the instrument’s susceptibility to fraudulent use.<sup>92</sup> Therefore, the main feature of retail payment systems is the ability to carry out the following steps:

(a) verification of the identity of the involved parties, (b) validation of the payment instrument, (c) verification of the ability to pay, (d) authorization of the

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<sup>87</sup> BIS CPSS Recommendations for Securities Settlement Systems, Annex 2, page 38 (Exhibit US-87).

<sup>88</sup> BIS CPSS Real-Time Gross Settlement Systems, page 4 (Exhibit US-83).

<sup>89</sup> BIS CPSS Real-Time Gross Settlement Systems, page 6 (Exhibit US-83); BIS CPSS Clearing Arrangements for Exchange-Traded Derivatives, page 12 (Exhibit US-84).

<sup>90</sup> BIS CPSS Real-Time Gross Settlement Systems, page 3 (Exhibit US-83).

<sup>91</sup> BIS CPSS Retail Payments I, page 2 (Exhibit US-81).

<sup>92</sup> BIS CPSS Retail Payments I, pages 7-8 (Exhibit US-81).

transfer of the funds by both the payer and the payer’s financial institution, (e) communication of the information by the payer’s financial institution to the payee’s financial institutions, and (f) processing of the transaction.<sup>93</sup>

66. For most payment card transactions, the first four steps occur through a network switch that allows for real-time authorization of the payment.<sup>94</sup> The retail payment system is widely recognized to be distinct from a country’s large-value payment systems.<sup>95</sup> For example, the U.S. Office of the Comptroller of the Currency identifies two different systems, “wholesale or large dollar systems” and “retail” systems:

The volume of funds and securities exchanged daily through the electronic funds transfer systems is in the trillions of dollars. For U.S. financial institutions, these transactions are handled by wholesale or large dollar systems such as FedWire, CHIPS, and SWIFT. Additionally, other funds transfer services, such as Automated Clearing Houses (ACH), Automated Teller Machines (ATM), Point-of-Sale (POS) systems, telephone bill paying, home banking systems, debit cards, and “smart cards” are gaining widespread customer use. Many of these transactions are initiated by customers rather than financial institutions. These are normally considered retail funds transfer systems.<sup>96</sup>

67. This distinction is relevant even if the actual fund transferring occurs on the same, or a connected, inter-bank funds transfer infrastructure,<sup>97</sup> as is the case in China. In November 2004, the “PBC High-Value Payment System (HVPS)” was connected to the inter-bank card payment system to improve the efficiency of inter-bank card payments.<sup>98</sup> However, even though the inter-bank fund transfer systems is now connected to HVPS, the infrastructure used to process payment card transactions is provided by China UnionPay. This retail payment infrastructure is largely distinct from the infrastructure for processing financial market transactions. For financial market transactions, the processing is conducted by China Government Securities Depository Trust & Clearing Co. (“CDC”), China Securities Depository and Clearing Corporation Limited

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<sup>93</sup> BIS CPSS Retail Payments II, page 3 (Exhibit US-86).

<sup>94</sup> BIS CPSS Retail Payments I, page 4 (Exhibit US-81).

<sup>95</sup> Bank for International Settlements, Committee on Payments and Settlement Systems, Technical Committee of the International Organization of Securities Commissions, Principles for Financial Market Infrastructures, March 2011, page 7 (“BIS CPSS Principles for Financial Market Infrastructures”) (Exhibit US-88) (“A payment system is generally categorized as either a retail payment system or a large-value payment system (LVPS)”).

<sup>96</sup> U.S. Office of the Comptroller of the Currency’s Handbook entitled “Payment Systems and Funds Transfer Activities” (March 1990) (“OCC Handbook”), page 1 (Exhibit US-89).

<sup>97</sup> See BIS CPSS New Developments in Large-Value Payment Systems, page 5 (Exhibit US-82) (“Some LVPS also process a large number of low-value or retail payments”).

<sup>98</sup> Financial Services Report of the People’s Bank of China, No. 1, “2006 China Payment System Development Report,” page 23 (2006) (Exhibit US-90).

(“CSC”), and the Central Bond Generalized System (“CBGS”).<sup>99</sup> Therefore, even when inter-bank funds transfers occur on through the same or connected channels, there is still a distinction between retail payment systems and large-value payments systems.

4. Regulatory Oversight Differs For Item (xiv) “Settlement and Clearing Services for Financial Assets”

68. **Item (xiv).** Item (xiv) transactions are subject to strict regulatory oversight whereas retail transactions are generally not regulated heavily. In the United States, all securities transactions are regulated by the Securities and Exchange Commission (“SEC”), and derivatives transactions by the Commodity Futures Trading Commission (“CFTC”). The SEC’s role is to oversee the market participants in the securities market, require disclosure of information related to securities, enforce securities laws, and protect investors.<sup>100</sup> The CFTC’s mission is to protect market participants from fraud, abusive practices, and systemic risk related to derivatives that fall under its authority.<sup>101</sup>

69. Similarly, China has instituted a regulatory framework to oversee transactions involving financial assets, such as securities, derivatives, and other negotiable instruments. The relevant regulators include the China Securities Regulatory Commission (“CSRC”), which oversees China’s securities registration and settlement institutions;<sup>102</sup> China Banking Regulatory Commission (“CBRC”), provides regulatory oversight;<sup>103</sup> and the PBOC, which runs China’s payment systems.<sup>104</sup>

70. The need for effective regulatory oversight is recognized internationally. In the wake of the financial crisis, international efforts to coordinate and strengthen financial regulations have focused on improving regulatory frameworks for securities and derivatives transactions. For example, the International Organization of Securities Commissions has played an active role in issuing recommendations for harmonizing regulations of financial market infrastructures, securities settlement systems, and derivatives transactions.<sup>105</sup> The BIS CPSS has also contributed to international discussions on regulatory reform for financial market infrastructures

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<sup>99</sup> Financial Services Report of the People’s Bank of China, No. 5, “2007 China Payment System Development Report,” pages 5-6, 66-69 (2008) (Exhibit US-91).

<sup>100</sup> BIS Red Book, “Payment Systems in the United States,” Section 4.1.2, page 447.

<sup>101</sup> U.S. Commodities Futures Trading Commission Website, “Mission & Responsibilities” (Exhibit US-92).

<sup>102</sup> Financial Services Report of the People’s Bank of China, No. 5, “2007 China Payment System Development Report,” pages 26-27 (2008) (Exhibit US-91).

<sup>103</sup> China Banking Regulatory Commission website, “About Us,” (Exhibit US-93).

<sup>104</sup> Financial Services Report of the People’s Bank of China, No. 1, “2006 China Payment System Development Report,” page 5 (2007) (Exhibit US-90).

<sup>105</sup> Financial Stability Board, *Progress in Implementation of the G20 Recommendations for Strengthening Financial Stability*, April 10, 2011, page 5 (Exhibit US-94); see also International Organization of Securities Commissions website, “General Information,” (Exhibit US-95).

and transaction processing.<sup>106</sup> These international organizations recognize that the settlement and clearing of financial assets must be regulated in order to protect market participants and the financial system as a whole.

71. The kinds of transaction described by Item (xiv) generally warrant tighter regulatory oversight because the failure of one participant to meet its obligations can render other participants unable to meet their obligations, which causes instability in financial markets.<sup>107</sup> The possibility that the failure of one participant can have a widespread impact makes the infrastructure through which financial market transactions occur “systemically important.”<sup>108</sup> The systemic risk of financial market transactions is due to several factors, including the nature and large value of the financial assets, the speed with which the transactions occur, and the interconnected nature of the processing infrastructure.<sup>109</sup> For example, BIS has issued various recommendations to minimize the risks involved in the settlement and clearing of securities and derivatives products.<sup>110</sup>

72. **Retail Payment Services.** Retail payments, on the other hand, are not as heavily regulated. Central banks typically oversee the funds transfer systems,<sup>111</sup> and consumer protection regulations may apply to protect consumers as participants in retail transactions. In China, the PBOC is responsible for overseeing payment systems, including CUP, with a focus on increasing the use and interoperability of bank cards.<sup>112</sup> In contrast to the regulatory frameworks in place for the settlement and clearing of financial assets, the regulatory oversight of retail payments is relatively light. This discrepancy is explained in large part by the different degrees of risk that the two types of financial services pose to the financial system.

73. In contrast, retail transactions pose little systemic risk because the aggregate value of retail payments that are processed are relatively small compared to large-value payment systems.<sup>113</sup> In other words, if a retail transaction could not be settled on time (or at all), it would not have a significant impact on the financial system as a whole. There are other risks in retail

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<sup>106</sup> Financial Stability Board, *Progress in Implementation of the G20 Recommendations for Strengthening Financial Stability*, April 10, 2011, page 5 (Exhibit US-94); see also BIS CPSS Recommendations for Securities Settlement Systems, Foreword (Exhibit US-87).

<sup>107</sup> BIS CPSS Recommendations for Securities Settlement Systems, pages 39, 41 (Exhibit US-87).

<sup>108</sup> BIS CPSS Glossary, page 48 (“Systemically Important Payment System”).

<sup>109</sup> See BIS CPSS Clearing Arrangements for Exchange-Traded Derivatives, page 16 (Exhibit US-84).

<sup>110</sup> See generally BIS CPSS Recommendations for securities settlement systems (Exhibit US-87); BIS CPSS Clearing Arrangements for Exchange-Traded Derivatives, pages 19-29 (Exhibit US-84).

<sup>111</sup> BIS CPSS Retail Payments II, page 17 (Exhibit US-86).

<sup>112</sup> Financial Services Report of the People’s Bank of China, No. 5, “2007 China Payment System Development Report,” pages 16-17 (2008).

<sup>113</sup> BIS CPSS Retail Payments II, pages 10-11 (Exhibit US-86).

transaction processing – the risk of financial loss due to fraud, human or technical error, or the default of one of the participants<sup>114</sup> – but these risks do not have a systemic effect.

74. The presence of systemic risk in transactions that fall under Item (xiv) not only distinguishes Item (xiv) from retail transactions, but it also provides a critical reason that the settlement and clearing of financial assets should be a separate financial service from the electronic processing of payment card transactions. It cannot be assumed that a WTO Member that intended to make a commitment in respect to EPS for payment card transactions also meant to commit itself in respect to the processing of large-value financial market transactions that could pose a systemic risk to the Member's financial system. Transactions that fall under Item (xiv) require substantial regulatory oversight, well-designed infrastructure, and sophisticated market participants that can meet strict criteria for participation, while none of these are required for the processing of retail transactions, such as payment card transactions. Therefore, it is unreasonable to conflate EPS for payment card transactions with settlement and clearing services for financial market transactions because the latter has a significantly different risk-profile.

C. The Illustrative List of Financial Assets in Item (xiv) Indicates That the Scope of those Assets is Limited to Investment Instruments

75. Illustrative lists may be not merely non-exhaustive lists of examples but also, and significantly, they may help to inform the overall scope of a provision and the meaning of a term that they illustrate.<sup>115</sup> Therefore, in order to determine the proper interpretation, it is particularly important to examine the context and structure of the category list and individual descriptions. In practical terms, this means that particular attention should be given to the illustrative lists that appear in several sector descriptions to help define the scope of a particular sector or sub-sector

76. China's position depends on an exceedingly broad definition of "financial asset" that is completely divorced from the use of the term within its immediate context, i.e., the full sentence in item (xiv).

77. An examination of each of the items in the illustrative list demonstrate that retail receipts, such as a claim on a payment card, are not of the same type of financial assets as the items included in the illustrative list. This further supports the conclusion that they are not within the scope of "financial assets" referenced in the provision.

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<sup>114</sup> BIS CPSS Retail Payments II, pages 10-11 (Exhibit US-86).

<sup>115</sup> The Appellate Body and several WTO panels have considered illustrative lists to provide useful context. For example, as the Panel in *US – Cotton (Article 21.5)*, para. 14.45, noted: "Panels and the Appellate Body have, in interpreting the meaning of 'export subsidies' in Article 10.1, relied, inter alia, on the relevant provisions of the SCM Agreement (including Articles 1 and 3 and items of the Illustrative List) as 'context.'" See, e.g., Appellate Body Report, *US – Cotton*, para. 647; Panel Report, *Canada – Dairy (Second Recourse to Article 21.5)* para. 5.153; Panel Report, *Canada – Dairy*, para. 7.125; Panel Report, *Canada – Aircraft (Article 21.5)*, para 5.80. See also GATT Panel Report, *US-Softwood Lumber II*, SCM/162, adopted 27 October 1993, para. 171 (discussing an illustrative list in the GATT and noting that "Just as the doctrine of ejusdem generis applied as an aid to statutory construction, so this doctrine was equally applicable when interpreting an international agreement, such as the General Agreement.").

### 1. Payment Cards Are Not Similar to “Securities”

78. A security is “a pledge of financial or physical property to be surrendered in the event of failure to repay a loan,” and a “medium of investment in the money market or capital market.”<sup>116</sup> A “security” is generally defined as “an instrument that signifies an ownership position in a corporation (a stock), a creditor relationship with a corporation or government body (a bond) or rights to ownership...”<sup>117</sup> Securities are, in short, ownership and investment instruments.

79. Credit and debit cards are not similar to securities. Payment cards are retail payment instruments.<sup>118</sup> They provide a non-cash alternative for consumers to use when making purchases. A payment card does not provide a pledge of property to secure a loan, it is not an investment instrument, and it is not tradeable on money markets or capital markets.

### 2. Payment Cards Are Not Similar To “Derivative Products”

80. Derivatives are also investment instruments. A derivative is “a financial contract the value of which depends on the value of one or more underlying reference assets, rates or indices” such as futures contracts and options.<sup>119</sup> A payment card is not a contract whose value is dependent of the performance of some other asset or investment. It is simply an instrument for making retail purchases.

### 3. Payment Cards Are Not Negotiable Instruments

81. Payment cards and the sales slips generated from payment card transactions do not meet the internationally accepted criteria for a negotiable instrument. For example, in the United States, negotiable instruments are governed by Article 3 of the UCC, as adopted by each state. The UCC definition of a “negotiable instrument” is identical in all key respects to the definition of an “international bill of exchange” and an “international promissory note” as set forth in the United Nations Convention on International Bills of Exchange and International Promissory Notes (the “UN Convention on Bills of Exchange”).<sup>120</sup> While adoption of the Convention has been somewhat limited to date, the Convention reflects a careful analysis and reconciliation by

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<sup>116</sup> The Economist, *Dictionary of Business*, page 334 (2003) (Exhibit US-69); *see also* UCC, Article 8, Section 8-102 (15) (Exhibit US-75).

<sup>117</sup> The Economist, *Dictionary of Business*, page 334 (2003) (Exhibit US-69); *see also* UCC, Article 8, Section 8-102 (15) (Exhibit US-75).

<sup>118</sup> BIS CPSS Retail Payments I, pages 2-5 (Exhibit US-81) (providing an overview of retail payment instruments).

<sup>119</sup> BIS CPSS Glossary of Terms (Exhibit US-68).

<sup>120</sup> United Nations Convention on International Bills of Exchange and International Promissory Notes, December 9, 1988 (“UN Convention on Bills of Exchange”) (Exhibit US-96).

the United Nations Commission on International Trade Law (“UNCITRAL”) of the negotiable instrument laws of different legal systems.<sup>121</sup>

82. As such, it provides a useful tool in comparing the UCC definition of a “negotiable instrument” to the commonly understood meaning of the term internationally. Article 3 of the UN Convention on Bills of Exchange defines an international bill of exchange or an international promissory note as a signed, written instrument containing an unconditional order or promise to pay a definite sum to the payee or his order, and which is payable on demand or at a definite time.<sup>122</sup> Not only are the UCC definition of “negotiable instrument” and the UN Convention on Bills of Exchange definitions of “international bill of exchange” and “international promissory note” consistent, but the UCC appears to have served as a primary source used by the UNCITRAL working group in drafting the Convention.<sup>123</sup> Therefore, under this internationally accepted definition, payment cards do not qualify as negotiable instruments.

83. The UCC definition of a “negotiable instrument” states:

(a) Except as provided in subsections (c) and (d), “negotiable instrument” means an unconditional promise or order to pay a fixed amount of money, with or without interest or other charges described in the promise or order, if it:

(1) is payable to bearer or to order at the time it is issued or first comes into possession of a holder;

(2) is payable on demand or at a definite time; and

(3) does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money.<sup>124</sup>

84. An “order,” as used in the definition of a “negotiable instrument,” is defined as a “written instruction to pay money signed by the person giving the instruction.”<sup>125</sup> Similarly, a “promise”

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<sup>121</sup> See UNCITRAL, Draft Uniform Law on International Bills of Exchange and Commentary: Report of the Secretary-General, March 31, 1972, Introduction, U.N. Doc. A/CN.9/67 (note that the Convention was initially styled as a uniform law and later revised to the form of a convention) (“UNCITRAL Report on Bills of Exchange”) (Exhibit US-97). See generally Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on International Bills of Exchange and International Promissory Notes (Exhibit US-98).

<sup>122</sup> UN Convention on Bills of Exchange, Article 3 (Exhibit US-96). Although Article 3 does not permit a bill of exchange or promissory note to be payable to bearer initially, Article 14 of the Convention permits such an instrument to be endorsed in blank or with a statement that it is payable to bearer.

<sup>123</sup> See UNCITRAL Report on Bills of Exchange, Article 1 (Exhibit US-97) (citing UCC as “relevant legislation”). Presumably, the UCC definition of a “negotiable instrument” is also consistent with the definition used by other principal legal systems, as the introduction to the draft notes that “[w]here the existing legal systems concur in a rule, that rule generally has been followed in the present draft.” UNCITRAL Report on Bills of Exchange, para. 9.

<sup>124</sup> UCC, Section 3-104 (Exhibit US-99).

<sup>125</sup> UCC, Section 3-104 (Exhibit US-99).

is a “written undertaking to pay money signed by the person undertaking to pay.”<sup>126</sup> Thus, the key elements of a negotiable instrument are that the promise or order to pay is in a signed writing, unconditional, and for an exact amount of money, and that the promise or order is payable to the holder of the instrument (*i.e.*, may be transferred from the initial recipient), on demand (or at a definite time), and does not require any further action on the part of the parties other than the transfer of money.

85. A payment card transaction does not involve a written promise or order to pay that satisfies the definition above and, thus, does not involve a negotiable instrument. Some payment card transactions are processed entirely electronically, without the cardholder signing a sales slip and, thus, do not result in the creation of any writing, signed by the cardholder, either promising to pay or ordering the payment of an amount to the merchant. Other payment card transactions require the cardholder to sign a sales slip instructing the bank that issued the payment card to pay the merchant for the transaction, thereby satisfying the requirement that the order to pay is evidenced in writing and is signed by the drawer. However, the sales slips created in connection with such transactions are not payable to bearer, but rather, are payable only to the identified merchant.

86. Also, the order to pay generated by the sales slip is not for a fixed amount of money because the issuing bank and the merchant’s bank will deduct fees from the transaction amount while processing the payment, and the amount ultimately received by the merchant will be some amount less than the value of the transaction identified on the sales slip. Moreover, the merchant’s right to collect payment on a sales slip is governed by, and subject to the terms of, the various agreements by and among the merchant, the merchant’s bank, the payment card network, and the issuing bank. It is also evident that a payment card sales slip is not an instrument that stands on its own and entitles any holder to collect payment (such as a check or promissory note). Rather, a sales slip more closely resembles a recordkeeping method to facilitate the exchange of financial information and financial data processing among participants in a multi-party funds transfer system.

87. Numerous U.S. courts have found that neither plastic credit cards nor the sales slips generated in connection with credit card transactions are negotiable instruments under Article 3 of the UCC.<sup>127</sup> For example, a court made a specific finding of fact that “There is no market for the sale of cardholder transactions... from merchant banks to issuing banks, and it would be meaningless to use such a market for purposes of analysis in this case. Only the member which issued a card has any interest in acquiring from merchant bank transactions effected by that

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<sup>126</sup> UCC, Section 3-104 (Exhibit US-99).

<sup>127</sup> See, e.g., *Broadway Nat. Bank v. Barton-Russell Corp.*, 5 N.Y.S2d 933 (1992) (Exhibit US-71) (“[A] credit card is a commercial instrument, but...not a negotiable instrument”); *First National Bank of Findlay v. Fulk*, 566 N.E.2d 1270 (1989) (Exhibit US-72) (credit card slips lacked words of negotiability and thus were not negotiable instruments under state law); *First United Bank v. Philmont Corp.*, 533 So.2d 449 (Exhibit US-73) (“Credit card sales slips are not checks, drafts or other negotiable instruments as defined by UCC Articles 3 and 4...the sales slips are non-negotiable instruments evidencing the payment of money...”); *Commercial Bank & Trust Co. v. Bank of Louisiana*, 487 So.2d 655 (1986) (Exhibit US-74) (“[C]redit card sales drafts are plainly not negotiable instruments...”).

card.”<sup>128</sup> Because they do not satisfy the definition of a negotiable instrument, payment card transactions are excluded from coverage under Article 3 of the UCC.<sup>129</sup> Instead, payment card transactions are processed and governed primarily under U.S. federal law, including the Truth in Lending Act and Electronic Fund Transfer Act, to the extent applicable, and the rules of the applicable payment card network.<sup>130</sup>

#### 4. Payment Cards Are Not Similar to other Types of “Negotiable Instruments” Referred to in Item (xiv)

88. Payment cards are also not similar to the types of negotiable instruments referenced in Item (xiv). “Negotiable instruments” include, for example, commercial paper, which a type of investment instrument that is processed through settlement and clearing.<sup>131</sup> As noted, in context, the types of negotiable instruments referenced in item (xiv) are tradeable assets, and do not include instruments that are used for retail payments.

89. China argues that, “Since it is beyond any reasonable dispute that the clearing and settlement of negotiable instruments is encompassed by item (xiv), it would be arbitrary and illogical to conclude that clearing and settlement services for certain types of retail payment instruments are covered by item (xiv), while clearing and settlement services for other types of retail payment instruments are covered by item (viii).”<sup>132</sup> China’s argument is premised on a false assumption. It is not true that “clearing and settlement services for certain types of retail payment instruments [such as checks] are covered by item (xiv).” Item (xiv) only covers those types of “negotiable instruments” that qualify as “financial assets,” and instruments such as personal checks do not fall within that category, as the term “financial assets” is used in item (xiv).

90. International classification schemes typically distinguish between, on the one hand, negotiable instruments that are tradeable or serve as investment instruments, and, on the other hand, instruments such as checks that are not tradeable. One such example is the System of National Accounts (SNA). As explained in the U.S. response to the Panel’s written questions (at para. 74), the SNA is an international standard system of national accounts. It is prepared jointly by the United Nations, the OECD, the World Bank, the IMF, and the European Commission.

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<sup>128</sup> Exhibit US-66, page 33.

<sup>129</sup> See UCC Article 4A, prefatory note (Exhibit US-99) (distinguishing a credit card slip from a negotiable instrument).

<sup>130</sup> See UCC Article 3, prefatory note (Exhibit US-99) (noting that the federal government has established regulations for credit and debit cards); UCC Article 4A, prefatory note (Exhibit US-99) (noting that payments by credit card are not governed by the UCC but, rather, aspects thereof are governed by federal law). See generally Miller and Hughes, Non-U.C.C. Payment Methods, in 10A Hawklund UCC Series at §§ 1:1 to 2:20 (Exhibit US-100) (discussing credit, debit and prepaid card payments as being governed by various state and federal laws rather than the UCC).

<sup>131</sup> BIS Commercial Paper Markets (Exhibit US-85) (“Commercial paper is a type of fixed-maturity unsecured short-term negotiable debt issued generally in bearer form and primarily by non-banks.”).

<sup>132</sup> China’s Answers to Panel’s Questions, para. 50.

The UN was represented in the preparation of the SNA by the United Nations Statistical Division, the same division which prepared the Central Product Classifications (CPC), including the provisional CPC which formed the basis of the W/120 classification and ultimately the GATS Annex on Financial Services.

91. The SNA distinguishes between financial claims that are negotiable and those that are not. The 2008 SNA (Exhibit US-70) states that “[t]hose financial claims that are negotiable are referred to as securities” and further explains (page 223, section 11.33):

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

92. The funds transfer mechanisms associated with credit and debit card transactions are not “negotiable” instruments as those term is used in the SNA. Similarly, according to the International Monetary Fund (IMF) “a financial asset is *negotiable* if it is actively or inactively traded in a secondary market. To qualify as negotiable, securities other than shares must be designed for prospective trading on an organized exchange or in the over-the-counter market, but demonstration of actual trading is not required. . . .” A footnote to “negotiable” states that “*negotiable instrument* is sometimes legally defined as an unconditional promise or order to pay a fixed amount of money. An ordinary check written on a deposit account would qualify as a negotiable instrument in the legal context, but not in the *MFSM* and *1993 SNA* context.”

93. Thus, according to the classification schemes formulated by the UN, the IMF and other international organizations, the term “negotiable instrument” does not include retail payment instruments such as checks.

D. China’s Interpretation of “Financial Asset” and “Negotiable Instrument” Does Not Accord With How The Term is Used Elsewhere in the Annex

94. The terms “financial assets” and “negotiable instruments” also appear in paragraph 5(a), item (x) of the Annex, which covers, “Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise.” Item (x) includes the following illustrative list of tradeable assets:

- (A) money market instruments (including cheques, bills, certificates of deposits);
- (B) foreign exchange;
- (C) derivative products including, but not limited to, futures and options;
- (D) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;
- (E) transferable securities;
- (F) other negotiable instruments and financial assets, including bullion.  
(emphasis added)

95. Thus, “negotiable instruments” and “financial assets” as used in item (x) refer to tradeable investment assets, rather than “[m]oney and claims.”<sup>133</sup> Thus, the context for item (xiv) indicates that “negotiable instruments” and “financial assets” are not retail payment vehicles like credit and debit cards.

E. As Additional Context, Subsector (d) Is the Most Specific and Accurate Description for Purposes of Classifying EPS for Payment Card Transactions

96. Item (viii) of paragraph 5(a) of the Annex, and subsector (d) in China’s Schedule (“All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement”) provide, additional context for the interpretation of item (xiv). Item (viii) and subsector (d) contain the most specific and accurate description of the service for purposes of classifying EPS for payment card transactions is subsector (d).

97. China’s commitments pertain to “all payment and money transmission services, including credit, charge and debit cards,” indicating that the scope of the commitment covers any service that is a type of “payment and money transmission” including “credit, charge, and debit cards” payment transactions. EPS suppliers are at the heart of this service. EPS clearly fall within the ordinary meaning of “payment and money transmission services” as one type of “all” such services. Second, the phrase “all payment and money transmission services” is modified with an illustrative list that explicitly provides that it “include[s] credit, charge and debit cards.” This explicit reference is in line with the recognition that EPS is integral to the processing of credit, charge, debit and other payment card-based electronic payment transactions and, without EPS, payment card transactions could not occur.

98. China argues that a “financial asset” should include a “claim by the acquiring bank against the issuing bank,” which China describes as a “right to receive payment in cash.”<sup>134</sup> China’s argument is based in part on the assumption that a credit card receivable may at times be securitized.<sup>135</sup> China’s arguments fail to recognize the difference between securitized instruments and those that are not.

99. The United States agrees that securitized receivables can be a financial asset.<sup>136</sup> However, the treatment of securitized receivables has nothing to do with the EPS necessary to process a retail payment transaction. In fact, major EPS suppliers do not settle and clear securities. EPS is supplied only to process retail transactions, and such processing takes place prior to the time when any securitization might occur.

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<sup>133</sup> See China’s First Written Submission, para. 86 (using the *Oxford Dictionary of Economics* definition of “financial assets”).

<sup>134</sup> China’s Answers to Panel Questions, para. 43.

<sup>135</sup> China’s Answers to Panel Questions, paras. 44-46.

<sup>136</sup> See U.S. Answers to the Panel’s First Set of Questions, para. 98.

100. The near instantaneous processing of retail transactions makes securitization of those daily data and money flows virtually impossible. In reality, it is impossible to identify any specific “claim by the acquirer against the issuing bank” because during the course of each day, a bank may be the acquirer on some transactions and the issuer on others. As transactions are posted throughout the day, a bank may be entitled to receive cash at some moments and obligated to pay cash at others. The scenario described by China would require “freezing” the EPS system at a single point in time. However, at the beginning of each day and at the end of each day no outstanding claims exist between issuers and acquirers and there is no “financial asset” that would appear on an acquirer’s balance sheet – nor would one appear during the middle of the day.

101. Furthermore, China focuses only on the securitization of credit card receivable and says nothing about debit card receivables which, by their nature, are not securitized. For example, in a four party system, the funds are transmitted among the four parties on a daily basis, and there is no outstanding receivable capable of being securitized. Payment and money transmission services for debit and credit cards are, however, covered by item (viii) of the Annex, the same subsector (d) of China’s schedule. There is no justification for treating credit card processing and debit card processing differently in terms of classification.

102. In its Third Party Submission, the European Union indicated that it considers the “clearing and settlement services” involved in the trading (buying and selling) of “securities, derivative products and other negotiable instruments” to be separate and distinct from the “payment and money transmission services that occur when there is a transfer of funds to settle “credit, charge, or debit cards.”<sup>137</sup> In response to a question from the Panel, several Third Parties confirmed that they shared the view of the European Union.<sup>138</sup> In addition, in their responses to Question 1 to the Third Parties from the Panel, Australia,<sup>139</sup> Korea,<sup>140</sup> and the EU<sup>141</sup> identified

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<sup>137</sup> Third Party Submission of the European Union, para. 27.

<sup>138</sup> See Australia’s Responses to Questions of the Panel Following the First Substantive Meeting With the Panel, Question 1, pages 1-2; Responses of the European Union to Questions by the Panel, paras. 1-4; Answers of Guatemala to Questions from the Panel, para 4; and Response of Korea to Questions From the Panel, para. 1.

<sup>139</sup> Australia’s Response to Question 1 of the Panel to Third Parties, page 1 (“Australia notes that negotiable instruments include negotiable rights that extend beyond the money transaction exchanged for the instrument, such as rights to the ownership of the share and voting interest in the company. Consequently, Australia points out that there are further steps involved in settling and clearing these assets and that distinct service providers such as Australia’s Clearing House Electronic Subregister System (‘CHESS’) provide the services necessary to settle and clear financial assets traded on the Australian stock exchange, such as registering the title of shares. As a result, both an ‘ordinary meaning’ reading of the terms as well as a textual interpretation of the Annex supports the view that credit, charge or debit cards should not be considered ‘negotiable instruments’ in the context of item (xiv) of the Annex.”)

<sup>140</sup> Response of Korea to Questions By the Panel To Third Parties, para. 1 (“clearing and settlement services within the meaning of item (xiv) of the Annex does not take place in payment and money transmission services in item (viii). To the extent that settlement and clearance occurs in the context of a payment and money transmission service is incidental processing to complete the payment or money transmission”).

<sup>141</sup> Response of the EU to Questions By the Panel To Third Parties, para. 1 (“The European Union considers clearing and settlement services for securities as completely distinct services from any elements of clearing and settlement that form part of a payment services.”).

several distinctions between the services required to settle and clear financial assets such as securities, derivatives, and other similar negotiable instruments and those that are included in payment and money transmission services.

**IV. CHINA’S MODE 1 AND MODE 3 COMMITMENTS FOR SUBSECTOR (D) “ALL PAYMENT AND MONEY TRANSMISSION SERVICES, INCLUDING CREDIT, CHARGE, AND DEBIT CARDS...”**

**A. China’s Mode 1 Commitments for “All Payment and Money Transmission Services, Including Credit, Charge and Debit Cards...”**

103. The second column of China’s Services Schedule sets out the terms, limitations, and conditions with respect to the market access commitment related to subsector (d) 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.

104. It is plain from the text that China has taken mode 1 commitments for “all payment and money transmission services, including credit, charge and debit cards...” The word “Unbound” is followed by the qualifying phrase “except for the following,” which in turn is further elaborated by two sentences that describe elements of the services within subsector (d) for which China has taken mode 1 commitments. Proper treaty interpretation requires that the qualifying phrase “except for the following” and the further specific elaboration following the word “Unbound” should be given meaning. In response to the Panel’s questions, the United States prepared a chart in which it identified several aspects of EPS that are covered by the mode 1 market access commitment undertaken by China.<sup>142</sup>

105. China argues that, assuming EPS for payment card transactions do fall within subsector (d), the United States has failed to demonstrate that China has any mode 1 market access commitments.<sup>143</sup> China’s responses to the Panel’s questions regarding the meaning of the extensive language qualifying the term “Unbound...” essentially reduces to the single point that all of the extensive language qualifying the term “Unbound” in its market commitments was

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<sup>142</sup> U.S. Answers to the Panel’s First Set of Questions, para. 121; *see also* U.S. Answers to the Panel’s First Set of Questions, paras. 122-131.

<sup>143</sup> China’s First Written Submission, paras. 123-130.

provided simply to confirm language already existing elsewhere.<sup>144</sup> In short, according to China, that the additional wording should be given no meaning. This is not credible. If China wished to in fact be fully “Unbound,” that is, not to have any commitments, it would have left the word “Unbound” unqualified. However, as the Schedule reflects, China did not do so. It is not credible to argue that this language is merely for greater certainty to repeat China’s commitments in subsectors (k) and (l). Such an argument fails to give meaning to this treaty language.

106. Perhaps recognizing the weakness of its argument, China asks the Panel to undertake a “thought exercise” in which it asks the Panel to disregard the actual text and to “imagine” that China’s Mode 1 market access entry does not contain the wording it does, “but instead said ‘unbound except for subsectors (k) and (l).’”<sup>145</sup> China’s calls for the Panel to ignore the actual text and to “imagine” instead alternative wording highlights the weakness of its argument. It is the actual terms of China’s commitments – as the words have been inscribed in China’s Schedule – that must be interpreted.

107. The services defined by the sector and subsector descriptions cannot be altered by the commitments made in the market access or national treatment columns. While a WTO Member may place limitations on the scope of its commitment with respect to a given sector, limitations inscribed in the market access and national treatment columns cannot change the scope of the sector description itself. Consequently, China’s mode 1 commitment must be understood as recognizing that elements of “payment and money transmission” services include “provision and transfer of financial information” and “advisory, intermediation and other auxiliary services” to the extent that such elements are integral to the core service, and that the service of which they form a part is properly classified within “payment and money transmission” services and not in subsector (k) or (l). As the United States explained in answers to the Panel’s questions, the “exceptions” set out in China’s market access commitments cover elements of EPS that are an integral part of the provision of “payment and money transmission” services.<sup>146</sup> Indeed, without the “excepted” elements, the vast majority of card based payment transactions simply could not occur.

108. As the United States has explained, activity involved in EPS for payment card transactions, which is also described by China in its mode 1 commitment, involves the transfer of financial information and financial data processing, and much of this occurs on a cross-border basis.<sup>147</sup> It is therefore not surprising that China made cross-border commitments for subsector (d) for EPS for payment card transactions to the extent that the activities entail the provision and transfer of financial information and financial data processing.

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<sup>144</sup> See, e.g., China’s Answers to Panel Questions, paras.74-79, 104.

<sup>145</sup> China’s Answers to Panel Questions, note 52.

<sup>146</sup> See U.S. Answers to Panel Questions, paras. 121-126.

<sup>147</sup> See U.S. Answers to Panel Questions, paras. 121-131.

109. Elements of CUP’s own activities are described in terms similar to the “excepted” elements that are set out in China’s mode 1 market access commitments. For example, Chapter 2 of CUP’s Articles of Incorporation, entitled “Purpose and Business Scope” states as follows:

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

Article 12. Upon being registered according to law, the business scope of the Company is as follows: (1) to establish and operate a single nationwide inter-bank bank card information switching network; (2) to provide advanced electronic payment technologies and specialized services in connection with the inter-bank bank card information switching; (3) and to engage in bankcard technological innovation; (4) to manage and operate the brand of “UnionPay”; (5) to formulate the code and technical standards for inter-bank bank card transactions, and to mediate and arbitrate any business disputes arising out of inter-bank transactions; (6) to organize trainings for the industry, business seminars and international exchange programs; and (7) to conduct related researches and consulting services; and to conduct such other related businesses as may be approved by competent authorities.<sup>148</sup>

110. Paragraph 2 of the Reply of the People’s Bank of China on the Opening of China UnionPay Co., Ltd. the PBOC “approve[s] the preparation for the establishment of China UnionPay Co., Ltd. (“CUP”). This company will be a joint-stock financial institution that provides an inter-bank bankcard information switching network and specialized services in connection therewith.”<sup>149</sup>

111. The Chinese regulatory system similarly describes a primary activity of CUP as exchanging information among financial institutions. Document No. 76, Exhibit US-56/US-63) includes the “Notice of People’s Bank of China in Relation to Issuance of Business Practices for the Interoperable Services of Bank Cards,” and an accompanying Appendix, which includes the “Business Practices for the Interoperable Services of Bank Cards” (“Business Practices Appendix”) In fact, the Business Practices Appendix, in Document No. 76, which required the formation and participation in the entity that evolved into CUP, described the scope of the operation as a “Bank Card Cross-bank Information Exchange System.” Article 2.2 of the measure states as follows:

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<sup>148</sup> The Articles of Incorporation of China UnionPay, Co. Ltd., Articles 11-12 (emphasis added) (Exhibit US-20).

<sup>149</sup> Exhibit US-27, para. 2 (emphasis added).

Bank Card Interoperation means that the Bank-Card Financial Institutions . . .link themselves with the countrywide or regional Bank Card Cross-bank Information Exchange System to achieve the sharing of information, machinery and merchants and bank and cross-bank interoperation.<sup>150</sup>

112. In its 2007 China Payment System Development Report, PBOC states that “CUP operates national bankcard cross-bank information exchange network, and provides specialized service on bankcard cross-bank information exchange. It is connected with HVPS, and PBC is responsible for the final settlement.”<sup>151</sup>

113. This is all of course consistent with the recognition that the ability to “transfer financial information” and supply “advisory, intermediation and other auxiliary financial services” cross-border with respect to an integrated service (when the service supplier is located in a particular country) is often necessary for corporate risk management purposes and typically occurs in the ordinary course of business.

114. Finally, the concept that a service may include elements of “provision and transfer of financial information, and financial data processing” was recognized, for example, in the Uruguay Round Understanding on Commitments in Financial Services, paragraph 8 of which states:

No Member shall take measures that prevent transfers of information or the processing of financial information, including transfers of data by electronic means, or that, subject to importation rules consistent with international agreements, prevent transfers of equipment, where such transfers of information, processing of financial information or transfers of equipment are necessary for the conduct of the ordinary business of a financial service supplier.

115. In other words, the provision and transfer of financial information and data processing is central to the supply of many different financial services, and, according to the Understanding, signatory WTO Members cannot frustrate their commitments by, for example, blocking the ability to communicate and process information. China is not a signatory to the Understanding. However, the principle stated in paragraph 8 of the Understanding is nonetheless relevant in that it recognizes that a particular financial services may include elements such as the “provision of financial information,” but this fact does not transform that service into the “provision of financial information.”

B. China’s Mode 3 Commitments for “All Payment and Money Transmission Services, Including Credit, Charge and Debit Cards...”

116. China has mode 3 market access and national treatment commitments for subsector (d). The presence of the term “financial institution” in China’s schedule does not create a separate and independent limitation. There is nothing in China’s Schedule that indicates it may condition

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<sup>150</sup> Document No. 76, Article 2.2 (Exhibit US-56/US-63).

<sup>151</sup> Exhibit US-15, page 25.

the supply of a service on the criteria listed in column 2 and in addition require that another Member's supplier meet additional (and unspecified) criteria to be recognized as a "foreign financial institution." The Schedule states that "[c]riteria for authorization to deal in China's financial services sector are solely prudential." Thus, under China's Schedule, the only limitations China may impose are in connection with legitimate prudential regulation and the limitations explicitly listed in China's Schedule – the now defunct restrictions on geographic scope and use of domestic currency, and ongoing requirements applicable to banks. The additional references to the term "financial institution" in the paragraphs that follow the explicit statement that the criteria are "solely prudential" does not alter that unequivocal statement as to the sole criteria for authorization to deal in China's financial services sector.

117. China advances several arguments in support of its assertion that its mode 3 commitments for subsector (d) are limited to "foreign financial institutions."<sup>152</sup> First, China argues that its mode 3 commitments in subsector (d) apply only to services supplied by banks because subsector (d) falls under the heading of "banking services."<sup>153</sup> Second, China maintains that because there are certain references to "foreign financial institutions" in its market access and national treatment limitations that this, in turn, means that its commitments are "limited to foreign financial institutions."<sup>154</sup> Third, China has offered a definition of "financial institution"<sup>155</sup> that is too narrow. Finally, China contends that "foreign financial institutions" – a term that it has not defined in its Schedule – are "banks and other types of regulated foreign financial institutions."<sup>156</sup> China's arguments to the contrary, it is clear that China's Schedule is neither limited to services supplied by banks, nor to services supplied by "financial institutions," and even if there were such a limitations, the EPS suppliers at issue would qualify.

1. The "Banking Services" Subheading in China's Schedule Does Not Limit China's Commitments to Banks

118. The fact that subsector (d) falls under the heading of "banking services" does not operate to limit China's commitments to "banks" or other "regulated financial institutions" as China argues.<sup>157</sup> The "banking services" heading does not operate in this manner. Even if it did, EPS suppliers would qualify: U.S. EPS suppliers, as well as CUP, were formally operated as associations of banks – and from their inception they were clearly performing "banking services." The nature of the service that an entity supplies does not change merely because that entity assumes a new corporate form. The characteristics and nature of the service control the classification of that service. Where the identity of the supplier is relevant, the sectoral description must clearly indicate that to be the case. For example, in China's Schedule, there are sectors described as "Motor vehicle financing by non-bank financial institutions." The absence

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<sup>152</sup> See China's First Written Submission, paras. 131-146.

<sup>153</sup> See China's First Written Submission, para. 132.

<sup>154</sup> See, e.g., China's First Written Submission, paras. 135-137.

<sup>155</sup> See, e.g., China's First Written Submission, para. 140.

<sup>156</sup> See China's First Written Submission, para. 140.

<sup>157</sup> See China's First Written Submission, para. 132.

of a qualification in subsector (d) indicates that it covers all of the indicated services, regardless of the type of entity that supplies those services.

119. It is also evident from China's Schedule itself that the term "banking services" listed in China's Schedule, including those listed in subsector (d) are not limited to those provided by banks as China claims. In addition to the explicit reference to "non-bank financial institutions" in China's Schedule, there are other references to "foreign finance companies" in the market access column and to "foreign financial leasing corporations" in the Additional commitments column.

120. The definition of "financial service supplier" in the Annex on Financial Services provides additional support in this regard: "A financial service supplier means any natural or juridical person of a Member wishing to supply or supplying financial services but the term 'financial service supplier' does not include a public entity." This definition covers not only banks but other suppliers of financial services, which supply or wish to supply financial services within the meaning of the Annex.

## 2. China's Commitments in Subsector (d) Are Not Limited to "Foreign Financial Institutions"

121. China also argues that its mode 3 market access and national treatment commitments for subsector (d) are limited to foreign financial institutions.<sup>158</sup> Although China includes certain limitations with respect to foreign financial institutions, this does not mean that its commitments are limited to foreign financial institutions. Such a limitation would have needed to be imposed explicitly.

122. The contrast between China's mode 1 and mode 3 commitments is telling in this regard. China's mode 1 commitment begins with "unbound except for . . .", while the mode 3 commitment has no such limiting language. WTO Members, including those cited by China, seeking to limit their commitments in similar circumstances have prefaced the commitment with "unbound except," or "the service may only be supplied by . . . ." The absence of similar language explicitly used by China shows that the term "financial institution" is not a limitation on the type of service supplier that may benefit from China's commitment.

123. Even if the term "financial institutions" in item B of China's mode 3 commitment were found to apply to all instances of supply of the listed services, China's argument that it serves as a separate limitation still fails. China's view is that the presence of the term "financial institutions" creates a separate and independent limitation. In other words, China argues not only that it may condition the supply of a service on the criteria listed in column 2, but also that it can require that another Member's supplier meet additional (and unspecified) criteria to be recognized as a "financial institution." Nothing in China's Schedule supports this view. In fact, the Schedule states that "[c]riteria for authorization to deal in China's financial services sector are solely prudential." Thus, under China's Schedule, the only limitations China may impose are

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<sup>158</sup> China's First Written Submission, para. 132.

prudential restrictions and the explicitly listed limitations – defunct restrictions on geographic scope and use of domestic currency, and ongoing requirements applicable to banks.

### 3. China’s Definition of “Financial Institution” Is Too Narrow

124. Finally, even if it were the case that the term “financial institution” somehow served as a limitation in China’s Schedule (and it is clear from the above that it does not), the definition of “financial institution” offered by China is far too narrow. Many definitions are much broader, and some explicitly include “an operator of a credit card system.”<sup>159</sup> Moreover, the narrow definition that China now offers is not consistent with how the term is used in China’s Schedule.

125. One example of a definition of “financial institution” that explicitly includes “an operator of a credit card system” can be found in *Black’s Law Dictionary* (Exhibit US-67), which defines “financial institution” to include:

An insured bank; a commercial bank or trust company; a private banker; an agency or branch of a foreign bank in the United States; an insured institution as defined in the National Housing Act; a thrift institution; a broker or dealer registered with the Securities and Exchange Commission; a broker or dealer in securities or commodities; an investment banker or investment company; a currency exchange; an issuer, redeemer, or cashier of travelers’ checks, checks, money orders, or similar instruments; an operator of a credit card system; an insurance company; a dealer in precious metals, stones or jewels; a pawnbroker; a loan or finance company; a travel agency; a licensed sender of money; a telegraph company.<sup>160</sup>

126. China offers a subsequent edition of *Black’s Law Dictionary* containing a different definition of the term in support of its argument (China Answers to Panel Questions, para. 111); however, that edition was not contemporaneous with the negotiation of China’s GATS Schedule of Concessions and therefore is not relevant to understanding the ordinary meaning of the term as used by the drafters of China’s Schedule. The term “financial institution” appears in China’s draft GATS Schedule as early as 1993; China and the United States concluded bilateral accession negotiations in 1999, and all of the relevant language was unchanged as of that date. Furthermore, other sources offer an even broader definition to include entities “whose core activity is to provide financial services”. For example, the Oxford Online Reference resource contains *A Dictionary of Finance and Banking*, which provides the following definition of “financial institution”:

An organization whose core activity is to provide financial services or advice in relation to financial products. Financial institutions include state bodies, such as central banks, and private companies, such as banks, savings and loan associations, and also financial markets. At one time there was a clear distinction

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<sup>159</sup> *Black’s Law Dictionary, 6<sup>th</sup> Edition*, West Publishing Co., St. Paul, MN (1990) (Exhibit US-67).

<sup>160</sup> *Black’s Law Dictionary, 6<sup>th</sup> Edition*, West Publishing Co., St. Paul, MN (1990) as including “...an operator of a credit card system...” (Exhibit US-67).

and regulatory division between deposit-taking institutions, such as banks, and non-deposit-taking institutions, such as brokers or life-insurance companies. This is no longer the case; brokers and other companies now often invest funds for their clients with banks and in the money markets.<sup>161</sup>

127. In addition, as the United States has noted, it is clear that CUP – China’s sole supplier of EPS – is considered by China to be a “financial institution” in China. For example, the Reply of PBOC on the Opening of CUP, states at paragraph 2 that “China UnionPay Co., Ltd. is a joint-stock financial institution that provides a inter-bank bankcard information switching network and specialized services in connection.”<sup>162</sup> Paragraph 6 of that document also describes the relevant license as a “Financial Institution Legal Person License.”

128. That CUP is unquestionably considered a “financial institution” in China – and one that is supplying the service at issue in this dispute – is further evidenced by statements by CUP executives themselves during a press event in connection with the establishment of CUP. The questions and answers from that press event are in a document posted on the website of the People’s Bank of China (“PBOC”):

Question 5: Why does China Unionpay adopt the corporate system to set the business norms and technical standards for realizing cross-bank network linkage and card utilization, resource sharing and joint development among banks?

Answer: As a financial institution for offering cross-bank information exchange network and specialized services for bankcards, China Unionpay, by adopting a corporate system, can adapt to changes and demands of the market with more clear-cut operation objectives and can establish effective internal structure of governance and efficient operational mechanism. It can, by cutting operational cost, expand the market of card utilization, enhance operational efficiency, ensure its own survival and growth and assume the responsibility of preserving and optimizing the value of the assets of the investors. Therefore, by drawing on the successful experiences of international counterparts, it is safe to say that China Unionpay, by adopting the corporate system, will be more dynamic and be more conducive to the sound development of bankcard business in China.<sup>163</sup>

129. Finally, China also cites to certain U.S. laws in defining “financial institutions” more narrowly as banks or entities accepting deposits.<sup>164</sup> Yet, there are many other definitions of “financial institutions” in U.S. law that are much broader and that explicitly include EPS suppliers. For example, for purposes of certain reporting requirements on monetary transactions,

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<sup>161</sup> A Dictionary of Finance and Banking. Ed Jonathan Law and John Smullen. Oxford University Press, 2008. Oxford Reference Online. Oxford University Press. (Exhibit US-76).

<sup>162</sup> Exhibit US-27.

<sup>163</sup> “China Unionpay Executive met the Press,” posted on website of the People’s Bank of China (Exhibit US-101).

<sup>164</sup> China’s Answers to Panel Questions, para. 113 and note 75.

bank secrecy, and money laundering, U.S. law defines a “financial institution” to include “an operator of a credit card system.”<sup>165</sup>

**V. 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)**

130. The measures imposed by China on the supply of electronic payment services are inconsistent with Article XVI:2 of the GATS because they limit the number of suppliers of EPS for RMB-denominated transactions that are paid in RMB. 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.<sup>166</sup>

131. 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 view that limitations amounting to a zero quota are quantitative limitations and fall within the scope of Article XVI:2(a).”<sup>167</sup>

132. China recognizes that the Appellate Body found in *US – Gambling* that Articles XXVIII(h) and VIII:5 of the GATS “suggest that the reference, in Article XVI:2(a), to limitations on the number of service suppliers ‘in the form of monopolies and exclusive service suppliers’ should be read to include limitations that are in form or in effect, monopolies or exclusive services suppliers.”<sup>168</sup> However, China argues that this reasoning does not apply to this dispute because “the present question was not directly presented in *Gambling*, as there were no monopoly or exclusive service supplier allegations.”<sup>169</sup>

133. This argument fails because *US – Gambling* squarely addressed the *legal* question of whether Article XVI:2 covers measures that had “the effect of limiting the number of services suppliers or output.”<sup>170</sup> It is true that the specific “number” in question in that appeal was “0.” However, the Appellate Body’s reasoning contains nothing to suggest that the conclusion would differ if the “number” in question were 3, or 2, or, as in this situation, 1. The Appellate Body

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<sup>165</sup> 31 U.S.C. 5312(a)(2)(L) (Exhibit US-102).

<sup>166</sup> Appellate Body Report, *US – Gambling*, para. 233 (original emphasis).

<sup>167</sup> Appellate Body Report, *US – Gambling*, para. 238.

<sup>168</sup> Appellate Body Report, *US – Gambling*, para. 230 (emphasis in original), quoted in Answers by China to Panel Questions After First Meeting, para. 120, note 83.

<sup>169</sup> Answers by China to Panel Questions After First Meeting, para. 120, note 83.

<sup>170</sup> Appellate Body Report, *US – Gambling*, para. 224.

even went so far as to emphasize that Article XVI:2(a) extends to measures that are “*in effect*” monopolies or services suppliers.<sup>171</sup>

134. China also looks to the report of the *US – Gambling* panel to constrain the scope of the Appellate Body’s conclusion, relying on that panel’s statement that:

Under Article VI and Article XVI, measures are either of the type covered by the disciplines of Article XVI or are domestic regulations relating to qualification requirements and procedures, technical standards and licensing requirements subject to the specific provisions of Article VI. Thus, Articles VI:4 and VI:5 on the one hand and XVI on the other hand are mutually exclusive.<sup>172</sup>

135. Article VI is not at issue in this dispute and, in any event, the Appellate Body has clarified that measures that “*in effect*” are limitations such as monopolies and exclusive service suppliers are disciplined under XVI:2. The allowance of a measure under one provision of a covered agreement does not immunize it from the other disciplines of that agreement. This is evident from Article VI:5 itself, which applies “[i]n sectors in which a Member has undertaken specific commitments.” As an obligation under Article XVI:2 is one such specific commitment, this language from Article VI:5 specifically envisages the concurrent applicability of Articles VI and XVI, precisely the situation that China now argues is precluded.

136. Thus, according to the Appellate Body, Article XVI:2 does not apply exclusively to limitations “*in the form of*” the restrictions listed in its subparagraphs (a) through (f), as China argues. Rather, as the Appellate Body has found, it extends to measures that “*are in effect*” such limitations, including monopolies and exclusive services suppliers.

#### **B. China’s Measures Related to China UnionPay and the Use of CUP Payment Cards Operate to Limit The Number Of Suppliers of EPS**

137. The evidence provided by the United States demonstrates that China’s measures limit the number of foreign suppliers of EPS for payment card transactions. China requires that all RMB-denominated payment card transactions in China be processed by CUP, and that CUP process all foreign currency denominated card transactions where the card is issued in China. In short, China requires that CUP process all payment card transactions where the card is issued in China and used in China.<sup>173</sup>

138. During the Panel’s first meeting with the Parties, China asserted several times that the United States had failed to demonstrate that foreign EPS suppliers could not supply EPS for payment card transactions in China. The Panel has now asked China Question 22(b) from the Panel to China:

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<sup>171</sup> Appellate Body Report, *US – Gambling*, para. 230.

<sup>172</sup> Panel Report, *US – Gambling*, para. 6.305, *quoted in* Answers by China to Panel Questions After First Meeting, para. 121.

<sup>173</sup> See U.S. July 29, 2011 Response, sections V.B to V.I.; U.S. First Written Submission, paras. 12, 31, 37-72; 79-92; U.S. Answers to Panel Questions, paras.13-16, 23-36, 62-66.

Could China confirm that operators other than China UnionPay could be authorised to establish their own network and process domestic RMB-denominated payment card transactions independently from China UnionPay's network? If relevant, please identify legal instruments and provisions that address this.

139. China did not answer the Panel's question.<sup>174</sup> This is not surprising because, as the United States has demonstrated, in fact and as China's measures mandate, EPS suppliers other than China UnionPay cannot process domestic RMB-denominated payment card transactions in China. EPS suppliers other than CUP cannot process any payment card transactions in China where the card is issued in China and used in China. Furthermore, China's failure to identify the legal instruments means that China's oral assertion that there are no restrictions is just that – an assertion – unsupported by any evidence, and the panel should make that finding.

140. In addition, in response to questions from the Panel, China repeatedly asserts that the United States has failed to establish that any of the measures at issue in this dispute require any transaction (of any type) to be processed over the CUP network.<sup>175</sup> Furthermore, China maintains in response to Question 22 and in Exhibit CHI-74 that there are only “five provisions of four different measures” cited by the United States in support of its monopoly allegations.<sup>176</sup> Contrary to what China suggests, the evidence provided by the United States consists of 19 instruments that operate together to limit the number of foreign suppliers of EPS for payment card transactions, where China requires that all RMB-denominated payment card transactions in China be processed by CUP, and that CUP process all foreign currency denominated card transactions where the card is issued in China. In short, China's measures limit the number of entities to one – CUP alone – that can process payment card transactions where the card is issued in China and used in China.<sup>177</sup>

141. Furthermore, China's interpretation of the measures and instruments that support CUP's monopoly fails to account for the degree to both the six separate measures and the 19 instruments identified by the United States entrench CUP's monopoly position. The measures and instruments operate both individually and in conjunction with one another to establish a monopoly for CUP and restrict the supply of EPS by foreign suppliers. The measures affect every aspect of a card-based electronic payment transaction and all of the key participants in a payment card transaction (issuer, acquirer, merchant, and the EPS supplier).

142. In response to Question 4 from the Panel, the United States provided an illustrative list of specific instruments that support each of the six measures. In response to Question 6 from the Panel, the United States demonstrated that each of the six measures is still in effect even following the repeal of Document No. 94 and Document No. 272 and the replacement of

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<sup>174</sup> See China's Answers to Panel Questions, para. 15.

<sup>175</sup> See China's Answers to Panel Questions, paras. 11-19.

<sup>176</sup> China's Answers to Panel Questions, para. 13.

<sup>177</sup> See U.S. July 29, 2011 Response, sections V.B to V.I.; U.S. First Written Submission, paras. 12, 31, 37-72; 79-92; U.S. Answers to Panel Questions, paras.13-16, 23-36, 62-66.

Document No. 66 with Document No. 53. The effect of each of the six measures and the related instruments is discussed in detail below.

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

143. As indicated in previous U.S. submissions,<sup>178</sup> the following 19 instruments establish and maintain CUP's position as the sole supplier of EPS services with respect to transactions on cards that are issued and used in China:

1. Circular of the People's Bank of China on Promulgation of Opinions on Implementation of Joint Work in Bank Card Interoperability in 2001 (Yinfa [2001] 37), issued on 19 February 2001 ("Document No. 37") (Exhibit US-40);
2. Circular on Uniform Use of CUP Logo and its Holographic Label for Anti-Counterfeiting by the People's Bank of China (Yinfa [2001] 57), issued on 13 March 2001 ("Document No. 57") (Exhibit US-41);
3. Opinions on Bank Card Interoperability Related Work in 2002 by the People's Bank of China (Yinfa [2002] 94), issued on 5 April 2002 ("Document No. 94") (Exhibit US-42);
4. Circular Regarding Issues Concerning Bank Card Interoperability Related Work by the People's Bank of China (Yinfa [2002] 272), issued on 29 August 2002 ("Document No. 272") (Exhibit US-43);
5. Announcement of Clearing Arrangements Provided by Banks in Relation to Individuals' Deposits, Exchanges, Bank Card and Remittance in RMB in Hong Kong (PBOC Announcement [2003] 16), issued on 19 November 2003 ("Document No. 16") (Exhibit US-44);
6. Circular on Regulating the Administration of Foreign Currency Bank Cards by the State Administration of Foreign Exchange Circular (Huifa [2004] 66), issued on 30 June 2004 ("Document No. 66") (Exhibit US-45);
7. Announcement of Clearing Arrangements Provided by Banks in Relation to Individuals' Deposits, Exchanges, Bank Cards and Remittance in RMB in Macao (PBOC Announcement [2004] 8), issued on 3 August 2004 ("Document No. 8") (Exhibit US-46);
8. Notice of the People's Bank of China Concerning Relevant Issues on Accepting and Using Renminbi Bank Cards in Border Areas (Yinfa [2004] 219), issued on 21 September 2004 ("Document No. 219") (Exhibit US-47);

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<sup>178</sup> See U.S. July 29, 2011 Response, sections V.B to V.I.; U.S. First Written Submission, paras. 12, 31, 37-72; 79-92; U.S. Answers to Panel Questions, paras.13-16, 23-36, 62-66.

9. Circular Regarding Issues Concerning Individual RMB Business Handled by Banks in Mainland China and Banks in Hong Kong and Macao by the People’s Bank of China (Yinfa [2004] 254), issued on 28 October 2004 (“Document No. 254”) (Exhibit US-48);
10. Some Opinions of the People’s Bank of China, the National Reform and Development Commission, the Ministry of Public Security, the Ministry of Finance, the Ministry of Information Industry, the Ministry of Commerce, the State Administration of Taxation, China Banking Regulatory Commission and the State Administration of Foreign Exchange on Promoting the Development of Bank Card Industry (Yinfa [2005] 103), issued 24 April 2005 (“Document No. 103”), (Exhibit US-1);
11. Guiding Opinions of the People’s Bank of China on Regulating and Promoting the Development of Bank Card Acceptance Market (Yinfa [2005] 153), issued on 16 June 2005 (“Document No. 153”) (Exhibit US-49);
12. The Opinions of the Standing Office of the People’s Bank of China on the Circular on Strengthening the Safety Management of Bankcards and Preventing and Fighting Crimes in Bank Cards by the People’s Bank of China, the China Banking Regulatory Commission, the Ministry of Public Security and the State Administration for Industry and Commerce (Yinfa [2009] 149), issued 1 August 2009 (“Document No. 149”) (Exhibit US-50);
13. Notice of the State Administration of Foreign Exchange on the Management of Foreign Currency Bank Cards [2010] 53, issued 11 October 2010 (“Document No. 53”) (Exhibit US-51);
14. Notice of the China Banking Regulatory Commission on the Issues Concerning Wholly Foreign-funded and Chinese-foreign Equity Joint Banks in Conducting the Bank Card Business (Yin Jian Fa [2007] 49), issued 6 June 2007 (“Document No. 49”) (Exhibit US-62);
15. Circular on Further Improving Bank Card Interoperability Related Work by the People’s Bank of China (Yinfa [2003] 129), issued on 2 July 2003 (“Document No. 129”) (Exhibit US-53);
16. Notice of Circulating the Bank Card Connection Business Standard by the People’s Bank of China (Yinfa [2001] 76), issued 29 March 2001, including but not limited to the Appendix, Business Practices for the Interoperable Service of Bank Cards (“Document No. 76”) (Exhibit US-56/US-63);
17. Measures for the Administration of Bank Card Business by the People’s Bank of China (Yinfa [1999] 17), issued on 27 January 1999 (“Document No. 17”) (Exhibit US-52);
18. Notice of the People’s Bank of China, the China Banking Regulatory Commission, the Ministry of Public Security and the State Administration for Industry and Commerce on Strengthening the Safety Management of Bank Cards and Preventing and Combating

Bank Card Crimes (Yinfa [2009] 142), issued 27 April 2009 (“Document No. 142”) (Exhibit US-55); and

19. Notice of the China Banking Regulatory Commission on the Issues Concerning Wholly Foreign-funded and Chinese-foreign Equity Joint Banks in Conducting the Bank Card Business (Yin Jian Fa [2007] 49), issued 6 June 2007 (“Document No. 49”) (Exhibit US-62).

144. Even without considering Documents Nos. 94, 272 and 66, which China argues have either been repealed or replaced, the above instruments interact to establish and maintain the CUP monopoly in essentially three ways. First, certain instruments explicitly state that CUP must be used to process specific types of transactions. Second, certain instruments establish and/or require the use of business specifications and technical standards which mandate the use of CUP. Finally, certain instruments implicitly recognize that CUP is the sole supplier of EPS services for RMB denominated transactions.

a. Instruments that Designate CUP as Sole Supplier

145. Several instruments independently designate CUP as a sole supplier. Document No. 53 (Exhibit US-51) is a primary example. Article V.2 of Document 53 states that “[d]omestic card transactions inside China shall be settled in RMB through domestic clearing channels . . . .”<sup>179</sup> CUP is the only “domestic clearing channel” and, therefore, the only entity that can settle domestic card transactions. Article V.3 sets forth procedures for correcting the erroneous processing of such transactions through an international bank card organization. Moreover, Article VII.3 then states that “[d]omestic RMB card clearing organizations shall do a good job in the RMB clearing of domestic transactions of home-foreign currency cards.” These are foreign denominated currency payment cards that are issued in China.

146. In Exhibit CHI-74, China dismisses the relevance of Article V.2 of Document 53 by asserting that “[t]he purpose of this provision is to avoid unnecessary foreign exchange transactions. It does not establish any sort of ‘monopoly’ for CUP.” Whether China has stated the purpose properly or not, the fact is that CUP is the only “domestic clearing channel” (a point which China has not denied), and that, therefore the measure *does* establish CUP as a monopoly.

147. The United States has also identified several measures that establish CUP as the sole entity responsible for processing RMB transactions involving RMB cards issued or used in Hong Kong and Macao. For example, Document No. 16 (Exhibit US-44) states that, with respect to Hong Kong, “[m]atters in relation to individual RMB bank card clearing shall be organized and handled by the clearance banks and China UnionPay Joint Stock Co., Ltd.” Document No. 254 (Exhibit US-48) requires that CUP process RMB transactions involving RMB cards issued in China and used in Hong Kong or Macao, or involved RMB cards issued in Hong Kong or Macao and used in China. Document No. 8 (Exhibit US-46) requires that CUP be used to clear RMB

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<sup>179</sup> China has argued that Document No. 66 was superseded by Document No. 53. As the United States has explained in response to Question 6 from the Panel, this does not affect the fact that CUP remains today a legally established monopoly. *See* U.S. Answers to Panel’s First Set of Questions, paras. 23-36.

denominated transactions in Macao. China does not deny that CUP has a monopoly over such services. Instead, China asserts in Exhibit CHI-74 that “[t]he United States has not demonstrated how this is relevant to the modes of supply at issue.” As the United States has explained in response to Question 9 from the Panel, these measures prevent foreign EPS suppliers from providing services to issuing or acquiring banks in China, and from providing services to banks in Hong Kong or Macao through the use of a settlement bank in China.

148. Section 1.2 of Document 153 (Exhibit US-49) appears to explicitly recognize that “China UnionPay is *the* domestic clearance organization which specializes in the RMB bank inter-bank information routing and exchange” (emphasis supplied). China argues that, properly translated, this provision states that CUP is only “*a*” clearing organization, rather than “*the*” bank card clearing organization, and that even if Document No. 153 did designate CUP as “*the*” clearing organization within China for RMB bank cards, this would not establish a “monopoly” for CUP.<sup>180</sup> However, as noted in paragraph 27 of the U.S. answers to the Panel’s first set of questions, other provision of Document No. 153 appears to confirm the designation of CUP as the sole supplier:

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

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

149. In addition, Section 2.2 of Document No. 37 (Exhibit US-40) states that cards that do not comply with “the unified requirements and the CUP logo usage requirements” must be replaced and that, “[s]tarting in 2004, all bank cards not bearing a CUP logo will not be used for cross-region or inter-bank transactions.” Article 6 of Document 57 (Exhibit US-41) requires that all “regional bank card interoperability logos produced and designed regionally shall be gradually abolished. According to this provision, from January 1, 2002 onward, no bank cards may bear any regional interoperability logo, and, from January 1, 2004 onwards, merchants and equipment cannot use any regional bank card interoperability logo. China does not include Document No. 57 in its table in Exhibit CHI-74.

150. Also, Article 6 of Document 153 (Exhibit US-49) states that, in any country where dual currency cards are used, “the Chinese issuing banks should support routing through the CUP

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<sup>180</sup> Exhibit CHI-74, pages 1-2. It should also be noted that the PBOC’s 2007 China Payment System Development Report, states that “CUP operates the bankcard inter-bank transaction clearing system to switch message and process the clearing data of bankcard inter-bank transactions,” page 59 (emphasis added) (Exhibit US-90). The PBOC thus recognizes CUP’s position as “the” sole supplier in the market. We note that this document is an official English language version of the document.

network and open RMB accounts related transactions and settlements to the CUP network.” China argues in Exhibit CHI-74 “this provision relates to the use of payment cards outside of China, and its relevance to this dispute is therefore unclear.” However, the provision applies to CUP’s services provided to “Chinese issuing banks,” *i.e.*, banks in China that issue cards in China. Its relevance to China’s services commitments is, therefore, clear. China also seeks to minimize the significance of this provision by arguing that it only requires that Chinese banks be “capable” of processing these transactions over the CUP network, but does not require them to do so. However, the provision goes on to state that “No organizations should set any obstacles or cause any interference.” In other words, CUP should be the only entity that should engage in such business.

151. Finally, Document 149 (Exhibit US-50) states that “acquiring organizations may not allow the non-CUP and non-PBOC 2.0 pre-payment cards to be accepted at any POS terminals.” China argues in Exhibit CHI-74 that this provision “simply refers to the fact that all POS terminals must be capable of accepting prepaid payment cards that bear the CUP logo. It does not prohibit accepting cards that also bear other logos, and thus does not establish any sort of ‘monopoly’ for CUP.” However, the intent of the provision is clearly intended to limit such cards to CUP cards.

152. Document No. 219, Article III, prohibits processing of payment card transactions by third-parties, mandating that “no merchant shall... authorize a third party to handle Renminbi card business or transfer such business to a third party”.<sup>181</sup>

b. Document No. 76 and Requirements to Use Uniform Business Specifications and Technical Standards

153. Document No. 76 (Exhibit US-56/US-63) includes the “Notice of People’s Bank of China in Relation to Issuance of Business Practices for the Interoperable Services of Bank Cards,” and an accompanying Appendix, which includes the “Business Practices for the Interoperable Services of Bank Cards” (“Business Practices Appendix”). The Business Practices Appendix requires that all domestic transactions on domestically issued cards be processed over the network that was to become CUP.

154. Several of the 19 instruments require the use of uniform business specifications and technical standards. For example:

- Document No. 37 (Exhibit US-40): Article 1, Sections 1.1 and 1.2 require that bank cards shall comply with designated technical standards and with the “Business Specifications for Interoperable Services of Bank Card.” Article 2, Section 2.1 requires that all cards bearing the CUP logo (which, by virtue of measures described elsewhere, includes all cards issued in China for domestic use) “must strictly abide by the unified technical specification and all bank card issuers must provide corresponding cross-region and inter-bank services pursuant to the unified business specifications.” Article 2, Section 2.2 requires the “replacement of all bank cards that do not conform to the unified

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<sup>181</sup> Document No. 219, Article III (Exhibit US-47).

requirements and the CUP logo usage requirements.” Article 3, Section 3.1 requires that commercial banks join the “nationwide bank card inter-bank exchange network” and once they have done so, “they must fully open various necessary functions in accordance with ‘Business Specifications for Interoperable Service of Bank Cards.’” China does not include this measure in its table in Ex. CHI-74.

- Document 57 (Exhibit US-41): Article 3 requires that “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 Card’ and relevant technical standards.” China does not include this measure in its table in Ex. CHI-74.
- Document 153 (Exhibit US-49): Article 2, Section 2.2 states that “POS terminals placed by the acquiring institutions or by third party service providers must conform to the business specifications and technical standards of cross-network interoperability, be posted with the unified CUP logo, and be capable of accepting all bank cards bearing the CUP logo.” Article 4 requires that “Merchant acquiring institutions shall . . . strictly comply with the unified inter-bank business specifications and technical standard.” China includes this measure in its table in Ex. CHI-74, but does not refer to these provisions.
- Document 129 (Exhibit US-53): Section 3.2 states, “Universal use of bank cards bearing the CUP logo. All RMB bank cards newly issued by all commercial banks and all postal savings and remittance bureaus must conform to the unified business specifications and technical standards and must bear the unified CUP logo . . .” China does not include this measure in its table in Ex. CHI-74.
- Document 142, (Exhibit US-55): Article II.3 requires that all bank cards must comply with certain technical specifications. Article VI.18 requires PBOC and CBRC to “urge all bank card operators to strictly implement the bank card business standards . . .” China does not include this measure in its table in Ex. CHI-74.
- Document 49 (Exhibit US-62): Article IV requires that “A wholly foreign-funded bank or Chinese-foreign equity joint bank which plans to issue bank cards shall abide by the bank card business and technical standards as formulated by the People’s Bank of China and meet the general requirements for the network of bank cards.” China does not include this measure in its table in Ex. CHI-74.
- Document 17 (Exhibit US-52): Article 64 requires that issuing banks “implement the technical standards prescribed by the state.” In fact, many of the relevant technical standards are developed by CUP. China does not include this measure in its table in Ex. CHI-74.

- Document 103 (Exhibit US-1): Article 5(1) requires that any newly issued RMB bank cards shall comply with applicable technical standards. Those standards are in the control of CUP. China does not include this measure in its table in Ex. CHI-74.

155. China concedes that the measures upon which the United States relies “requir[e] all banks that issue interbank payment cards to be members of a common network.”<sup>182</sup> Indeed, the Business Practices Appendix is quite clear on this point. As discussed below, the Business Practices Appendix establishes a standard set of procedures for processing transactions and specifies the entities that are charged with carrying out such processing. As the document makes clear, these procedures are binding on all banks. According to paragraph 2 of the Notice, “[t]he Standard is applicable to all entities “with bank card businesses, all Interoperating Bank cards and related cross-bank business.”<sup>183</sup> Furthermore, paragraph 3 of the Notice states that “all acquiring banks that have been participating in bank card acceptance business shall meet the relevant requirements of the Business Practices” and “the Issuing Banks shall start compulsory businesses, and shall complete the ban card processing system reform in combination with the implementation of technical standards of various bank cards.”<sup>184</sup>

156. Paragraph 5 of Document No. 76 (the Notice) states that “[a]ll bank card business rules that are inconsistent with the Business Practices shall be abolished as from the implementation date of the Business Practices.” Furthermore, Chapter 10 of the Business Specifications Appendix states that “[t]hese Business Practices are not applicable to the situation where a foreign currency card issued outside China is used in China,” which in turn implies that the Business Specifications Appendix apply with respect to all transactions involving domestically-issued cards.

157. On an operational level, the Business Practices Appendix is very precise with respect to how transactions must be processed and how the participating banks must organize themselves. According to the Business Practices Appendix, banks engaged in cross-bank card business must establish a “United Association,” which is defined as a “countrywide bank card united operational organization” comprised of financial institutions “which conduct bank card business in China.”<sup>185</sup> Only after a “bank card financial institution” has “become[] an official member of the United Association” would it be “qualified to apply to participate in bank card interoperable service and to become an Interoperating Member.”<sup>186</sup> The Business Practices state that the United Association is to be the owner of the UnionPay logo,<sup>187</sup> and the purpose of the logo is to

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<sup>182</sup> See China’s Answers to Panel Questions, para. 18.

<sup>183</sup> Document No. 76 (Notice), para. 2 (Exhibit US-56/US-63). Article 2.3 of the Business Practices Appendix defines an “Interoperating ban” as a “Bank-Card Financial Institution conducting bank card business.”

<sup>184</sup> Document No. 76 (Notice), para. 3 (Exhibit US-56/US-63).

<sup>185</sup> Document No. 76 (Business Practices Appendix) Chapter I, Article 2.1 (Exhibit US-56/US-63).

<sup>186</sup> Document No. 76 (Business Practices Appendix) Chapter I, Article 2.1 (Exhibit US-56/US-63). *See also* Chapter I, Article 5.2.1 (“The Bank-Card Financial Institutions shall first join the United Association in order to apply for interoperability, and the other Professional Service Institutions shall obtain specific acknowledgement from the United Association in order to apply for interoperability”).

<sup>187</sup> Document No. 76 (Business Practices Appendix) Chapter I, Article 4.2 (Exhibit US-56/US-63).

“set up a unified bank card network logo while carrying out interoperating business.”<sup>188</sup> The use of the logo was, and is, mandatory on cards and equipment, as discussed elsewhere.

158. According to the Business Practices Appendix, inter-bank card transactions are to be processed through specific entities, the Bank Card Information Exchange Centers, which the Business Practices define as the “bank card cross-bank interoperating service organization for transmitting bank card transaction information and providing cross-bank transaction clearing data.”<sup>189</sup> The Bank Card Information Exchange Centers include a Headquarters Center and various Regional Centers. According to Article 3.2, “[t]he Headquarters Center is responsible for information exchange of bank card cross-bank and cross-region transactions,”<sup>190</sup> while the “Regional Center is responsible for information exchange within the region and for information exchange of cross-bank and cross-region transactions is the regional center.” Chapter III of the Business Specifications explains how information is switched through the Headquarters and Regional Centers. Chapter IV then specifies how “funds settlement” is to occur and states, in Article 1.4, that “[t]he national cross-bank funds settlement of bank cards shall be based on the settlement data provided by the Information Exchange Center.”

159. Thus, the Business Practices Appendix requires that all banks participating in the bank card business join together and participate in a common network, and are to process transactions through the specified designated entities (the Bank Card Information Exchange Centers), which later became consolidated in CUP.

160. The Business Practices Appendix was adopted in anticipation of the formation of CUP. As stated in paragraph 4 of the Notice, “[b]efore the establishment of a unified bank card industry organization [*i.e.*, CUP], the State Bank Card Office shall be responsible for the interpretation of the Business Practices . . . .”<sup>191</sup> When CUP was formed in 2002, it took over the responsibilities of the switching network. As stated in CUP’s Notification of Business License Approval and Issuance, the “Business Scope” of CUP is, in part, to “establish and operate a single nationwide inter-bank bank card information switching network” and “to manage and operate the brand ‘UnionPay’, [and] to formulate the code and technical standards for inter-bank bank card transactions.”<sup>192</sup>

161. In the end, Document No. 76, established that all cards must comply with uniform standards that are CUP standards and therefore, any financial institutions seeking to acquire

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<sup>188</sup> Document No. 76 (Business Practices Appendix) Chapter I, Article 4.1 (Exhibit US-56/US-63).

<sup>189</sup> Document No. 76 (Business Practices Appendix) Chapter I, Article 4.2 (Exhibit US-56/US-63).

<sup>190</sup> See also the definition on page 126 (“Headquarter Center means the Bank Card Information Exchange Center which is connected with each Interoperating Bank and is mainly responsible for bank card cross-region and cross-bank transactions”) Document No. 76 (Business Practices Appendix) (Exhibit US-56/US-63).

<sup>191</sup> The transition to CUP was governed in part by Document No. 94 and Document No. 272, which China has indicated have been repealed. These measures also required use of the Business Practices Appendix (Exhibit US-56/US-63). *See, e.g.*, Document No. 94 (Exhibit US-42), Sections 3.1, 3.3, 3.4, 4.2; and Document No. 272 (Exhibit US-43), Articles 2, 3, 4.1. As the United States has explained in response to Question 6 from the Panel, the repeal of these measures does not change the fact that CUP remains today a legally established monopoly.

<sup>192</sup> Exhibit US-29.

merchant bank card transactions must join CUP's network and process transactions according to CUP's rules and procedures, including the logo requirements and the unified CUP standards. The rules, procedures, and standards are exclusive to CUP and the logo on a card signifies that that whenever that card is used in China for a transaction, that transaction will be processed by CUP.

162. Despite the clear language of the Business Practices Appendix, China argues that, “the fact that the measures require banks to be members of a common network does not preclude their membership in other networks. There are many banks throughout the world that issue dual-network (or even multi-network) cards that are capable of being processed over more than one network.”<sup>193</sup> In other words, China argues, even though all banks that conduct bank card business must participate in the common network (*i.e.*, CUP), they are nonetheless free to use other networks. China's statement is flatly inconsistent with its own statements and rules.

163. As noted, paragraph 5 of Document No, 76 (the Notice) makes it clear that all inconsistent “bank card business rules” must be abolished. However, even if this provision were not included in the Notice, it is evident that the Business Practices are, and were intended to be, exclusive. The Business Practices are binding with the force of law (unlike, for example, the rules adopted by Visa or MasterCard). They very clearly state how transactions must be processed. While China argues that other networks may be used because the Business Practices do not expressly state that other networks are prohibited, this interpretation is not only inconsistent with the Notice, but inconsistent with the way laws are typically written. For example, if a law states that taxes are to be filed with the tax authority, it does not then need to specify that taxes cannot be filed with other agencies. The law has specified a procedure and that procedure must be followed to the exclusion of other procedures. The same is true with respect to the Business Practices, *i.e.*, they have specified a procedure for processing transactions and no other procedures may be used.

164. The fact that the Business Practices were intended to specify the exclusive means for processing inter-bank transactions is reinforced by the constant refrain throughout the document that the purpose of the measure is to establish a “single” and “unified” or “standardized” system. As noted, Article 4.1 of the Business Practices indicates that the logo is “unified.” (China interprets Article 4.1 as stating that purpose of the logo is to “standardize” the domestic bankcard acceptance market).<sup>194</sup> Article 2.1 defines the “[b]ank card united association” as a “countrywide bank card united operational organization.” According to China, Article 1.1 of the Business Specifications states that the purpose of the Specification is to “standardize the cross-bank business operations of bankcards.”<sup>195</sup> This phraseology makes it clear that the procedures set forth in the Business Specifications are the exclusive procedures.<sup>196</sup>

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<sup>193</sup> China's Answers to Panel Questions, para. 18.

<sup>194</sup> Exhibit CHI-56.

<sup>195</sup> Exhibit CHI-56.

<sup>196</sup> *See also* PBOC's 2007 China Payment System Development Report, page 23 (Exhibit US-15) (“[b]ankcard payment system consists of inter-bank card payment system and issuers' intra-bank card payment systems. Today, China has put in place a payment network of bankcards based on inter-bank payment system of

165. That same emphasis is carried over into CUP's foundational documents. Article 11 of CUP's Article of Incorporation state that the purpose of the company is "to set up and operate a unified" network.<sup>197</sup> Article 12 of CUP's Articles of Incorporation states that the "business scope of the Company is as follows: (1) to establish and operate a single nationwide inter-bank card information switching network." CUP's Notification of Business License Approval and Issuance,<sup>198</sup> similarly defines the Business Scope of CUP as "establish[ing] and operat[ing] a single nationwide inter-bank bank card information switching network." Again, the point is plain. CUP is the one and only system for processing domestic transactions on domestic cards.

c. Instruments Which Recognize that CUP Is the Sole Supplier

166. A third category of instruments recognizes that CUP is the sole supplier of EPS services for transactions on cards issued and used in China. These measures include, for example, measures related to fraud protection and similar regulation which is explicitly directed only to CUP. Taking note of the U.S. reference to such measures, China argues (para. 13 of its response to the Panel questions) that "[t]he weakness of the U.S. allegation is evident in the fact that the United States relies upon obscure provisions of measures relating to foreign exchange and combating payment card crimes as the basis for its 'monopoly' allegation." There are two critical issues that China overlooks.

167. First, as noted, even if certain measures are related to, *e.g.*, foreign exchange, that in itself does not disprove the point that the measures establish or entrench the CUP monopoly. For example, as noted, Article V.2 of Document 53 (Exhibit US-51) states that "[d]omestic card transactions inside China shall be settled in RMB through domestic clearing channels . . . ." Document 53 relates largely to foreign exchange measures. However, CUP is the only "domestic clearing channel" and, therefore, the only entity that can settle domestic card transactions.<sup>199</sup> Therefore, despite the fact that the measure relates to foreign exchange, it nonetheless entrenches the CUP monopoly.

168. Second, the importance of many of these provisions arises from the fact that, if other suppliers were permitted in the market, the measures would have been drafted much more broadly so as to apply to other EPS suppliers. By targeting CUP and CUP alone, the measures recognize the CUP monopoly. For example, Section 3.4 of Document 129 (Ex. US-53) requires CUP to work with the commercial banks to improve procedures for dealing with errors. Section III of Document 273 (Ex. US-54) requires CUP to put in place certain mechanisms regarding the overseas use of domestically issued cards. Sections IV and V of the same document require

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China UnionPay (CUP) which connects the issuers' intra-bank card payment systems. As an important component of infrastructure in bankcard payment system, the network has achieved a 'netunion' of bankcards which accelerates the application of bankcards greatly"). Thus, PBOC recognizes that the purpose of CUP is to unify bankcard use in China.

<sup>197</sup> Exhibit US-20.

<sup>198</sup> Exhibit US-29.

<sup>199</sup> The term "domestic cards" is defined in Document No. 53, Articles I and II, (Exhibit US-51) to include "domestic foreign currency cards," *i.e.*, cards issued domestically but which are either denominated in a foreign currency or are dual-currency cards.

CUP to put in place certain risk management measures. Sections III and V of Document 142 (Ex. US-55) require acquiring institutions to work with CUP to put in place certain risk control measures. Section VI of the same document requires CUP to work with PBOC and the Ministry of Public Security on certain anti-crime mechanisms. If CUP were not a monopoly, then all other EPS suppliers would be subject to these same anti-crime, risk control and other requirements. This makes no sense.

2. Requirements on issuers that payment cards issued in China bear the CUP logo.

169. Apart from Document Nos. 94 and 272, which China has indicated have been repealed, the United States identified several other instruments that require that all cards issued in China bear the CUP logo.<sup>200</sup> For example, Document 57, Article 1 (Exhibit US-41) requires that “all bank cards issued by commercial banks solely for domestic use must bear the CUP logo.” Article 2 of the same document also requires that “dual account” cards carry the CUP logo. Additionally, Documents No. 17, 37, 57, 129 and 219 contain provisions requiring the use of the CUP logo.<sup>201</sup>

170. Document No. 17 require the use of the unified standards of the Business Practices Appendix, which are CUP-only, is consistent with the mandate for the use of CUP for any payment card transaction in China where the card is issued in China and used in China.

171. 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.”<sup>202</sup> 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. In addition, Document No. 129 requires that all newly issued bankcards “must bear the unified CUP logo” and “must conform to the unified business specifications and technical standards.”<sup>203</sup> 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.<sup>204</sup> These measures allow CUP to prevent any other suppliers from entering the market.

172. Document No. 76, Article 4 assigns to the “United Association” ownership of the “UnionPay” logo and gives it the use and management rights of the logo. These rights were

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<sup>200</sup> See U.S. July 29, 2011 Response, Section V.E; U.S. First Written Submission, paras. 12, 31, 45-72, 93-101; U.S. Answers to the Panel’s First Set of Questions, para. 17.

<sup>201</sup> See Document No. 17, Article 64 (Exhibit US-52), Document No. 37, Articles 1, 2, and 3 (Exhibit US-40), Document No. 57, Articles 1-6 (Exhibit US-41), Document No. 129, Article 3 (Exhibit US-53), and Document No. 219, Article III (Exhibit US-47).

<sup>202</sup> Document No. 37, Article 1, Section 1.2(i) (Exhibit US-40).

<sup>203</sup> Document No. 129, Article 3.2 (ii) (Exhibit US-53).

<sup>204</sup> Document No. 219, Article III (Exhibit US-47).

eventually transferred to CUP. See the Notification of Business License Approval and Issuance (Exhibit US-29), in which CUP’s “Business Scope” is defined to include management and operation of the UnionPay logo. Because CUP has exclusive control over the UnionPay logo, it may refuse permission for the logo to appear on any cards that carry the logo of a competing EPS supplier. If CUP refuses permission to use the UnionPay logo, then the cards carrying the logo of the competing supplier cannot be issued (because all cards must carry to UnionPay logo) and the competing supplier is effectively barred from the market. This means, therefore, that CUP can (and does) leverage the logo requirements to preserve its monopoly position.

173. The logo requirements are inconsistent with Article XVI because they help entrench the CUP’s position as the sole service supplier in the market.

3. Requirements that all ATM and POS terminals in China accept CUP cards.

174. Apart from Document Nos. 94 and 272, the United States identified several other instruments that require all ATM and POS terminals in China to accept CUP cards and/or require that all POS terminals must conform to CUP technical specifications.<sup>205</sup> Suppliers of EPS must ordinarily invest heavily and incur substantial expense to build acceptance of their payment card products by merchants, often in vigorous competition with other suppliers of EPS.<sup>206</sup>

175. Document 149, Article 2(5)(iii) prohibits acquiring institutions from accepting prepaid cards not bearing the CUP logo. China explains in Exhibit CHI-74 that this provision requires only that POS terminals “must be capable of accepting prepaid payment cards issued by CUP and does not prohibit accepting cards that also bear other logos.”<sup>207</sup> China’s explanation is not consistent with Document No. 149’s clear prohibition on accepting non-CUP cards: “No acquiring institutions may, through the bankcard acceptance terminals, accept prepaid cards without the [CUP] logo.” This prohibition would prevent merchants and acquirers from accepting any prepaid cards that do not bear the CUP logo, and foreign-issued prepaid cards are prohibited for transactions in China.

176. 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.”<sup>208</sup>

177. Document No. 17’s requirement that bank card issued within China must implement the “technical standards prescribed by the state” mandates the use of unified, CUP-only standards,

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<sup>205</sup> See U.S. July 29, 2011 Response, section V.F; U.S. First Written Submission, paras. 12, 31, 45-72, 102-110; U.S. Answers to the Panel’s First Set of Questions, para. 18.

<sup>206</sup> See, e.g., U.S. July 29, 2011 Response, paras. 55-61; U.S. Answers to First Set of Panel’s Written Questions, para. 56.

<sup>207</sup> Exhibit CHI-74, page 2.

<sup>208</sup> Document No. 153, Article 2.2 (Exhibit US-49).

which in turn means that any POS terminal must be capable of accepting CUP cards for any payment card transaction in China where the card is issued in China and used in China.

178. 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.”

179. Document No. 57 establishes additional requirements that advance the goal of a single unified network using CUP cards for inter-bank transactions as of 2001: “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.”<sup>209</sup> Document No. 57 also mandates the abolition of “[r]egional bank card interoperability logos produced and designed regionally” and that “[s]tarting January 1, 2004, the specially engaged merchants of bank cards and terminal equipment such as ATM, POS etc. shall not bear any regional bank card interoperability logo.”<sup>210</sup>

180. The requirements that all ATM and POS terminals in China accept CUP cards are inconsistent with Article XVI to the extent they entrench the CUP’s position as the sole service supplier in the market.

4. Requirements on acquiring institutions to post the CUP logo and be **capable of accepting all bank cards bearing the CUP logo.**

181. Apart from Document Nos. 94 and 272, the United States identified several other instruments that require acquiring institutions to post the CUP logo and be capable of accepting all bank cards carrying the CUP logo, including by complying with the business standards and technical specifications of interbank interoperability.<sup>211</sup> As explained above, these logo requirements result in a mandate that all financial institutions that wish to acquire merchant bank card transactions must join CUP and process transactions according to CUP’s rules and procedures.

182. 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.”<sup>212</sup> Document No. 149, from 2009, provides that

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<sup>209</sup> Document No. 57, Article 3 (Exhibit US-41).

<sup>210</sup> Document No. 57, Article 3 (Exhibit US-41).

<sup>211</sup> See U.S. July 29, 2011 Response, Section V.G; U.S. First Written Submission, paras. 12, 31, 45-72, 111-115; U.S. Answers to the Panel’s First Set of Questions, para. 19.

<sup>212</sup> Document No. 153, Article 2.2 (Exhibit US-49).

“[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.”<sup>213</sup> Similarly, Document No. 37, Article 2.1(i), back in 2001, required all commercial banks to make technical preparations for accepting bank cards bearing the CUP logo, and required acquirers to join CUP for accepting cards. As detailed above, Document No. 76, established effective requirements all cards must comply with uniform standards that are CUP standard and therefore, any financial institutions seeking to acquire merchant bank card transactions must join CUP and process transactions according to CUP’s rules and procedures, including the logo requirements and the unified CUP standards.

183. The requirements on acquiring institutions to post the CUP logo and be capable of accepting all bank cards bearing the CUP logo are inconsistent with Article XVI to the extent they entrench the CUP’s position as the sole service supplier in the market.

#### 5. Broad prohibitions on the use of non-CUP cards.

184. The United States has identified several instruments that prohibit the use of non-CUP cards.<sup>214</sup> In addition, the description of the scope of CUP’s business in CUP’s Articles of Association, CUP’s “Notification of Business License Approval and Issuance,” and PBOC’s reply with respect to the establishment of CUP clearly confirm that CUP is to be the single nationwide inter-bank card network.<sup>215</sup> Additional provisions in other instruments prohibit processing of transactions by third-parties (*i.e.*, any network other than CUP).<sup>216</sup>

185. Document No. 76 (Exhibit US-56/US-63) mandates the use of CUP’s rules and procedures for managing all aspects of EPS including issuing, acquiring, use of the CUP logo, and processing. No other EPS provider can operate in the Chinese market given the requirement to comply with CUP’s rules and procedures as set out in the national bankcard standards and inter-operability requirements.

186. Section 2.2 of Document No. 37 (Exhibit US-40) states that cards that do not comply with “the unified requirements and the CUP logo usage requirements” must be replaced and that, “[s]tarting in 2004, all bank cards not bearing a CUP logo will not be used for cross-region or inter-bank transactions.” Article 6 of Document 57 (Exhibit US-41) requires that all “regional bank card interoperability logos produced and designed regionally shall be gradually abolished. According to this provision, from January 1, 2002 onward, no bank cards may bear any regional interoperability logo, and, from January 1, 2004 onwards, merchants and equipment cannot use any regional bank card interoperability logo. 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.”<sup>217</sup> Similarly, Document No. 37, Article 2.1(i), back in 2001,

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<sup>213</sup> Document No. 149, Section 2(5)(iii) (Exhibit US-50).

<sup>214</sup> See U.S. July 29, 2011 Response, Section V.H; U.S. First Written Submission, paras. 12, 31, 45-72, 89-117; U.S. Answers to the Panel’s First Set of Questions, para. 20.

<sup>215</sup> See U.S. July 29, 2011 Response, paras. 124-125; see also Exhibit US-20, Exhibit US-27, and Exhibit US-29.

<sup>216</sup> Exhibit US-49, Article I.3.

<sup>217</sup> Document No. 149, Section 2(5)(iii) (Exhibit US-50).

required all commercial banks to make technical preparations for accepting bank cards bearing the CUP logo, and required acquirers to join CUP for accepting cards. Document No. 219, Article III, prohibits processing of payment card transactions by third-parties, mandating that “no merchant shall... authorize a third party to handle Renminbi card business or transfer such business to a third party”.<sup>218</sup>

187. In addition to these explicit prohibitions on the use of non-CUP cards, the requirements in Document Nos. 37, 57, 94, 272, 129, and 219 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, and the acquiring institutions be capable of accepting CUP cards, together operate as an effective prohibition to the use of non-CUP cards.

188. The broad prohibitions on the use of non-CUP cards or on the use of foreign EPS suppliers are inconsistent with Article XVI to the extent they entrench the CUP’s position as the sole service supplier in the market.

6. Requirements relating to China, Macao, and Hong Kong that mandate the use of CUP.

189. The United States identified certain instruments, Documents No. 16, 8, 254, and 219, mandating the use of CUP to process certain transactions involving Macao and Hong Kong.<sup>219</sup> These instruments requires that CUP be used to process RMB transactions in China using bank cards issued in Hong Kong and Macao and that CUP be used to process any RMB transactions on Hong Kong and Macao using cards issued in China. The United States would also refer the Panel to the U.S. response to Question 9 and from the Panel.

**7. Conclusion**

190. The collective effect of these measures is to establish CUP as the sole entity able to provide EPS for payment card transactions in China where the card is issued in China and used in China. Banks in China must use CUP’s network in order to issue or acquire bank card transactions. Only CUP cards can be issued as RMB denominated cards. The logo and interoperability requirements mean that that all banks that wish to acquire merchant transactions or operate ATMs and all merchants who wish to accept bank cards must join CUP and process transactions in accordance with CUP’s rules and procedures as set out in Document No. 76 (Exhibit US-56/US-63). These requirements gave CUP automatic and universal acceptance of its RMB payment card products by banks and merchants in China and permitted and supported CUP becoming the sole supplier of EPS in China. These measures have entrenched CUP’s monopoly position. Suppliers of EPS must ordinarily invest heavily and incur substantial expense to build acceptance of their payment card products by merchants, often in vigorous

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<sup>218</sup> Document No. 219, Article III (Exhibit US-47).

<sup>219</sup> See U.S. July 29, 2011 Response, Section V.I; U.S. First Written Submission, paras. 12, 31, 45-72; U.S. Answers to the Panel’s First Set of Questions, para. 21.

competition with other suppliers of EPS.<sup>220</sup> All transactions that take place involving cards issued in China and used for transactions in China must be processed over CUP's network as well as transactions involving RMB denominated cards issued and/or used in Macau and Hong Kong.

### **C. China Has Not Rebutted the U.S. Prima Facie Case**

191. The United States has satisfied its burden with respect to its claims, providing extensive evidence regarding the operation of the measures and instruments at issue and how each results in a breach of China's obligations.<sup>221</sup> In its First Written Submission, China opted not to offer substantive rebuttal to U.S. claims related to the challenged measures or to the CUP monopoly, stating that "China will not devote a significant amount of attention in this submission to the challenged measures or the alleged 'monopoly' that is the foundation of the U.S. claims."<sup>222</sup> Thus, China has left unanswered much of the evidence on the record with respect to the measures, and has failed to rebut the presumption raised by the evidence submitted by the United States.

## **VI. CHINA'S MEASURES ACCORD LESS FAVORABLE TREATMENT TO FOREIGN EPS SUPPLIERS**

### **A. GATS Article XVII (National Treatment)**

192. 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 meet this requirement in instances in which it accords foreign services or suppliers formally different treatment. 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."

193. 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"

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<sup>220</sup> See, e.g., U.S. July 29, 2011 Response, paras. 55-61; U.S. Answers to First Set of Panel's Written Questions, para. 56.

<sup>221</sup> The correct burden of proof standard was enunciated by the Appellate Body in *US – Shirts and Blouses*: "[I]t is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption." Appellate Body Report, *US – Shirts and Blouses*, page 14.

<sup>222</sup> China's First Written Submission, para. 13.

Chinese suppliers.<sup>223</sup> 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.<sup>224</sup>

194. The United States has demonstrated each element. Instead of a substantive rebuttal to the U.S. national treatment claims, China simply contends that the U.S. national treatment claims “do nothing more than repeat the monopoly allegations that are the basis for its market access claims under Article XVI.”<sup>225</sup> China’s arguments are misplaced here too. The measures imposed by China affecting suppliers of EPS for payment card transactions are also inconsistent with Article XVII of the GATS. China’s measures affecting EPS for payment card transactions are inconsistent with Article XVII because they treat foreign EPS suppliers less favorably than CUP.

195. China has also argued that “[c]onsistent with the order of precedence established by Article XX:2 and the principle of effet utile, [Articles XVI and XVII] must be seen as mutually exclusive in their respective spheres of applications.”<sup>226</sup> China’s argument is without merit. Article XX:2 does not render Articles XVI and XVII “mutually exclusive in their respective spheres of applications.” Article XX:2 is a scheduling rule, applying with regard to “measures . . . inscribed in the column relating to Article XVI,” and specifying that “the inscription will be considered to provide a condition or qualification to Article XVII as well.” It exists precisely because there are measures that might be inconsistent with both Article XVI and Article XVII, rather than mutually exclusive.

196. Moreover, China reaches the wrong conclusion in its response to Question 69(a) from the Panel because it misperceives Article XVI:2 as covering both discriminatory and non-discriminatory quantitative restrictions. Its example of such a “discriminatory” measure – “a limitation on the total number of foreign service suppliers that are allowed to provide the service”<sup>227</sup> – reveals the error of this position. Article XVI:2 covers “limitations on the number of service suppliers, whether in form of numerical quotas, monopolies, exclusive service suppliers, or the requirements of an economic needs test.” But a limitation of the number of

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<sup>223</sup> Panel Report, *China – Publications and Audiovisual Products*, paras. 7.962, 7.970, 7. and 972.

<sup>224</sup> See, e.g., Panel Report, *China - Publications and Audiovisual Products*, para 7.956; Panel Report, *EC – Bananas III*, para. 7.314.

<sup>225</sup> China’s First Written Submission, para. 14.

<sup>226</sup> China’s First Written Submission, para. 156

<sup>227</sup> China’s First Written Submission, para. 151.

foreign suppliers does not limit “the number of service suppliers” because it is silent as to how many domestic persons can supply the service. Thus, an “unbound” in the market access column of a Member’s Schedule of Specific Commitments, when combined with “none” in the national treatment column, carves out only overall quantitative limitations, and not limitations that discriminate against foreigners.

**B. China’s Measures Treat EPS Suppliers of Other Members Less Favorably than CUP, China’s Supplier of the Like Service**

197. 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.<sup>228</sup>

198. 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).

199. The United States has explained how China’s 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.

200. China’s measures ensure that CUP is the sole supplier of EPS for payment card transactions in China where the card is issued in China and used in China, and for certain payment card transactions involving Hong Kong and Macau.<sup>229</sup> The description of the scope of

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<sup>228</sup> Appellate Body Report, *EC – Bananas III*, para. 220 (footnote omitted).

<sup>229</sup> See U.S. July 29, 2011 Response, sections V.B, V.C, V.D; U.S. First Written Submission, paras. 12, 31, 37-72; 79-92; U.S. Answers to Panel Questions, paras.13-16, 23-36, 62-66. See also section V.B.1 of this submission.

CUP's business in CUP's Articles of Association, CUP's "Notification of Business License Approval and Issuance," and PBOC's reply with respect to the establishment of CUP clearly establish that CUP is to be the single nationwide inter-bank card network.<sup>230</sup> Additional provisions prohibit processing of transactions by third-parties (*i.e.*, any network other than CUP).<sup>231</sup> China's measures discriminate against foreign suppliers of EPS by either categorically precluding their participation in the market, or by modifying the conditions of competition among the key participants – issuers, acquiring institutions, merchants, and the EPS supplier – in card-based electronic payment transactions.

201. China's measures require 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.<sup>232</sup> No other EPS provider is afforded such a privilege. Any issuer of payment cards in China is required to have access to the CUP system (and to pay for that privilege) and, as a result, issuers have no reason to seek alternative suppliers of EPS. The logo requirements also operate such that even if a card was issued with the logo of a foreign EPS supplier, CUP would also obtain an advantage as the CUP logo would have to appear on the card as well.

202. Similarly, China's measures require all ATMs, POS terminals, and merchant card processing equipment accept CUP cards.<sup>233</sup> Once again, no foreign EPS supplier is afforded a similar privilege. Moreover, even were a foreign supplier of EPS able to create or secure access to a POS terminal, then China's measures would still provide CUP with an advantage because of the requirement that all ATMs, POS terminals, and merchant card processing equipment accept CUP cards.

203. For the same reasons, China's measures requiring that all acquiring institutions in China post the CUP logo and accept all cards bearing that logo distort the competitive relationship between CUP and foreign suppliers.<sup>234</sup> No foreign EPS supplier is afforded a similar privilege. Acquiring institutions have important relationships with merchants, often providing POS terminal and processing equipment to merchants so it can process payment cards. Acquiring institutions also maintain the merchant's account, handle relations with the merchant, and ensures that payments are properly credited to the merchant.

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<sup>230</sup> See U.S. July 29, 2011 Response, paras. 124-125; see also Exhibit US-20, Exhibit US-27, and Exhibit US-29.

<sup>231</sup> Exhibit US-49, Article I.3.

<sup>232</sup> See U.S. July 29, 2011 Response, sections V.B, V.C, V.E; U.S. First Written Submission, paras. 12, 31, 37-72; 93-101; U.S. Answers to Panel Questions, paras.13-15, 17, 23-36, 62-66. See also section V.B.2 of this submission.

<sup>233</sup> See U.S. July 29, 2011 Response, sections V.B, V.C, V.F; U.S. First Written Submission, paras. 12, 31, 37-72; 102-110; U.S. Answers to Panel Questions, paras.13-15, 18, 23-36, 62-66. See also section V.B.3 of this submission.

<sup>234</sup> See U.S. July 29, 2011 Response, sections V.B, V.C, V.G; U.S. First Written Submission, paras. 12, 31, 37-72; 111-115; U.S. Answers to Panel Questions, paras.13-15, 19, 23-36, 62-66. See also section V.B.4 of this submission.

204. The broad prohibitions on the use of non-CUP cards and that prevent foreign suppliers of EPS have similar adverse effects on competition and operate to accord less favorable treatment to foreign EPS suppliers.<sup>235</sup> China requires that all inter-bank transactions for all bank cards be handled through CUP.

205. Finally, the requirements pertaining to card-based electronic transactions in China, Macao and Hong Kong also modify the conditions of competition and operate to accord less favorable treatment to foreign EPS suppliers.<sup>236</sup> China requires that CUP be used to handle all RMB transactions in Macao or Hong Kong using bank cards 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.

206. These measures affect the conditions of competition in the supply of EPS within the meaning of Article XVII because they directly regulate the terms on which they may be provided. The measures at issue provide different treatment solely according to the identity of the EPS supplier: CUP or not CUP. The Panel in *China - Publications and Audiovisual Products* found that:

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.”<sup>237</sup>

207. The effect of these measures is to completely distort competition in China’s market for EPS for payment card transactions. These measures establish and maintain CUP the sole entity able to provide the full range of EPS for payment card transactions in China where the card is issued in China and used in China. Banks in China must join CUP in order to issue or acquire bank card transactions. Only CUP cards can be issued as RMB denominated cards. The logo and interoperability requirements mean that all banks that wish to acquire merchant transactions or operate ATMs and all merchants who wish to accept bank cards must join CUP and process transactions in accordance with CUP’s rules and procedures as set out in Document No. 76 (Exhibit US-56/US-63). These requirements gave CUP automatic and universal acceptance of its RMB payment card products by banks and merchants in China and permitted and supported

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<sup>235</sup> See U.S. July 29, 2011 Response, sections V.B, V.C, V.H; U.S. First Written Submission, paras. 12, 31, 37-72; 79-117; U.S. Answers to Panel Questions, paras.13-15, 20, 23-36, 62-66. See also section V.B.5 of this submission.

<sup>236</sup> See U.S. July 29, 2011 Response, sections V.B, V.C, V.I; First Written Submission, paras. 12, 31, 37-72; 79-117; U.S. Answers to Panel Questions, paras.13-15, 21, 23-36, 44-51, 62-66. See also sections V.B.6 of this submission.

<sup>237</sup> Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

CUP becoming the sole supplier of EPS in China. No foreign EPS supplier enjoys any of these advantages and CUP is not constrained in the ways in which foreign EPS suppliers are constrained.

208. China's measures have entrenched CUP's monopoly position and clearly modify the conditions of competition in favor of CUP, and concerns of potential competition that CUP would face is precisely what drove China to implement the measures subject to this challenge:

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.<sup>238</sup>

209. The measures at issue were meant to favor the domestic Chinese entity and accordingly discriminate on that basis. They have been effective in this regard and outside of China, with the ability to operate from its protected home market, CUP has become a significant and increasingly active competitor.<sup>239</sup> 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" and 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."<sup>240</sup>

210. Finally, 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.

211. 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

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<sup>238</sup> Document No. 103, Section III (Exhibit US-1).

<sup>239</sup> See U.S. July 29 Response, paras. 55-61; see also, e.g., "China Unionpay Executive met the Press," posted on website of the People's Bank of China (Exhibit US-102); 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).

<sup>240</sup> The Articles of Association of China UnionPay Co., Ltd., Article 11 (Exhibit US-20).

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.<sup>241</sup>

212. On their face, many of the measures at issue explicitly prohibit any entity other than CUP from supplying services in the Chinese market. For example, Section 1.2 of Document 153 (Exhibit US-49) appears to explicitly recognize that “China UnionPay is *the* domestic clearance organization which specializes in the RMB bank inter-bank information routing and exchange” (emphasis supplied). This is also of course consistent with the description of the scope of CUP’s business in CUP’s Articles of Association, CUP’s “Notification of Business License Approval and Issuance,” and PBOC’s reply with respect to the establishment of CUP clearly establish that CUP is to be the single nationwide inter-bank card network.<sup>242</sup> Finally, other provisions prohibit processing of transactions by third-parties (*i.e.*, any network other than CUP).<sup>243</sup>

213. 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. 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.<sup>244</sup>

214. 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.

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

## VII. CONCLUSION

216. The United States respectfully requests that the Panel find that China’s measures 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.

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<sup>241</sup> Panel Report, *China - Publications and Audiovisual Products*, para 7.979.

<sup>242</sup> See U.S. July 29, 2011 Response, paras. 124-125; see also Exhibit US-20, Exhibit US-27, and Exhibit US-29.

<sup>243</sup> Exhibit US-49, Article I.3.

<sup>244</sup> Panel Report, *Canada – Autos*, para. 10.304.