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Report of the Panel

CHINA – CERTAIN MEASURES AFFECTING ELECTRONIC PAYMENT SERVICES

(WT/DS413/R¹)
(Circulated on 16 July 2012)

Parties:

Complainant: United States (US)
Respondent: China
Third Participants: Australia, Ecuador, European Union (EU), Guatemala, India, Japan and the Republic of Korea

Panellists:

Virachai Plasai (Chairperson), Elaine Feldman (Member), Martin Redrado (Member)

I. BACKGROUND

This dispute concerns a series of legal requirements relating to electronic payment services that the US alleged are maintained by China. According to the US, 'electronic payment services' involves services through which transactions involving payment cards are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated ("EPS"). The US challenged the following legal requirements maintained by China:

- a. Requirements that mandated the use of China UnionPay, Co. Ltd. (CUP) and/or established CUP as the sole supplier of electronic payment services for all domestic transactions denominated and paid in China's domestic currency, renminbi (RMB) ("sole supplier requirements");
- b. Requirements that payment cards issued in China bear the CUP logo ("issuer requirements");
- c. Requirements that all automated teller machines (ATM), merchant card processing equipment, and point-of-sale (POS) terminals in China accept CUP cards ("terminal equipment requirements");

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**This issue can also be accessed online at <http://wtocentre.iift.ac.in/DisputeAnalysis.asp> . Queries and comments are most welcome and may be directed to disputes_cws@iift.ac.in.

¹ The consultations were requested by the US with China on September 15, 2010; WT/DS413/1.

- d. Requirements on acquiring institutions to post the CUP logo and be capable of accepting all bank cards bearing the CUP logo ("acquirer requirements");
- e. Broad prohibitions on the use of non-CUP cards for cross-region or inter-bank transactions ("cross region / inter-bank prohibitions"); and
- f. Requirements pertaining to card-based electronic transactions in Hong Kong, China and Macao, China ("Hong Kong / Macau requirements").

The US considered that these requirements were maintained through a series of instruments that were identified in the request for establishment of a panel. According to the US, each of the legal requirements identified in the request for the establishment of a panel was inconsistent with China's obligations under Article XV:1 And XVI:2(a) and Article XVII of the General Agreement on Trade in Services (GATS) and hence it requested the Panel that pursuant to Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (the "DSU"), China bring its measures into conformity with its WTO obligations. China on the other hand requested the Panel to reject the US's claims in the dispute in their entirety.

II. KEY ISSUES AND PANEL FINDINGS

A. Preliminary Ruling under Article 6.2 of the DSU

China submitted a request for a preliminary ruling to the Panel with respect to the consistency of certain aspects of the US panel request with Article 6.2 of the DSU. China argued that the US's panel request failed to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in two respects: first, by failing to explain how the definition of "electronic payment services" related to China's specific commitments in any of the three subsectors identified in the panel request; and second, by failing to indicate which mode or modes of supply the US considers to be at issue. US requested the Panel to decline China's request to make findings in advance of either party filing its first submission. After consulting with the parties, the Panel decided to issue a preliminary ruling to the parties on 7 September 2011, prior to receiving the US's first written submission. The Panel in its preliminary ruling concluded that China had failed to establish that the US's panel request was inconsistent with Article 6.2 of the DSU and found that the text of the panel request made it clear that each of the requirements allegedly imposed by China was considered by the US to be in breach of Articles XVI:1 and XVI:2 and Article XVII of the GATS. (Paras 7.1-7.4)

B. Services at Issue

The Panel began its analysis with an examination of the essential features of "payment card" transaction based on the submissions of the parties, before turning to the scope of the services at issue and the particular areas of disagreement between the parties. The Panel noted that a typical transaction involving the purchase of a good or a service entailed a payment to the merchant by the consumer and such transactions often involved "payment cards". (Paras 7.12-7.17)

The Panel further noted that there were two main business models used in card-based electronic payment transactions. These are often referred to as "open-loop", or "*four-party*" models, and "closed-loop", or "*three-party*" models. In the four-party model, different entities handled the issuing of payment cards, the acquisition of transactions and the actual processing of transactions. In the three-party model, the payment card company itself was responsible for issuing cards, handling the acquisition of transactions, and processing the transactions. The US's request for the establishment of a panel specified that the present dispute concerned "*certain restrictions and requirements maintained by China affecting electronic payment services for payment card transactions and the suppliers of those services (electronic payment services suppliers)*". It described "electronic payment services" and a "payment card" as follows:

"Electronic payment services" involve the services through which transactions involving payment cards (as defined below) are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated. According to the US, electronic payment services (EPS) are at the centre of all payment card transactions, and without these services the transactions could not occur."

"A "payment card" includes a bank card, credit card, charge card, debit card, check card, automated teller machine (ATM) card, prepaid card, and other similar card or payment or money transmission product or access device, and the unique account number associated with that card or product or access device." (Paras 7.18-7.27)

China submitted that the services at issue, as described in the US's request for the establishment of a panel, related to *inter-bank payment card transactions*, i.e. transactions where the financial institution that issues the payment card to the card holder was unrelated to the financial institution that acquires the payment card transaction from the merchant. According to the Panel, the services at issue related not only to inter-bank payment card transactions, as defined by China, but also to payment card transactions where the issuing financial institution was related to - or could indeed be the same as - the acquiring financial institution. (Paras 7.27-7.37)

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

China argued that the definition of the services at issue proposed by the US was premised on a four-party model. The services at issue did not include the supply of services in three-party models and, therefore, the Panel should not reach findings on the supply of services under this model. The US argued that the services at issue covered services supplied in three-party models and three-party model transactions included both those EPS systems that performed the functions of issuer and acquirer internally and "on-us" transactions occurring in a four-party system where the issuer and the acquirer were the same entity. The Panel recalled that the services at issue, as defined in the panel request, consisted of a "system" that "typically includes" five elements, namely:

- (i) the processing infrastructure, network, and rules and procedures that facilitate, manage, and enable transaction information and payment flows and which provide system integrity, stability and financial risk reduction;
- (ii) the process and coordination of approving or declining a transaction, with approval generally permitting a purchase to be finalized or cash to be disbursed or exchanged;
- (iii) the delivery of transaction information among participating entities;
- (iv) the calculation, determination, and reporting of the net financial position of relevant institutions for all transactions that have been authorized; and
- (v) the facilitation, management and/or other participation in the transfer of net payments owed among participating institutions. (Paras 7.38-7.41)

The Panel noted that China had not challenged this description. Moreover, China agreed that the definition of the services at issue proposed by the US included EPS suppliers operating four-party models. The Panel considered important the use of the words "typically includes" in the panel request. By describing the "system" being supplied as "typically" including a number of specified elements, the panel request provided certain general parameters of the system under consideration, rather than seeking to confine the Panel's examination to a "system" that necessarily contained each and every element listed, and only those elements. According to the Panel, in a three-party model, the supply of the fourth and fifth elements of the system would usually involve individuals (e.g. card holders and merchants) rather than "institutions". However, in its view, that aspect did not change the nature of the EPS supplied. In the Panel's view, EPS suppliers operating under three- and four-party models provided *in essence* the same

services, as argued by the US and some of the third parties. It would be virtually impossible, in the Panel's view, to distinguish between the processing of a three-party transaction and the processing of an "on-us" four-party transaction, which, China agreed, were undoubtedly within the scope of the services at issue. For the above-mentioned reasons, the Panel found that the services at issue included the services supplied under three-party models, in addition to the services supplied under four-party models. (Paras 7.41-7.45)

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

China argued that issuer and merchant processors were providers of outsourced technology services to the issuing and acquiring institutions, respectively. China further argued that the panel request referred to a "system" provided by "EPS suppliers", that allowed for the authorization, clearing and settlement of inter-bank payment card transactions. In China's view, issuer and merchant processors did not supply a "system". The US argued that issuers and acquirers were optional entities for card-based electronic payment transactions. According to the US, this was in contrast to an EPS supplier that provided necessary infrastructure and services for card-based electronic payment transactions. (Paras 7.46-7.48)

The Panel restricted itself to the question of whether or not the services supplied by issuer and merchant processors were included in the services at issue. The Panel noted that due to their substantial involvement in the process, and considering the overlap between, on the one hand, the services supplied by third-party processors, and, on the other hand, those supplied by electronic payment services suppliers, third-party processors were part of the payment services loop. In the light of the foregoing analysis, the Panel concluded that the services at issue included the services supplied by third-party processors. (Paras 7.52-7.54)

Whether the services at issue are integrated services

The US argued that electronic payment services for payment card transactions were one integral service – one that was supplied and consumed as such. China argued that the services at issue did not have the nature of a single, integrated service. In the Panel's view, all these elements show that "electronic payment services for payment card transactions" were made up of different services that may be individually identified. It agreed with the US's argument that without the entire system supplied by the EPS supplier, no issuer would be able individually to offer a card that was as widely accepted by merchants, and no acquirer could offer merchants a service that could deliver such a large number of card holders. From that perspective, considering the transaction from beginning to end, electronic payment services for payment card transactions constituted an integrated service. In the Panel's view, the services at issue may also as a factual matter be supplied by a single service supplier or by more than one service supplier acting in concert. Therefore, according to the Panel, the services at issue included both the instances in which these services were supplied as a single service by a single service supplier, and those instances in which different elements of the "system" described by the US were supplied by different service suppliers. (Paras 7.55-7.62)

C. China's specific commitments concerning the services at issue

The US claimed that, in sector 7.B, under the heading "Banking and Other Financial Services" of its GATS Schedule, China undertook market access and national treatment commitments with respect to subsector (d), which reads "[a]ll payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers draft (including import and export settlement)" (subsector (d)). According to the US, subsector (d) included the electronic payment services supplied in connection with "credit, charge and debit cards", and other payment card transactions. In China's view, the clearing and settlement services at issue fell under paragraph 5(a), subsector (xiv), of the GATS Annex on Financial

Services (subsector (xiv)), which covered "[s]ettlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments", a subsector for which no commitments had been made in China's Schedule.

Interpretation of subsector (d) in China's Schedule

(i) *Ordinary meaning*

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

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

According to the Panel, an analysis of definitions contained in *dictionaries and glossaries* suggested that the terms "*payment*", "*money*" and "*transmission*", when used in combination, referred to the transfer of a generally acceptable means of exchange from one person or place to another. The money transferred may be due for goods or services received, or for settling a debt. Next, the Panel assessed whether it was appropriate to examine industry sources in addition to dictionaries for the purpose of determining the ordinary meaning of a term appearing in a GATS schedule, and concluded that if *industry sources* could be shown to assist with this task in a particular dispute, it saw no reason why a panel should not refer to them. The Panel noted that industry sources cited in this dispute referred to payment transactions, electronic payments and the various types of cards specifically identified in subsector (d) of China's Schedule. However, the Panel noted that industry sources did little to shed further light on the scope of subsector (d). (Paras 7.80-7.91)

Having considered the ordinary meaning of "payment", "money" and "transmission", the Panel noted that these three elements must be examined in conjunction with the term "*services*", which they qualify. The Panel observed that the GATS provided no definition of the word "service", although it defined related concepts, such as the *supply* of a service and a *service supplier*. It was clear to the Panel that the *supply* of a "payment service" was not the same thing as the act of paying for goods or services. Suppliers of "payment and money transmission services" were providing a "service" that facilitated and enabled payments and money transmissions. Thus, it agreed with the US that "payment and money transmission services" included those services that "manage", "facilitate" or "enable" the act, of paying, or transmitting money. (Paras 7.92-9.97)

Next, the Panel noted that subsector (d) began with the word "all". It was the only subsector in the financial services section of China's Schedule that did so. Subsector (viii) of the GATS Annex on Financial Services, on which, according to China, subsector (d) of China's Schedule was based, also started with the word "all". Consistent with the principle of effective treaty interpretation, the Panel considered that the word "all" before "payment and money transmission services" must be given meaning and effect. In its view, the use of the term "all" manifested an intention to cover comprehensively the entire spectrum of "payment and money transmission services". (Paras 7.98-9.99)

(ii) *Context*

(Key Question: What comprises context when interpreting a Members' GATS Schedule?)

The Panel noted that pursuant to the rule codified in Article 31(2) of the Vienna Convention, the "context" within which a treaty provision shall be interpreted notably comprises the text of the treaty, including its preamble and annexes. For the purpose of interpreting a Member's GATS schedule, the

Appellate Body found in *US – Gambling* that the context included:

- a. the remainder of the Member's schedule;
- b. the substantive provisions of the GATS;
- c. the provisions of covered agreements other than the GATS; and
- d. the GATS schedules of other WTO Members. (Para 7.102)

The rest of subsector (d)

The Panel noted that the phrase "[A]ll payment and money transmission services" in subsector (d) of China's Schedule is immediately followed by the phrase: "including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement)". The Panel further observed that this phrase was similar to that found in subsector (viii) of the Annex on Financial Services, on which, according to China, subsector (d) was based. The only difference was the parenthetical addition "(including import and export settlement)" in subsector (d). The Panel found that the phrase "including credit, charge and debit cards, travellers cheques and bankers drafts", which shed light on the types of services covered by the phrase "all payment and money transmission services", referred to an illustrative list of payment and money transmission instruments. The Panel considered that such transactions included not only those involving, for instance, the use of a credit card at a POS terminal for the purpose of a good or service, but also those involving the use of a credit, debit or ATM card for the purpose of withdrawing cash from an ATM. In the Panel's view, the latter constituted a form of money transmission service. (Paras 7.101-7.105)

The US submitted that the parenthetical phrase "(including import and export settlement)" did not appear in subsector (viii) of the GATS Annex on Financial Services, but was added by China to the description of the services covered by subsector (d). According to the United States, the explicit use of "settlement" suggests that there is an element of settlement and clearing that occurs as part of the payment service. The Panel concluded that the parenthetical addition "(including import and export settlement)" in China's Schedule confirmed that subsector (d) included settlement, and by implication clearing, e.g. when bankers' drafts were used as payment instruments for transactions between importers and exporters. It perceived no sound basis for assuming that subsector (d) included settlement, and where appropriate clearing, of transactions involving the use of bankers' drafts, but that it would exclude settlement and clearing of transactions involving the use of the *other* payment instruments listed in subsector (d). (Paras 7.106-7.118)

Other elements in China's schedule

China argued that subsector (d) was one of six subsectors listed in China's Schedule under the heading "*Banking services as listed below*". According to China, the ordinary meaning of "banking services" was services provided by banks. The Panel however concluded that this subheading was not indicative of an intention to circumscribe the commitments under subsectors (a) to (f) to a certain category of services suppliers, namely banks. Rather, this subheading indicated that the services concerned were typically supplied by banks, or were typically provided by banks in the past. This did not detract from the fact, however, that some of these services could be, and were, also provided by other types of financial entities. Additionally, and from a more practical point of view, this subheading may also serve to separate commitments undertaken in respect of subsectors (a) to (f) from different commitments undertaken in respect of other subsectors listed further down in China's Schedule. (Paras 7.121-7.133)

The Panel was also of the view that the market access entry under mode 1 constituted relevant context for the purpose of interpreting the scope of subsector (d). There, the Panel found that this entry was properly understood as referencing China's mode 1 market access commitment for subsectors (k) and (l). Hence,

the context provided by the market access entry under mode 1 did not suggest an interpretation that was different from that suggested by the other contextual elements examined so far that subsector (d) encompasses services that are essential to the processing and completion of transactions using payment cards. (Paras 7.134-7.138)

The GATS Annex on Financial Services

The Panel noted that Article XXIX of the GATS (*Annexes*) states that "[t]he Annexes to this Agreement are an integral part of this Agreement". Pursuant to that provision, the GATS Annex on Financial Services was treaty text. Moreover, it constituted context for purposes of interpreting China's Schedule, which was itself an integral part of the GATS. The Panel noted that Subsector (xiv) in paragraph 5(a) of the Annex, which falls under the heading "Banking and other financial services (excluding insurance)", states as follows:

"Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments"

China argued that the clearing and settlement services at issue in this dispute were classifiable under subsector (xiv) of the Annex, a subsector for which China undertook no commitments. The US replied that China's position was inconsistent with the ordinary meaning of "settlement and clearing services for financial assets" and failed to recognize that subsector (xiv) constitutes a substantially different financial service than the services at issue. On the basis of its analysis, the Panel concluded the following on the issue:

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

The Panel also noted that with respect to subsector (x) in the Annex, the fact that it referred to cheques as tradable instruments did not invalidate its conclusion with respect to the scope of subsector (d) in China's Schedule.

The structure of GATS

The Panel also noted that the interpretation of subsector (d) based on the structure of the GATS as context, it was of the view that the classification under a single subsector of a service made up of a combination of different services was not incompatible with the principle of mutual exclusivity if these services, when combined together, resulted in a distinct service that was supplied and consumed as such. Moreover, the mere fact that separate suppliers provided one particular component of a service did not in itself imply that that component should be classified as a distinct service, or that the component was not part of an integrated service. In the Panel's view, what was relevant in relation to the classification of an integrated service was not whether it was supplied by a single supplier or by several suppliers, but rather

whether the component services, when combined together, resulted in a new and distinct service, the integrated service. This confirmed the view that subsector (d) encompassed the services essential to the processing and completion of transactions using payment cards. (Para 7.188)

Schedules of other WTO Members

China submitted that other WTO Members considered the services encompassed by subsector (viii) to be limited to services that were supplied by banks and other types of financial institutions. According to China, there was no indication in any WTO Member's commitments for subsector (viii) that these services were provided by suppliers other than banks or other financial institutions. The Panel recalled that, in *US – Gambling* and in *China – Publications and Audiovisual Products*, GATS schedules of other WTO Members were used by the panels and the Appellate Body as relevant context for the interpretation of a Member's Schedule. The Panel observed that the schedules of other WTO Members cited by China used different names to describe entities supplying services under subsector (d). These included "banks", "commercial banks", "financial institutions", "specialized finance companies" and "credit institutions". China did not submit evidence or make arguments as to the precise nature of these differently named entities in China's and other WTO Members' schedules. For that reason, the Panel concluded that it was not clear whether the schedules of other WTO Members cited by China indicated that "all payment and money transmission services" could only be supplied by "banks and other types of financial institutions" within the meaning attributed by China to those terms. Thus the context provided by the Schedules of other WTO Members does not point to an interpretation that is different from that suggested by other elements of context examined above. (Paras 7.189-7.193)

(iii) Object and Purpose

China argued that the US's interpretation of China's Schedule or items in the Annex on Financial Services was "plainly contrary to the object and purpose of the GATS", because it was "arbitrary, illogical, and completely unpredictable". The Panel began its consideration of the object and purpose of the GATS and the WTO Agreement by noting one of the key objectives listed in the Preamble to the GATS, namely "the establishment of a multilateral framework of principles and rules for trade in services with a view to the expansion of such trade under conditions of *transparency* and *progressive liberalization*". The Panel found that its conclusion that subsector (d) of China's Schedule encompasses EPS was consistent with the object and purpose of the GATS and the WTO Agreement. (Paras 7.194-7.199)

D. Measures at Issue

The US had identified a series of six requirements, or measures, which it claimed operated alone or in combination to impose market access restrictions and national treatment limitations on service suppliers of other WTO Members seeking to supply EPS in China. The US argued that these measures were maintained through a series of legal instruments and were inconsistent with China's obligations under Articles XVI:1 and XVI:2(a), and Article XVII of the GATS. China contended that the US had failed to demonstrate that the alleged measures operated in a manner that was inconsistent with either Article XVI or XVII of the GATS.

1. *The specific measures at issue that form part of the US's challenge*

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

For each of the six requirements, the US had identified an illustrative list of instruments in which the particular measure was reflected. In its rebuttal submission, China argued that the US had sought to improperly base its claims on measures that were not specifically identified in the panel request. Rather

than focusing on those legal instruments, China was of the view that the US had attempted to improperly shift the basis of its claims to target measures at issue that existed "independently" of any particular legal instrument. (Paras 7.213-7.214)

The Panel noted that Article 6.2 of the DSU required that a complaining party identify the "specific measures at issue" among meeting other requirements. Moreover, Article XXVIII(a) of the GATS defined a "measure" for purposes of the GATS as "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form". In three narrative paragraphs in its panel request, the US described those "requirements" or "measures" that it considered were inconsistent with China's obligations under Articles XVI and XVII of the GATS. In the Panel's view, the fact that the US considered that a series of "instruments" "illustrate" or "reflect" the existence of six alleged requirements did not prevent making findings on the six identified requirements as the "measures" at issue in the sense of Article 6.2 of the DSU and Article XXVIII(a) of the GATS. Accordingly, the Panel examined whether the legal instruments identified in the US's panel request established the existence of the six alleged requirements or measures at issue. (Paras 7.215-7.217)

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

China submitted evidence to the Panel that three of the legal instruments were either repealed or replaced prior to the establishment of the Panel. China requested that the Panel should decline to make findings with respect to these three instruments. The US referred to all of these legal instruments in its panel request and subsequently in its submissions to the Panel.

In *US – Upland Cotton*, the Appellate Body had noted that "the fact that a measure has expired may affect what recommendation a panel may make" but it was "not dispositive of the preliminary question of whether a panel can address claims in respect of that measure". On the evidence before the Panel, it opined that it had no reason to assume that the three instruments would be re-introduced. Furthermore, the US had alleged that China currently maintained in place each of the relevant requirements even without these instruments being in effect. Accordingly, the Panel did not consider that in the particular circumstances of this case there was any need to go further and address also Document Nos. 66, 94 and 272. (Paras 7.221-7.228)

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

(a) Issuer requirements

According to the US, the instruments that imposed the aforesaid requirements made frequent references to a logo that must be displayed on bank cards issued in China or on terminal equipment operated in China. The US was of the view that the logo in question was that of China UnionPay Co., Ltd. ("CUP") and accordingly referred to it as the "CUP logo". In contrast, China argued that the relevant instruments referred to the "Yin Lian logo", which China said indicated a bank card's interoperability. On an analysis of all the relevant documents, the Panel noted that China maintained requirements on commercial banks as issuers of bank cards and all RMB bank cards issued in China by commercial banks for use in domestic inter-bank RMB transactions must bear the *Yin Lian*/UnionPay logo on the front of the card. (Paras 7.2-7.296)

According to the Panel, the issue to be addressed was whether the issuer requirements would prevent commercial banks from issuing single or dual currency bank cards in China that could be used in domestic inter-bank RMB transactions and that would be capable of being processed over a network in China that was not the CUP network. The Panel understood that it was technically possible for a single bank card to be capable of being processed over more than one network. The US contended, however,

that the Yin Lian/UnionPay logo use requirement was incompatible with logo use requirements of competing EPS suppliers. China responded that the US had cited no evidence of this incompatibility and pointed out that bank cards in China frequently bore more than one logo. For these reasons, the Panel saw no basis on which to conclude that the provisions in question would prohibit the issuance of relevant cards that would be capable of being processed over more than one inter-bank network in China, provided these cards also bore the Yin Lian/UnionPay logo. (Para 7. 298)

Turning to the interoperability element of the issuer requirements, China submitted that these requirements did not preclude issuers from being members of networks other than the CUP network, and did not prevent bank cards from adhering at the same time to technical standards that were not those of CUP. According to the Panel, the existence of dual-branded (dual-logo), dual-currency bank cards issued in China suggested that it was technically possible for bank cards simultaneously to comply with different sets of business specifications and technical standards. The US had not demonstrated that any of the aforementioned provisions were inconsistent with central issuer-related bank card business rules that had been adopted by EPS suppliers other than CUP. Consequently, the Panel found no basis to conclude that the issuer requirements that related to interoperability would prevent the issuance of single or dual currency cards that would be capable of being processed over more than one inter-bank network in China. (Para 7.299)

(b) Terminal equipments requirement

The US also asserted that the terminal requirements were maintained through specific provisions of the certain Chinese legal instruments that required that all ATMs, merchant card processing equipment and POS terminals in China be capable of accepting CUP cards. China responded that the measures at issue required that all POS terminals used for domestic inter-bank transactions denominated in RMB in China be capable of accepting bank cards that bore the *Yin Lian* logo and they must adhere to certain technical standards. These measures created uniform technical and commercial standards that allowed a national inter-bank payment card network to function. (Paras 7.300-7.303)

On an analysis of the relevant legal instruments, the Panel noted that China required that terminals (ATMs, merchant processing devices and POS terminals) in China that were part of the national bank card inter-bank processing network be capable of accepting all bank cards bearing the *Yin Lian/UnionPay* logo. However, the Panel was not convinced that some of the legal instruments when considered individually required that all terminal equipment in China be capable of accepting bank cards bearing the *Yin Lian/UnionPay* logo. Having reached these conclusions, the Panel considered China's argument concerning the implications of the terminal equipment requirements. According to China, the US had not identified any aspect of the terminal equipment requirements that would prevent the acceptance of bank cards that are capable of being processed over multiple networks. The Panel also understood that modern ATMs and POS terminals were typically capable of accepting not just bank cards with the logo of one particular EPS supplier, but also bank cards with the logo of other EPS suppliers. Hence, in the absence of other evidence, the Panel concluded that the terminal equipment requirements would prevent the acceptance of bank cards that would be capable of being processed over an inter-bank network in China other than that of CUP. (Paras 7.331-7.334)

(c) Acquirer requirements

The US submitted that through specific legal instruments China required that all acquirers in China post the CUP logo and be capable of accepting CUP cards. China responded that the measures at issue required POS terminals in China to adhere to certain technical standards and to bear a common logo indicating their ability to be used for domestic inter-bank transactions. These measures create uniform technical and commercial standards that allow a national inter-bank payment card network to function.

The Panel began its analysis by noting that the acquirer requirements as defined by the US comprised two distinct elements (i) requirements that acquirers post the *Yin Lian/UnionPay* logo, and (ii) requirements that acquirers be capable of accepting payment cards bearing the *Yin Lian/UnionPay* logo. The Panel concluded that China imposed a requirement that acquirers post the *Yin Lian/UnionPay* logo. In addition, it found that China maintained requirements that acquirers be capable of accepting all bank cards bearing the *Yin Lian/UnionPay* logo. (Paras 7.335-356)

As regards the implications of the acquirer requirements, the Panel noted China's argument that US has not identified any aspect of the acquirer requirements that would prevent the acceptance of bank cards that are capable of being processed over multiple networks. With respect to the terminal equipment, in the absence of other evidence the Panel saw no basis for concluding that these acquirer requirements would prevent the acceptance by acquirers of bank cards capable of being processed over an inter-bank network in China other than that of CUP. With respect to the interoperability element of the acquirer requirements, the Panel noted that it would be technically possible for acquirers simultaneously to comply with different sets of business standards and technical specifications. As a result, there were no reasonable grounds to conclude that the acquirer requirements pertaining to interoperability would prevent the acceptance of bank cards that were capable of being processed over more than one inter-bank network in China. (Paras 7.357-7.359)

Lastly, the Panel also found no basis, given the absence of evidence, to conclude that the acquirer requirement that mandated the posting of the *Yin Lian/UnionPay* logo prevented the posting of other EPS suppliers' logo, much less the acceptance by acquirers of bank cards that were capable of being processed over an inter-bank network in China other than that of CUP. (Para 7.360)

(d) Hong Kong / Macau requirements

The US argued that China required that CUP handle the clearing of all RMB bank card transactions in Hong Kong or Macao using bank cards issued in China, and that CUP handle the clearing of any RMB bank card transaction in China using bank cards issued in Hong Kong or Macao. China rejected the view that this requirement or any of the identified legal instruments were relevant to the modes of supply at issue in this dispute, on the basis that the measures concerned the clearing of RMB transactions taking place in either Hong Kong or Macao, both of which were separate customs territories. On the analysis of the relevant documents, the Panel concluded that China required that CUP and no other EPS supplier should handle the clearing of certain RMB bank card transactions that involved either an RMB bank card issued in China and used in Hong Kong or Macao, or a bank card issued in Hong Kong or Macao that was used in China in an RMB transaction. (Paras 7.361-7.383)

(e) Sole supplier requirement and cross-region/inter-bank prohibitions

The US asserted that China imposed measures that mandated the use of or established CUP as the sole supplier of EPS for all domestic transactions denominated and paid in RMB through the following Chinese legal instruments. The US argued that the preceding legal instruments interacted to establish and maintain CUP as the sole supplier in three ways: (i) certain instruments explicitly stated that CUP must be used to process specific types of bank card transactions; (ii) certain instruments established and/or required the use of business specifications and technical standards which mandated the use of CUP; and (iii) certain instruments implicitly recognized that CUP was the sole supplier of EPS services for RMB denominated transactions. China rejected that the identified legal instruments operated to establish CUP as sole supplier for the clearing and settlement of all RMB domestic inter-bank bank card transactions. (Paras 7.384-7.388)

The Panel concluded that none of the identified legal instruments considered *individually* mandated or

established CUP as sole supplier of EPS in respect of domestic RMB bank card transactions or otherwise prohibited the use of EPS suppliers other than CUP. However, nothing in the cited provisions of the relevant instruments precluded the issuance or acceptance of bank cards that would operate on any inter-bank networks other than that of CUP, or precluded the use, or the acceptance at terminals, of bank cards bearing logos of other EPS suppliers, so long as those cards also bore the *Yin Lian*/UnionPay logo and were also interoperable over the CUP network. Accordingly, the Panel found that the cited provisions of these instruments did not establish or maintain CUP as the exclusive EPS supplier for all RMB bank card transactions, where a bank card was issued and used in China. Therefore, in respect of the various instruments identified in connection with the alleged sole supplier requirements, the Panel was unable to conclude that any of the legal instruments, when considered individually, maintained or established CUP as the exclusive EPS supplier for RMB bank card transactions, or otherwise prohibited the use of EPS suppliers other than CUP. (Paras 7.389-7.481)

Furthermore, the Panel noted that the US had requested the Panel to consider the "measures" at issue in this dispute both individually and in combination with each other. The US considered that the six requirements, as reflected in the legal instruments at issue, operated together in several respects to establish and maintain CUP as the sole or exclusive EPS supplier.

- a. First, the US maintained that various legal instruments worked together in ways to explicitly or implicitly restricted entry into the Chinese market.
- b. Second, the US's arguments suggested that it considered that certain instruments work together in ways that imposed technical barriers to entry.
- c. Third, the US considered that the measures operated together in a way that made it "economically unviable" to enter the market.

The Panel considered each of these arguments separately:

Explicit and implicit legal operation of the instruments when considered collectively

The Panel noted that with the exception of RMB bank card transactions involving Hong Kong and Macao nationals that travel to China, and Chinese nationals that travel to Hong Kong or Macao, the US had failed to identify anything in the identified legal instruments that explicitly granted CUP the exclusive privilege to supply EPS in respect of all RMB bank card transactions taking place in China. Thus, it considered that the US had not met its burden to establish that the net, or combined, legal effect of these instruments was to preclude EPS suppliers other than CUP from operating in China's market for RMB bank card transactions. (Para 7.491-7.497)

Technical barriers imposed through the instruments

The US had also alleged that the rules and standards imposed under certain of the instruments at issue made it technically difficult for foreign EPS suppliers to operate in the market, thereby effectively "entrenching" CUP as the sole supplier. In the absence of any evidence that an EPS supplier would not be able to take such steps to make its cards compatible with this standard due to costs or other reasons, or that competing standards are inherently incompatible, the Panel considered that the US had failed to establish that the need to comply with this standard would ensure that CUP was the sole supplier. (Paras 7.498 -7.499)

Economic barriers imposed by the instruments

Lastly, the Panel addressed the US's contention that the instruments in question made it "economically unviable" for any foreign EPS supplier to participate in that market, thereby entrenching CUP as the sole supplier in the market for RMB bank card transactions. In the absence of concrete evidence, the panel was again not persuaded that the cost associated with these or other business or technical requirements had dissuaded or would in the future dissuade issuers or acquirers from seeking the services of other EPS suppliers, thereby effectively establishing or maintaining CUP as the only supplier in the market. (Paras

7.500-7.504)

(f) Overall conclusion

Accordingly, the Panel found that the US had not substantiated its claim that the instruments at issue *collectively* mandated the use of CUP or established CUP as the sole supplier of EPS for all domestic RMB bank card transactions. (Para 7.505)

E. US claims under Article XVI of the GATS

The US submitted that China made mode 1 and mode 3 commitments in its Schedule covering the supply of EPS, wherein China committed not to maintain any limitations on the number of foreign EPS suppliers. Through the imposition of these six requirements, the US asserted, China established and maintained a monopoly structure to ensure that CUP was the exclusive supplier of EPS for all RMB bank card transactions in China whenever a bank card was issued in China and used in China. As a result of this, the US considered that the measures at issue were inconsistent with China's obligations under Articles XVI:1 and XVI:2(a) of the GATS. China argued that the US had failed to prove that China made relevant market access and national treatment commitments under subsector (d) in relation to mode 1 and mode 3, and therefore requested the Panel to dismiss the US's claims. (Paras 7.508-7.509)

Whether China has made mode 1 or mode 3 market access commitments covering the supply of EPS

The Panel began its analysis under Article XVI by determining whether China had undertaken relevant market access commitments in its GATS Schedule for subsector (d) and the two modes of supply relied on by the US, i.e. modes 1 and 3.

a. Mode 1 commitments

The US argued that China had undertaken mode 1 market access commitments with respect to subsector (d) in its Schedule. Under mode 1, the word "Unbound" was followed by the qualifying phrase "except for the following," which in turn was further elaborated by two sentences that described elements of the services within subsector (d). According to the US, China's mode 1 commitment must be understood as recognizing that "payment and money transmission" services included aspects of "provision and transfer of financial information" and "advisory, intermediation and other auxiliary services" to the extent that such aspects were integral to the core service, and that such aspects were properly classified within "payment and money transmission" services and not in subsector (k) or (l). China recalled its view that the services at issue were not properly classifiable under subsector (d) of its Schedule. China argued that, in order to give effect to its unbound market access entry for subsectors (a) through (f), it was critically important to distinguish between those activities that were unbound in mode 1 and those activities that fell within the exception. (Paras. 7.514-7.516)

The relevant section of China's Schedule is reproduced below (emphasis added):

[...]	
B. Banking and Other Financial Services (excluding insurance and securities)	(1) <i>Unbound except for the following:</i>
Banking services as listed below:	- <i>Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;</i>
(a) ...	- <i>Advisory, intermediation and other auxiliary financial services on all activities listed in subparagraphs (a) through (k), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.</i>
(b) ...	
(c) ...	(2) [...]
- Other financial services as listed below:	
(k) <i>Provision and transfer of financial information, and financial data processing and related software by supplier of other financial services;</i>	(1) <i>None</i>
(l) <i>Advisory, intermediation and other auxiliary financial services on all activities listed in subparagraphs (a) through (k), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.</i>	(2) [...]
	(3) [...]
	(4) [...]
- Securities	(1) [...]
	(2) [...]
	(3) [...]
	(4) [...]

The Panel observed that WTO Members commonly used the inscription "Unbound except for" in their GATS schedules. China had made use of it in other sectors listed in its Schedule. Moreover, China employed this inscription for its mode 4 commitments as well, as have most other WTO Members. What was particular about and set apart the mode 1 entry in question, however, was the fact that the two services referred to were textually nearly identical to subsectors (k) and (l) for which China had undertaken specific commitments. Pursuant to Article 31 of the Vienna Convention, the Panel examined the ordinary meaning of the text of the relevant mode 1 entry in its context and in the light of the object and purpose of the GATS and the WTO Agreement. The Panel's analysis of the ordinary meaning of the terms used to describe the services under the mode 1 entry at issue did not allow it to conclude that these services were "elements" of "all payment and money transmission services" in subsector (d), as contended by the US. It suggested, to the contrary, that these services were separate and distinct from the services listed in the sectoral column with respect to subsectors (a) to (f). To that extent, the text in the two hyphens was consistent with the view that this entry refers to the full market access commitment on mode 1 for subsectors (k) and (l). (Paras 7.520-7.524)

On an examination of relevant contextual elements, which included the remainder of China's Schedule and the Annex, the Panel noted that China's sectoral commitments under mode 4, generally read

"[u]nbound, except as indicated in horizontal commitments". These inscriptions were found under both the market access and national treatment columns, and referred to the horizontal section of China's Schedule where the scope of China's mode 4 commitments was defined. Hence, these mode 4 entries indicate that as a general matter, China's Schedule did not contain cross-references to another part of the same Schedule. The Panel observed that subsectors (k) and (l) in China's Schedule were relevant contextual elements for the interpretation of the mode 1 entry at issue. Thus, although the US submitted that limitations in the market access and national treatment columns could not modify the scope of the sector description, according to the Panel, US's proposed approach to interpreting the excepted language in the mode 1 entry at issue would do precisely that. By carving out elements of the services listed in the two hyphens on the grounds that these elements were "aspects" of the services described under subsector (d), the US's approach would correspondingly remove these same elements from subsectors (k) and (l) which are committed in the sectoral column of China's Schedule. (Paras 7.525-7.527)

The US additionally referred to paragraph 8 of the Understanding on Commitments in Financial Services in support of its view that a service may include elements of "provision and transfer of financial information, and financial data processing". The Panel observed, first, that, as acknowledged by the US, China was not a party to the Understanding and hence, paragraph 8 of the Understanding was not applicable to China. (Para 7.532)

Based on the preceding analysis, the Panel considered that the mode 1 entry at issue did not result in a market access commitment under mode 1 for "all payment and money transmission services". In its assessment, China's mode 1 market access entry concerning subsectors (a) to (f) should be understood instead as referencing China's mode 1 market access commitment for subsectors (k) and (l), which was fully bound. In other words, in the Panel's view, the phrase "except for the following" had not been used to undertake a market access commitment under mode 1 for subsectors (a) to (f). Rather, it served to alert the reader to other relevant content in China's Schedule – in this case, the full mode 1 commitment undertaken by China under subsectors (k) and (l) of its Schedule. (Paras 7.533-7.537)

The Panel did not find it necessary to resort to supplementary means of interpretation under Article 32 of the Vienna Convention as the interpretation of the mode 1 entry at issue pursuant to Article 31 of the Vienna Convention did not leave the meaning ambiguous or obscure. Thus, the Panel concluded that China had no market access commitments under mode 1 with respect to the services encompassed under subsector (d) of its Schedule. (Paras 7.537-7.538)

b. Mode 3 commitments

The US argued that under the market access commitments for mode 3, China scheduled certain limitations regarding geographic coverage, potential clients, and licensing, all of which were to be eliminated within five years after China's accession, i.e. in December 2006. Therefore, since December 2006, China's Schedule provided no market access limitations under mode 3 with respect to EPS. China argued that its market access commitments for subsector (d) and mode 3 were limited to foreign financial institutions (FFIs) and did not expire five years after China's accession. (Paras 7.539-7.541)

The Panel noted that both parties agreed that China had market access commitments in subsector (d) and mode 3 that applied to FFIs. The parties disagreed, however, on whether these commitments were limited to FFIs and on whether EPS suppliers were FFIs. To determine whether EPS suppliers of other WTO Members constitute non-bank FFIs, the Panel first ascertained the ordinary meaning of the term "FFIs" and found that the term "FFIs" as it appears in China's Schedule is reasonably susceptible of meaning any foreign institutions that provide financial services classifiable under subsectors (a) to (f). The Panel then proceeded to examine further and in more detail whether the relevant context confirmed or puts in doubt either of the above-noted ordinary meanings. The Panel noted that the relevant mode 3 entry lists

temporary or permanent (i) geographic restrictions (section A), (ii) client limitations on local currency business (section B), and (iii) licensing requirements, including general authorization criteria and qualifications for engaging in local currency business (section C). These elements were applicable to all FFIs. The Panel perceived no basis to conclude that it would be unreasonable to impose these limitations on EPS suppliers of other WTO Members. (Paras 7.548-7.559)

To sum up, according to the Panel, the contextual considerations either supported or did not contradict the view that the term "FFIs" covered any foreign institutions that provided financial services classifiable under subsectors (a) to (f). Thus, on the basis of the ordinary meaning of the term "FFIs" read in the specific context provided by China's Schedule, the Panel saw no reason to construe that term in such a way that it would exclude EPS suppliers of other WTO Members. The Panel thus proceeded to examine China's current market access commitments in respect of FFIs that provided their services through mode 3. China's mode 3 entry expressly stated that for local currency business, and after expiry of the phase-out period of five years, FFIs – which included EPS suppliers of other WTO Members – may provide their services to all Chinese enterprises and natural persons, without being subject to geographic restrictions or non-prudential authorization criteria restricting their ownership, operation or juridical form. Significantly, China's mode 3 entry did not set out any limitations on the number of service suppliers in the form of a monopoly or exclusive service suppliers. (Paras 7.566-7.574)

Accordingly, the Panel came to the conclusion that in respect of services classified under subsector (d) and provided by FFIs, which included EPS provided by EPS suppliers of other WTO Members, China had made a commitment on market access concerning mode 3. That commitment was not subject to any limitations on the number of service suppliers. As a consequence, China was obligated to give EPS suppliers of other WTO Members access to its market, through commercial presence, so that they may engage in local currency business in China, subject to such suppliers meeting the aforementioned qualifications requirement. (Para 7.575)

Whether the measure at issue is inconsistent with Article XVI of GATS

The US asserted that China made relevant commitments in its Schedule not to maintain any limitations on the number of EPS suppliers of other WTO Members in respect of the services at issue. As a result of these commitments, the US considered the measures at issue were inconsistent with China's obligations under Articles XVI:1 and XVI:2(a) of the GATS. China asserted that the US had failed to demonstrate that the measures at issue maintained or adopted limitations on the number of service suppliers that were inconsistent with Article XVI:1 or XVI:2(a) of the GATS.

a. *Whether the relevant requirements fall within the scope of Article XVI:2(a) of the GATS*

(Key Question: *For the purposes of Article XVI:2, can a monopoly supplier be at the same time an exclusive service supplier?)*

The US argued that each of the requirements at issue was inconsistent with Article XVI:2(a) of the GATS because they limited the number of foreign suppliers of EPS for bank card transactions. The US considered these measures established and maintained CUP as both a "monopoly" supplier and an "exclusive service supplier" within the meaning of Article XVI:2(a) of the GATS for all RMB bank card transactions. China argued that the Appellate Body made clear in *US - Gambling* that the scope of Article XVI:2(a) extended only to "quantitative" or "quantitative-type measures" and therefore, Article XVI did not extend to measures that "merely have the effect of limiting the number of services suppliers". (Paras 7.582-7.583)

The Panel noted that Article XXVIII(h) of the GATS defined "monopoly supplier of a service" as "any person, public or private, which in the relevant market of the territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service". Article VIII:5 states:

"The provisions of this Article shall *also* apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory".

Taking into account the different meaning given to these terms in the text of the Articles VIII:5 and XXVIII(h) of the GATS, and the distinction made in Article XVI:2(a), the Panel considered that a monopoly supplier was a sole supplier authorized or established formally or in effect by a Member, whereas an exclusive service supplier was one of a small number of suppliers in a situation where a Member authorized or established a small number of service suppliers, either formally or in effect, and that Member substantially prevents competition among those suppliers. Thus, for the purposes of Article XVI:2, the Panel did not consider that a monopoly supplier was at the same time an exclusive service supplier. (Paras 7.584-7.587)

b. *Whether the issuer, terminal equipment and acquirer requirements are inconsistent with Article XVI:2(a) of the GATS*

The US argued that no EPS supplier other than CUP benefitted from requirements imposed on issuers and acquirers of bank cards, or terminal equipment requirements. Due to the need to fulfil these requirements, the US argued that issuers and acquirers must have access to the CUP system, and must pay for that access. China contended that none of these three requirements "have anything to do with the maintenance or adoption of a limitation on market access 'in the form of' of a monopoly or exclusive service supplier arrangement". The Panel noted that the nature of these requirements made clear that none of them imposed a limitation on the supply of EPS services that was quantitative in nature, i.e. they did not require that CUP shall be established and maintained as a "monopoly" or an exclusive service supplier. In addition, it found that none of the provisions in the legal instruments that reflect these three requirements imposed an express limitation on the number of EPS suppliers that was numerical or quantitative in nature, be it in the form of a monopoly or exclusive service supplier. Similarly, it saw no limitation on the number of EPS suppliers resulting from the fact that terminal equipment in China must be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo and that acquirers must post the *Yin Lian*/UnionPay logo and be capable of accepting all bank cards bearing the *Yin Lian*/UnionPay logo. (Paras 7.594-7.604)

For these reasons, the Panel was unable to conclude that the issuer, terminal equipment and acquirer requirements, considered either separately or in combination, were inconsistent with Article XVI:2(a) of the GATS. (Para 7.605)

c. *Whether the requirements pertaining to RMB card-based transactions taking place in China, Macao and Hong Kong are inconsistent with Article XVI:2(a) of the GATS*

The US argued that this requirement established and maintained CUP as a "monopoly" supplier or an "exclusive service supplier" within the meaning of Article XVI:2(a) of the GATS in respect of the services at issue. China contended that there was no legal basis for the claims advanced by the US in relation to EPS services in Hong Kong or Macao under the modes of supply at issue. Pursuant to Article XVI:2 of the GATS, China argued that a Member's schedule only implicates the provision of services in the territory of that Member. China submitted that Hong Kong and Macao were separate customs territories for purposes of the covered WTO agreements, and that each maintained their own rights and obligations in respect of these agreements. Thus, the issue arises whether the supply of services through commercial presence under China's mode 3 commitments included the supply of services to all

actors under these three scenarios, including actors located outside of China, in either Hong Kong or Macao. In assessing this issue, the Panel noted that the supply of a service through commercial presence (mode 3) was defined in Article I:2(c) of the GATS as the supply of a service "by a service supplier of one Member, through commercial presence in the territory of any other Member". "Commercial presence" was defined in Article XXVIII. (Paras 7.606-7.616)

As the panel had noted in its report in *Mexico – Telecoms*, this definition was silent with respect to any other territorial requirement (as is the case in cross-border supply under mode 1) or the nationality of the service recipient (as is the case in consumption abroad under mode 2). The definition of services supplied through commercial presence addressed only the location of the foreign service supplier, not that of the recipient of the relevant service, nor the nationality of the recipient. The Panel agreed with the reasoning of the previous panel in *Mexico – Telecoms*. A foreign service supplier may therefore, subject to any limitations set out in the Member's schedule, supply a committed service to a foreign recipient wherever located, and of whatever nationality or origin. Thus, in the absence of a specific mode 3 limitation in China's Schedule that restricted the supply of EPS from within China into the territory of other WTO Members, the Panel considered that China's commitment under mode 3 covered not only the supply of EPS to clients within China, but also the supply of EPS to clients located in the territory of other WTO Members. (Paras 7.617-7.619)

Having so concluded, the Panel turned to consider whether China had fulfilled its obligations in Section 7.B(d) of its Schedule to ensure that EPS suppliers of any other Member may supply their services from China to issuers and acquirers, in a four-party model, or to the card holder and merchant, in a three-party model or other similar variations, in order to comply with its obligations under Article XVI:2(a) of the GATS. The measures required that only CUP handled the processing of the relevant transactions taking place in Hong Kong or Macao, or China. These transactions included situations in which (i) a Chinese national travelled to Hong Kong or Macao and initiated an RMB bank card transaction with a card issued in China; and (ii) a Hong Kong or Macao national travelled to China and initiated an RMB bank card transaction there with a card issued in either Hong Kong or Macao. Due to the requirement that only CUP handle the processing, in the event a foreign EPS supplier established itself in China through commercial presence, that foreign EPS supplier would be prevented from providing its services with respect to any such transaction. Thus, the Panel found that the Hong Kong/Macao requirements imposed a limitation on the number of service suppliers in the form of a monopoly within the meaning of Article XVI:2(a) of the GATS for the supply of EPS for RMB bank card transactions that involved either an RMB bank card issued in China and used in Hong Kong or Macao, or an RMB bank card issued in Hong Kong or Macao that was used in China in an RMB-denominated transaction. Because China had not "otherwise specified in its Schedule" that it may maintain such a limitation, the Hong Kong/Macao requirements imposed by China were inconsistent with Article XVI:2(a) of the GATS. (Paras 7.620-7.624)

d. *Whether China's requirements, when considered jointly, are inconsistent with Article XVI:2(a) of the GATS*

The Panel noted that it had concluded that the US failed to establish that the issuer, terminal equipment and acquirer requirements, considered either separately or in combination, were inconsistent with Article XVI:2(a) of the GATS. Separately, it also concluded that the Hong Kong/Macao requirements imposed a limitation on the number of service suppliers in the form of a monopoly within the meaning of Article XVI:2(a) of the GATS. The Panel observed that the Hong Kong/Macao requirements were limited in scope to bank card transactions that involved bank cards issued in China and used in Hong Kong or Macao, or alternatively, bank cards issued in Hong Kong or Macao and used in China. Due to their limited scope, the Panel did not see how consideration of the Hong Kong/Macao requirements in conjunction with the issuer, terminal equipment and acquirer requirements would lead us to conclude that

the issuer, terminal equipment and acquirer requirements imposed a type of limitation that is inconsistent with Article XVI:2(a) of the GATS. (Paras 7.625-7.627)

e. *Whether the measures at issue are inconsistent with Article XVI:1 of the GATS*

The US had raised claims in respect of both Articles XVI:1 and XVI:2(a) of the GATS. The Panel noted that several panels have discussed the relationship between Articles XVI:1 and XVI:2. The panel in *US – Gambling* found "[t]he ordinary meaning of the words, the context of Article XVI, as well as the object and purpose of the GATS confirm that the restrictions on market access that are covered by Article XVI are only those listed in paragraph 2 of this Article". On this basis, finding that the measures at issue were inconsistent with Articles XVI:2(a) and (c), the panel in that dispute did not consider it necessary to reach findings in respect of Article XVI:1 of the GATS. The Appellate Body in that dispute did not specifically address what was required to establish a violation of Article XVI:1. In *China – Publications and Audiovisual Products*, the panel concluded similarly to the panel in *US – Gambling*. Bearing the approaches of these panels in mind, the Panel similarly did not consider it necessary to proceed in its analysis under Article XVI:1. In any event, in the absence of any meaningful attempt by the US to demonstrate that the issuer, terminal equipment and acquirer requirements, taken either individually or together, were separately inconsistent with Article XVI:1, the Panel considered that the US had failed to meet its burden to present a *prima facie* case in respect of its Article XVI:1 claim. (Paras 7.628-7.630)

F. US claims under Article XVII of the GATS

The US claimed that all six of China's requirements at issue were inconsistent with Article XVII both individually and in conjunction with each other. It based these claims on national treatment commitments which it alleged were assumed by China under subsector (d) and modes 1 and 3. The US submitted that these requirements treat foreign suppliers of EPS services less favourably than CUP. With regard to its national treatment commitments, China argued that the US had failed to demonstrate that these commitments were relevant to the services and service suppliers at issue.

(a) Analytical approach and scope of Article XVII findings

The panel in *China – Publications and Audiovisual Products* had effectively applied a three-part test to assess whether a Member's measure was inconsistent with Article XVII. The Panel also followed the same analytical approach, noting also that China had not specifically opposed the US's suggestion. Accordingly, in order to sustain its claim that China's measures were in breach of Article XVII, the US as the complaining party needed to establish all of the following three elements:

- (i) China has made a commitment on national treatment in the relevant sector and mode of supply, regard being had to any conditions and qualifications, or limitations, set out in its Schedule;
- (ii) China's measures are "measures affecting the supply of services" in the relevant sector and mode of supply; and
- (iii) China's measures accord to services or service suppliers of any other Member treatment less favourable than that China accords to its own like services and service suppliers.

(b) China's requirements considered individually

1. Whether China has undertaken relevant national treatment commitments

The first element of the three-part analysis was to determine whether China has made commitments on national treatment in the relevant sector and modes of supply, regard being made to any limitations set out in its Schedule.

(i) *Mode 1 commitments*

General

The US argued that China had made a full national treatment commitment for subsector (d) in mode 1, having inscribed "None" (no limitations) for this mode in the national treatment column of its Schedule. China responded that the US improperly based its national treatment claims on "the same aspects of the same measures" that were the foundation of its market access claims under Article XVI of the GATS. The Panel observed that Article XX:1 required a Member to inscribe, for the sectors it had committed in its Schedule, the limitations ("terms, limitations and conditions") it intended to maintain for market access, and the limitations ("conditions and qualifications") it wished to maintain for national treatment. It also observed that Article XX:1 required a Member to inscribe, for the sectors it had committed in its Schedule, the limitations ("terms, limitations and conditions") it intended to maintain for market access, and the limitations ("conditions and qualifications") it wished to maintain for national treatment. In the light of the basic rule set out in Article XX:1, supplemented by the Scheduling Guidelines, the Panel examined the relevant entries in China's Schedule. (Paras 7.645-7.651)

The Panel recalled that China had inscribed the term "None" in the column entitled "Limitations on National Treatment". Hence, as regards the supply of services in subsector (d) through mode 1, the entry of "None" in the national treatment column suggested that China would be committed to providing full national treatment. Since nothing in the generality of the wording of Article XX:2 indicated that it applied only to measures within the scope of subparagraphs (e) and (f), which were expressly or inherently discriminatory in nature, the Panel viewed Article XX:2 as a further indication that measures within the scope of any of the subparagraphs of Article XVI:2 can have discriminatory aspects. This view was also supported by the Scheduling Guidelines, in which the generality of the discussion on measures inconsistent with both Articles XVI and XVII reflected the view that, overall, Article XVI:2 extended to measures with discriminatory aspects. With respect to China's inscription of "Unbound" for market access in mode 1, the Panel's finding therefore suggested that China may introduce or maintain any measures falling within Article XVI:2, including those that may be discriminatory within the meaning of Article XVII. The Panel noted, however, that its analysis of the scopes of Articles XVI and XVII led to an apparent ambiguity in China's inscriptions in mode 1 for market access and national treatment. On the one hand, China's full national treatment commitment under Article XVII extended to "all measures affecting the supply of a service", which would appear to include measures within the scope of its unbound market access commitment. On the other, China's unbound market access commitment under Article XVI would appear to extend to measures that were also discriminatory, and within the scope of its full national treatment commitment. (Paras 7.651-7.656)

In resolving this difference of view, the Panel considered that the main issue was rather a lack of clarity about the scope of the *inscriptions* "Unbound" and "None" when applied, in China's Schedule, to measures that conflicted with both market access and national treatment obligations. The Panel noted that a special scheduling rule in Article XX:2 aimed to resolve this lack of clarity. The wording of Article XX:2 indicated that it applied when a measure was (a) inconsistent with both Article XVI and Article XVII, and (b) inscribed in the market access column of a Member's Schedule. As long as these two requirements were met, then the inscription under market access would provide a "condition or qualification" or, in the simpler usage adopted, a "limitation", to Article XVII as well. In the Panel's view, the inscription of "Unbound" in the market access column of China's Schedule had the equivalent effect of an inscription of all possible measures falling within Article XVI:2. (Paras 7.659-7.660)

Having found that the special scheduling rule in Article XX:2 applied to China's inscription of "Unbound", the Panel recalled that Article XX:2 provided, in the case of measures inconsistent with both Articles XVI and XVII, that the measure inscribed in the market access column encompassed aspects

inconsistent with *both* market access and national treatment obligations. Consequently, an "Unbound" inscription in the market access column encompassed inconsistencies with Article XVII as well as those arising from Article XVI. The inscription of "Unbound" would therefore, in the terms of Article XX:2, "provide a condition or qualification to Article XVII as well", thus permitting China to maintain measures that were inconsistent with both Articles XVI and XVII. (Para 7.661)

The Panel observed however, that its interpretation also gave meaning to the term "None" in the national treatment column. Due to the inscription of "None", China must grant national treatment with respect to any of the measures at issue that are not inconsistent with Article XVI:2. The Panel thus found that Article XX:2 established a certain *scheduling* primacy for entries in the market access column, in that a WTO Member not wishing to make any commitment under Article XVI, discriminatory or non-discriminatory, may do so by inscribing the term "Unbound" in the market access column of its schedule. For all these reasons, the Panel found that China's market access entry concerning subsector (d) and mode 1 allowed it to maintain any measures in that subsector and mode that were inconsistent with both Articles XVI and XVII. (Paras 7.664-7.665)

Whether China has mode 1 national treatment commitments that apply to China's relevant requirements

The Panel recalled that the instruments that imposed the Hong Kong/Macao requirements mandated that only CUP handle the processing of RMB payment card transactions that involved either an RMB payment card issued in China and used in Hong Kong or Macao, or an RMB card issued in Hong Kong or Macao and used in China. In the light of this, the Hong Kong/Macao requirements in the Panel's view constituted limitations on the number of service suppliers in the form of a monopoly, including with regard to EPS suppliers of other WTO Members that would supply their services on a cross-border basis to Chinese consumers (mode 1 supply). Accordingly, despite the inscription of "None" in its national treatment column concerning subsector (d) and mode 1, China had no obligation in respect of the Hong Kong/Macao requirements to accord to EPS supplied through mode 1, and EPS suppliers of other WTO Members supplying through mode 1, treatment no less favourable than that it accords to its own like services and service suppliers. For these reasons, the Panel concluded that the Hong Kong/Macao requirements, to the extent that they affected the cross-border supply of EPS (mode 1), were not inconsistent with China's obligations under Article XVII:1 of the GATS. (Paras 7.666-7.668)

With respect to the issuer, terminal equipment and acquirer requirements, the Panel had previously found that, contrary to the US's assertion, these requirements were not subject to Article XVI because they did not impose any market access limitations of the type specified in Article XVI:2(a). The Panel recalled, however, that China had inscribed in its national treatment column a full national treatment commitment in mode 1 for subsector (d). The issuer, terminal equipment and acquirer requirements were covered by this commitment if they were "measures affecting the supply" of EPS through mode 1. (Paras 7.669-7.670)

(ii) *Mode 3 commitments*

China's Schedule in the column entitled "Limitations on national treatment" contains a relevant entry read as follows:

- (3) Except for geographic restrictions and client limitations on local currency business (listed in the market access column), foreign financial institution [*sic*] may do business, without restrictions or need for case-by-case approval, with foreign invested enterprises, non-Chinese natural persons, Chinese natural persons and Chinese enterprises. Otherwise, none.

The US noted that this entry provided for no national treatment limitations concerning subsector (d) and mode 3 other than the geographic and client limitations inscribed in the mode 3 market access column. The US argued that because those market access limitations expired in December 2006, there were no

longer any national treatment limitations with regard to subsector (d) and mode 3. China responded that its mode 3 national treatment commitments for subsector (d) mirrored the corresponding limitation on market access inscribed by China in its Schedule for the same subsector and mode. Thus, China submitted that its mode 3 national treatment commitments were limited to "foreign financial institutions". In other words, China contended that the only types of entities that may provide relevant services on a commercial presence basis were foreign financial institutions. (Paras 7.671-7.673)

The Panel observed that China's national treatment entry concerning mode 3 ended with the phrase "otherwise, none". This indicated that there were no limitations on China's national treatment commitment concerning subsector (d) and mode 3 other than those set out in the preceding sentence of the entry. Having regard to that sentence, the Panel noted that it referred to geographic restrictions and client limitations on local currency business conducted by foreign financial institutions that were listed in the corresponding mode 3 market access column of China's Schedule. However, these restrictions and limitations were only in effect until December 2006. As a consequence, under the terms of the entry in question, foreign financial institutions must no longer face any limitations on national treatment. The Panel determined there that EPS suppliers of other WTO Members, i.e. WTO Members other than China – could be properly considered foreign financial institutions and found no basis to conclude differently in the context of the present inquiry. The Panel concluded that, with regard to EPS provided by suppliers of other WTO Members, China was obligated to accord national treatment to like EPS and EPS suppliers of other WTO Members in respect of local currency (RMB) business, subject to such suppliers meeting the aforesaid qualifications requirement. (Paras 7.674-7.678)

Whether China has mode 3 national treatment commitments that apply to China's relevant requirements

With respect to the issuer, terminal equipment and acquirer requirements, the panel had found earlier that these requirements were not subject to Article XVI because they did not impose any market access limitations of the type specified in Article XVI:2(a). However, in the panel's view these requirements were covered by China's aforementioned national treatment commitment for mode 3, provided they were "measures affecting the supply" of EPS through mode 3.

2. Whether China's requirements affect the supply of services

The second element of Article XVII inquiry called for an analysis of whether China's requirements (measures) affected the supply of services. The Appellate Body in *EC Bananas III*, had provided the relevant clarification regarding the meaning of the term "affect" The ordinary meaning of the word "affecting" implied a measure that had "an effect on", which indicated a broad scope of application. In respect of the Hong Kong/Macao requirements the Panel had already reached the conclusion that they were not inconsistent with Article XVII to the extent that they affected the cross-border supply of EPS. It did not, therefore, need to examine these requirements further. In contrast, it did need to determine whether the issuer, terminal equipment and acquirer requirements affected the supply of EPS. The Panel noted that the issuer, terminal equipment and acquirer requirements were addressed, *inter alia*, to issuers, merchants and acquirers, but not to EPS suppliers. However, all three requirements explicitly related to one – and only one – EPS supplier, CUP. Due to the fact that the three requirements in question had an effect on the terms on which CUP can supply its services, they also had a consequential effect on the terms on which CUP's potential competitors, which included EPS suppliers of other Members, could supply their services in China, e.g. on a cross-border basis or through commercial presence. In the light of this, the Panel concluded that the issuer, terminal equipment and acquirer requirements "have an effect" on, and hence affect, the mode 1 and 3 supply of EPS by suppliers of other Members and each constituted "measures affecting the [mode 1 and 3] supply of services" within the meaning of Article XVII:1. (Paras 7.680-7.686)

3. Whether China's requirements accord less favourable treatment

The third and last element of Article XVII enquiry involved determining whether China's requirements (measures) accorded to services or service suppliers of any other Member "treatment less favourable" than that China accorded to its own "like services and service suppliers". Thus, subject to all other Article XVII conditions being fulfilled, formally identical or different treatment of service suppliers of another Member constituted a breach of Article XVII:1 if and only if such treatment modified the conditions of competition to their detriment.

(i) *Issuer requirements*

Different treatment of like services and service suppliers

The US pointed out that the issuer requirements mandated that any payment cards used only for RMB purchases in China, as well as any dual currency cards issued in China, bore the CUP logo. The US submitted that no other EPS provider was afforded such a privilege. The Panel first addressed the issuer requirements that relate to the *Yin Lian/UnionPay* logo use. These requirements meant that bank cards issued by commercial banks in China must bear the *Yin Lian/UnionPay* logo. In contrast, there was nothing in the record to indicate that bank cards must bear the logos of other EPS suppliers. Thus, the requirements in question gave rise to formally different treatment between CUP and its network, on the one hand, and other EPS suppliers and their networks, on the other. As concerns the other relevant type of issuer requirements – those relating to interoperability – the panel recalled that they required issuers in China to join CUP, and bank cards issued in China to be interoperable with the CUP network. The parties had not made the panel aware of any comparable requirement whereby issuers would have to join other networks and bank cards would need to be interoperable with them. It consequently determined that the relevant requirements also resulted in formally different treatment between CUP and other EPS suppliers. (Paras 7.691-7.694)

Next, the panel considered whether the issuer requirements accorded different treatment to "like services and service suppliers". According to the panel in *China – Publications and Audiovisual Products*, in a case "where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis [of 'likeness'] would probably be required." In the light of the above, the Panel considered that a likeness determination should be based on arguments and evidence that pertained to the competitive relationship of the services being compared. While the evidence provided by the US was not extensive, it was sufficient to raise a presumption that the services supplied by CUP and those supplied by EPS suppliers of other Members were essentially the same in competitive terms. Turning now to the issue of "likeness" of service suppliers, the Panel noted that in a different dispute, a panel had found that entities may be considered like service suppliers if, and to the extent that, they provided like services. However, the Panel considered that "like service suppliers" determinations should be made on a case-by-case basis. CUP and EPS suppliers of other Members provided like services. Furthermore, the evidence before indicated that CUP and EPS suppliers of other Members described their business scope in very similar terms, and that CUP was perceived by EPS suppliers of other Members as a competitor in the global marketplace. This suggested that these suppliers competed with each other in the same business sector. Based on these elements and considerations, and in the absence of any evidence from China suggesting that CUP was different from EPS suppliers of other Members, the panel considered that for purposes of this case CUP and EPS suppliers of other Members were "like" suppliers of EPS, at least to the extent that they provide "like" services. (Paras 7.609-7.709)

Less favourable treatment

In relation to the "less favourable treatment" condition, the US argued that due to the issuer requirements, issuing banks may not use the CUP logo unless they had access to the CUP network, paid CUP for that access, and met CUP's technical standards. The Panel found no basis on which to conclude that the provisions in question would prohibit the issuance of relevant cards that would be capable of being

processed over a network in China that was not that of CUP. As a result, any EPS supplier of another Member that wishes to have a commercial bank in China issue a bank card on its network would have no choice but to accept that the *Yin Lian/UnionPay* logo feature prominently on the front of that card. Pursuant to Article XVII:3, these requirements can therefore be considered to result in like EPS suppliers of other Members being treated less favourably than CUP. (Paras 7.710-7.712)

The Panel next considered the interoperability element of the issuer requirements. The US asserted in this context that issuers must have had access to the CUP network and must pay fees to CUP for that access. The US had not established that the issuer requirements entail, or are associated with, access fees payable to CUP, let alone their level and other modalities. In contrast, the Panel agreed that issuers in China must have access to the CUP network, and that bank cards that must display the *Yin Lian/UnionPay* logo must also be interoperable with CUP. Accordingly, it confined its analysis to these particular requirements. In effect, these interoperability requirements guarantees that all commercial banks that issues bank cards for use in domestic inter-bank RMB transactions in China were members of CUP. They further guarantees that all bank cards that were issued for such use by commercial banks – CUP cards as well as non-CUP cards – were capable of being processed over CUP's network. In contrast, in cases where CUP-branded bank cards were issued, they would not need to be interoperable with networks of EPS suppliers of other Members. Based on these elements, the Panel considered that the interoperability requirements in question modified the conditions of competition in favour of CUP. By virtue of Article XVII:3, they thus resulted in like EPS suppliers of other Members being treated less favourably than CUP. (Para 7.714)

The Panel also considered to the extent that EPS suppliers, such as those that implemented a three-party model, used institutions authorized as commercial banks in China to issue bank cards, or are themselves authorized as commercial issuing banks, the issuer requirements resulted in less favourable treatment of such EPS suppliers. (Paras 7.716)

(ii) Terminal equipment requirements

Different treatment of like services and suppliers

The US recalled that under the terminal equipment requirements all ATMs, merchant card processing equipment and POS terminals must accept cards bearing the CUP logo. According to the US, there was no equivalent requirement for other cards, and no foreign EPS supplier was afforded a similar privilege. The Panel noted that pursuant to the terminal equipment requirements, terminal equipment that joined the national bank card inter-bank processing network must be capable of accepting bank cards bearing the *Yin Lian/UnionPay* logo. In contrast, the record did not indicate that China imposed a requirement whereby terminal equipment must be capable of accepting bank cards bearing the logos of other EPS suppliers. In the light of this, the Panel determined that the terminal equipment requirements resulted in formally different treatment between CUP and other EPS suppliers. (Paras 7.717-7.720)

Next, the Panel examined whether the terminal equipment requirements accorded different treatment to "like services and service suppliers". As with the issuer requirements, the terminal equipment requirements drew a distinction between CUP and other EPS suppliers that was not based on origin, but on the identity of the EPS supplier, or the network it operates. Thus, it concluded that the terminal equipment requirements resulted in different treatment of "like" EPS and EPS suppliers of other Members. (Paras 7.721-7.722)

Less favourable treatment

The US argued that the terminal equipment requirements modified the conditions of competition in favour of CUP. CUP was guaranteed access to all merchants in China who accepted credit cards, while foreign EPS must market themselves to each POS terminal user. The Panel recalled that pursuant to the terminal equipment requirements all terminals in China that were part of the national bank card inter-bank

processing network must be capable of accepting all bank cards bearing the *Yin Lian/UnionPay* logo. This guaranteed that all bank cards that bore the *Yin Lian/UnionPay* logo could be accepted by commercial bank and merchant terminal equipment in China and processed over CUP's network. As regards EPS suppliers of other WTO Members, the terminal equipment requirements did not appear to preclude terminals from accepting at the same time bank cards that would be capable of being processed over a network in China other than that of CUP. Consequently, EPS suppliers of other WTO Members could seek to obtain access to the terminals that must be capable of accepting bank cards bearing the *Yin Lian/UnionPay* logo. Having regard to Article XVII:3, the terminal equipment requirements therefore accorded to like EPS suppliers of other WTO Members less favourable treatment than to CUP. (Paras 7.723-7.725)

(iii) *Acquirer requirements*

Different treatment of like EPS suppliers

The Panel recalled that pursuant to the acquirer requirements, acquirers must (i) post the *Yin Lian/UnionPay* logo and (ii) be capable of accepting bank cards bearing the *Yin Lian/UnionPay* logo. The latter requirements related both to terminal equipment and interoperability. In contrast, the parties had not made it aware of any requirements whereby acquirers would have to post the logos of other EPS suppliers or be capable of accepting bank cards bearing their logos. It therefore considered that the acquirer requirements resulted in formally different treatment between CUP and other EPS suppliers. Based on the foregoing considerations, the Panel concluded that the acquirer requirements resulted in different treatment of "like" EPS and EPS suppliers of other WTO Members. (Paras 7.731-7.734)

Less favourable treatment

The US argued that the acquirer requirements distorted the competitive relationship between CUP and foreign EPS suppliers for the same reasons as the terminal equipment requirements. The Panel noted that its considerations in relevant paragraphs concerning the terminal equipment requirements were applicable, with the necessary modifications, to the acquirer requirements in question. Accordingly, on the basis of the factual situation described in this paragraph and the considerations set out in these paragraphs, it considered that the acquirer requirements that related to terminal equipment modified the conditions of competition in favour of CUP. (Paras 7.735-7.736)

On the issue of interoperability element of the acquirer requirements, the Panel noted that these requirements did not appear to prevent acquirers from complying with business standards and technical specifications adopted by EPS suppliers of other Members. Thus, if EPS suppliers of other Members wished acquirers to join their networks and to be able to accept bank cards that were interoperable with their networks, they must take the initiative. Based on these elements, it considered that the acquirer requirements that related to interoperability modify the conditions of competition in favour of CUP. In view of Article XVII:3, it further determined that they resulted in like EPS suppliers of other Members being treated less favourably than CUP. (Para 7.737)

The final element of the acquirer requirements to be examined was the *Yin Lian/UnionPay* logo element. Pursuant to this requirement, acquirers must post the *Yin Lian/UnionPay* logo on merchant terminals. While the *Yin Lian/UnionPay* logo is automatically posted, EPS suppliers of other Members who wished acquirers to post their logo needed to invest time and effort to achieve this. Thus, according to the Panel, the requirement that acquirers must post the *Yin Lian/UnionPay* logo modified the conditions of competition in favour of CUP. In accordance with Article XVII:3, the requirement could thus be considered to result in like EPS suppliers of other Members being treated less favourably than CUP. (Para 7.738)

(c) China's requirements considered jointly

According to the US, the requirements at issue were not just WTO-inconsistent when analysed individually, but operated together in a manner that was also WTO-inconsistent. In considering the US's request, the Panel recalled that it found above that the issuer, terminal equipment and acquirer requirements were each inconsistent with Article XVII:1 for modes 1 and 3. It further found that the Hong Kong/Macao requirements were inconsistent with Article XVI:2(a) for mode 3, and not inconsistent with Article XVII:1 for mode 1 (due to the absence of a national treatment obligation covering these requirements). In the Panel's view, these findings helped to secure a positive solution to this dispute. That being so, it saw no need to determine whether the same requirements, when considered in conjunction with each other, would give rise to an independent breach of Article XVII:1 for mode 1 or 3. (Para 7.750)

III. DISPUTE NOTES ON SELECT ISSUES

- Sources of International Law:

The Panel in its analyses has mainly relied on treaty text (viz. DSU and GATS) and the previous relevant Panel / Appellate Body Reports. The Appellate Body had also relied on the Vienna Convention to refer to the customary rules of interpretation as codified in Articles 31 and 32 for interpretation of certain issues.

- Articles XVI, XVII and XX:2 GATS:

The Panel in this dispute had observed that on the one hand, China's full national treatment commitment under Article XVII extended to "all measures affecting the supply of a service", which would appear to include measures within the scope of its unbound market access commitment. On the other hand, China's unbound market access commitment under Article XVI would appear to extend to measures that were also discriminatory, and within the scope of its full national treatment commitment. Thus, in resolving this difference of view, the Panel considered that the main issue was rather a lack of clarity about the scope of the *inscriptions* "Unbound" and "None" when applied, in China's Schedule, to measures that conflicted with both market access and national treatment obligations. The Panel noted that a special scheduling rule in Article XX:2 aimed to resolve this lack of clarity. The wording of Article XX:2 indicated that it applied when a measure was (a) inconsistent with both Article XVI and Article XVII, and (b) inscribed in the market access column of a Member's Schedule. As long as these two requirements were met, then the inscription under market access would provide a "condition or qualification" or, in the simpler usage adopted, a "limitation", to Article XVII as well.

- Monopoly supplier of service, exclusive service supplier and Article XVI:2 GATS

The US had argued that the measures at issue established and maintained CUP as both a monopoly and exclusive service supplier. Taking into account the different meaning given to these terms in the text of the Articles VIII:5 and XXVIII(h) of the GATS, and the distinction made in Article XVI:2(a), the Panel considered that a monopoly supplier was a sole supplier authorized or established formally or in effect by a Member, whereas an exclusive service supplier was one of a small number of suppliers in a situation where a Member authorized or established a small number of service suppliers, either formally or in effect, and that Member substantially prevents competition among those suppliers. Thus, for the purposes of Article XVI:2, the Panel did not consider that a monopoly supplier was at the same time an exclusive service supplier.