Market Access and National Treatment in China--Electronic Payment Services: An Illustration of the Structural and Interpretive Problems in GATS

Rachel Block
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Abstract
The General Agreement on Trade in Services (GATS) has proved to be a less effective and more problematic instrument than hoped for at its enactment nearly twenty years ago. A recent case brought by the United States, China—Electronic Payment Services, illustrates a number of the problems, such as the uncertain definition and scope of sectors listed in Members’ schedules of liberalization commitments. The Panel Report also shows the unique challenges of crafting a test and setting an evidentiary burden for establishing a state-driven monopoly when the industry has natural-monopoly characteristics—which are typical of many tradable services like telecommunications and payment processing networks. Further, this Panel was the first to deal with the complication of overlapping yet seemingly contradictory market access and national treatment commitments in a particular subsector. In this case, for electronic payment services, China appeared to commit to provide treatment no less favorable than that extended to domestic suppliers, yet at the same time reserved the right to deny foreign suppliers access to the Chinese market. Which inscription governs, given that GATS itself provides no clear rule for interpreting such a schedule? The Panel concluded that the denial of market access trumped the granting of national treatment, an outcome that may be reasonable in this particular context but which lacks a firm basis in the GATS text.

This Comment argues that the confusion about scheduling of market access and national treatment commitments is symptomatic of deeper ambiguity about the scope of the disciplines themselves. This Comment explores of the implications of four different interpretive rules in eight different scheduling scenarios, extending the existing literature by more fully defining and evaluating the rules and applying them to a broader range of situations. Ultimately, no one rule

* B.A. Economics 2004, Swarthmore College; M.Sc. Economics 2007, Universitat Pompeu Fabra; J.D. Candidate 2015, The University of Chicago Law School. The author would like to thank Professors Daniel Abebe, Anu Bradford, Saul Levmore, Eric Posner, and Randal C. Picker, as well as practitioners Daniel J. Calhoun and Ellen G. Block, for their input. All opinions and remaining errors are the author’s own.
can be consistent with the text of GATS and with the expectations of both the scheduling Member and its trading partners. To resolve this problem, this Comment advocates a pragmatic, empirical, harm- or surprise-minimizing approach aimed at approximating the common intention of Members. Finally, this Comment considers the lessons of China—Electronic Payment Services for the nascent negotiations on a new international trade in services agreement (TISA).

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I. INTRODUCTION

It is a precarious but possibly hopeful moment for multilateralism and global trade in services. In September 2013, a new Director-General, Roberto Azevêdo, took the helm of the World Trade Organization (WTO).

Azevêdo has been candid about the stalled state of the Doha Round of trade negotiations and is committed to breathe new life into them:

[1]It is clear that the system is in trouble.... [T]he perception in the world is that we have forgotten how to negotiate. The perception is ineffectiveness. The perception is paralysis.... We must send a clear and unequivocal message to the world that the WTO can deliver multilateral trade deals.

One symptom—and, to some extent, cause—of the stalemate in multilateral WTO negotiations is the proliferation of alternative preferential trade agreements (PTAs)—regional PTAs, such as the United States-driven Trans-Pacific Partnership (TPP) and Transatlantic Trade and Investment Partnership (TTIP), and bilateral PTAs, such as the U.S.—Colombia trade agreement.

Frustration with the limited extent of trade liberalization under the General Agreement on Trade in Services (GATS) has also channeled the negotiating energy of a number of countries toward an alternative international Trade in Services Agreement (TISA).
But the TISA is still in early-stage negotiations. GATS is not yet in the rear view mirror, and perhaps it should not be. Is GATS—or the WTO's Dispute Settlement Mechanism—broken? Is GATS too internally inconsistent to ensure that Members' expectations and intentions are honored? Too limited in its commitments to satisfy the United States and certain other countries? What lessons for a new TISA can be drawn from GATS's strengths and weakness?

A recent WTO dispute, *China—Electronic Payment Services*, can help answer some of these questions. In this dispute, the United States challenged China's restrictions on foreign provision of payment processing services in the credit and debit card industry. The Panel agreed with the United States that China violated its commitments under GATS when it failed to extend nondiscriminatory treatment to non-Chinese suppliers such as MasterCard and Visa. However, the Panel rejected the United States' claim that China had effectively granted a monopoly to a domestic company, China UnionPay.

The Panel Report—one of very few reports to interpret GATS—highlights the importance of clarity about the classification of services. By holding that the United States' proffered evidence of a state-sponsored monopoly was insufficient, the Panel Report also illustrates the challenge of assessing such claims in a network industry with a two-sided market—a so-called platform. Finally, and most significantly for this Comment, the Panel Report also shows the crucial connection between the substance of obligations and the way in which they are interpreted.

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12 *Id.* ¶ 8.1(e).
which they are inscribed by Members in their schedules. In particular, this Panel was the first to deal with the complication of overlapping yet seemingly contradictory commitments in a particular subsector.

This Comment proceeds as follows. Section II.A gives an overview of the China—Electronic Payment Services dispute. Section II.B provides background on the motivation, substance, and structure of GATS, introducing the market access and national treatment obligations and the form and function of Members’ schedules of commitments. Section II.C introduces some of the challenges of applying GATS in practice and of the WTO’s approach to dispute resolution in the multilateral trading system more generally. Section III follows these threads while taking a closer look at the Panel Report and the Panel’s reasoning on a number of issues before it. In Section III.A, this Comment argues that the current approach to defining the scope of scheduled subsectors leaves too much room for confusion. Further, the novel method of defining a service applied by the China—Electronic Payment Services Panel—including within a subsector all component services essential to delivery of the explicitly named service—introduces its own problems, such as overlapping subsectors. Any new agreement could avoid these problems by employing a so-called negative list approach, whereby all services are presumed covered by a country’s commitments except for those expressly carved out. Section III.B considers the hazily outlined evidentiary burden that the Panel required (and found wanting) to substantiate the United States’ claim that China had implemented a state-sponsored monopoly. This Section argues that the particular nature of many services—namely, two-sided networks or platforms—will require more direct engagement by the parties and the WTO with the rapidly advancing economic modeling of platform competition. Section III.C introduces the Panel’s interpretation of possibly inconsistent market access and national treatment commitments, inscribed by China in its schedule, for the subsector that contains electronic payment services.

Section IV expands on this issue, introducing and evaluating solutions to the problem of ambiguously scheduled commitments within the GATS framework. Section IV.A explains the overlapping relationship between the market access and national treatment disciplines and the inextricable link between the substance of these disciplines and Members’ scheduling of specific commitments in the disciplines. Section IV.B describes four potential rules for interpreting conflicting commitments within a schedule, demonstrates the outcomes of applying these rules to various scheduling scenarios, and evaluates how well each rule follows the text of GATS while preserving the expectations of the scheduling Member and its trading partners. Sections IV.A and IV.B emphasize that the China—Electronic Payment Services Panel Report does not provide sufficient guidance about how to resolve inconsistencies that take forms other than that in China’s schedule, and may not even properly apply to a
different case with the same Unbound/None\textsuperscript{13} scheduling conundrum. Further, Section IV.C concludes that no one rule can satisfy all goals, and proposes two approaches for how the WTO could arrive at a satisfactory rule going forward. One route would be to openly identify the internal inconsistencies and take a pragmatic, empirical approach to approximating the common intention of Members, based on ferreting out and resolving existing problems in Members’ schedules. A somewhat less satisfying but still reasonable approach would be to limit the precedential impact of the interpretation of one ambiguous schedule entry on other disputes. Panels could base their case-by-case rulings on the plausible prior expectations of the parties to the particular dispute, with the goal of minimizing surprises and approximating the common intention of the parties to the dispute. Section V.A summarizes the preceding analysis of the China—Electronic Payment Services Panel Report, and Section VB closes with a discussion of the recently announced negotiations on a new services agreement.

II. BACKGROUND: \textit{China—Electronic Payment Services} in Context

A. The Dispute

The United States initiated the case in September 2010, alleging that China had violated its market access and national treatment commitments,\textsuperscript{14} under GATS Articles XVI and XVII respectively, to liberalize trade in electronic payment services (EPS).\textsuperscript{15} According to the United States, China had instituted a number of measures that effectively established state-owned China UnionPay\textsuperscript{16} as the sole supplier of EPS for (i) inter-bank and cross-region payment card transactions, (ii) all payment card transactions paid in renminbi (RMB) in China.

\textsuperscript{13} See infra Table 1 and text accompanying notes 63–65.

\textsuperscript{14} As discussed in the text accompanying infra notes 56–61, a market access commitment is basically an agreement to open the door to services supplied by other Members, while a national treatment commitment is an agreement to treat those foreign suppliers no less favorably than domestic suppliers.

\textsuperscript{15} Request for Consultations by the United States, \textit{China—Certain Measures Affecting Electronic Payment Services} 1–2, WT/DS413/1 (Sept. 20, 2010). EPS are basically the services performed by the likes of Visa, MasterCard, and their competitors. A fuller definition is provided in infra Section III.A.

using cards issued in Hong Kong or Macao, (iii) all RMB transactions in Hong Kong or Macao using cards issued in China, and (iv) perhaps even all RMB transactions in China, regardless of where the card was issued—thereby excluding foreign competitors.\(^7\) The United States also alleged that China had required that all payment card processing devices be compatible with UnionPay's network; that all payment cards bear the UnionPay logo, regardless of who issued the card; and that all card-accepting merchants in China display the UnionPay logo and accept UnionPay cards.\(^8\)

The United States claimed that the overall effect of these requirements was to grant UnionPay a regulation-based competitive advantage in the market for EPS within China, in some instances rising to the level of an outright monopoly.\(^9\) The United States then argued that China had undertaken Article XVI market access and Article XVII national treatment commitments for these electronic payment services, described in subsector 7.B(d) of its GATS schedule, and that the challenged measures were inconsistent with those commitments.\(^10\)

After initial consultations failed, the WTO Dispute Settlement Body (DSB) established a Panel in mid-2011 to hear the case.\(^21\) A year later, the Panel Report was circulated to Members, who adopted the Report at the August 2012 meeting of the DSB.\(^22\) Both parties have declined to appeal the case.\(^23\)

The result was only a partial win for the United States.\(^24\) The Panel found that China had in fact implemented a number of the challenged measures. The

\(^7\) Request for Consultations by the United States, China—Electronic Payment Services, supra note 15, at 2; China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.209. See also Request for the Establishment of a Panel by the United States, China—Certain Measures Affecting Electronic Payment Services 1, WT/DS413/2 (Feb. 14, 2011) (providing additional detail about the restrictions allegedly imposed and their relationship to China's commitments under GATS).

\(^8\) China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.209.

\(^9\) Id. ¶ 7.482 ("The United States considers that the net effect of these measures is to 'create a system in which CUP is the only entity that can supply EPS for RMB transactions', or that the measures 'ensure and consolidate CUP's monopoly position.' ")

\(^10\) Id. ¶ 7.208; Request for the Establishment of a Panel by the United States, China—Electronic Payment Services, supra note 17, at 4-5.

\(^11\) Constitution of the Panel Established at the Request of the United States, Note by the Secretariat: China—Certain Measures Affecting Electronic Payment Services ¶ 4, WT/DS413/3 (July 5, 2011).

\(^12\) China—Certain Measures Affecting Electronic Payment Services: Summary of the Dispute to Date, WTO (Sept. 30, 2013), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds413_e.htm (last visited Nov. 11, 2013).

\(^23\) The period for appeal has now ended. Thus, the Panel Report is the final word on the dispute. See WTO Adopts Electronic Payments Ruling as China, U.S. Decline Appeals, 29 INSIDE U.S.—CHINA TRADE, no. 18, Sept. 5, 2012, available at Westlaw, 2012 WLNR 18881280.

\(^24\) See id. (quoting U.S. and Chinese representatives and officials statements, with both sides claiming a win).
Panel also found that, in subsector 7.B(d), China had undertaken both national treatment and partial market access commitments for trade via commercial presence of foreign suppliers in China, and national treatment commitments for cross-border supply. The Panel agreed that some of the measures were inconsistent with China’s obligations and recommended that China bring these measures into conformity. However, the Panel also read China’s somewhat ambiguous schedule to create no market access obligations for cross-border supply. Further, the Panel rejected the United States’ claims that certain measures created an across-the-board monopoly for the processing of all domestic RMB payment card transactions, explaining that the United States had provided insufficient evidence.

B. The Basics of GATS

1. The drive for liberalization of trade in services.

The General Agreement on Trade in Services, which came into force in 1995 as part of the Uruguay Round of negotiations that also established the WTO, is a multilateral agreement aimed at eliminating barriers to international trade in services. After the successes of the General Agreement on Tariffs and Trade (GATT) in reducing barriers to trade in goods, policymakers turned their attention to liberalizing trade in services as technological change, particularly in telecommunications, made trading services more feasible. Policymakers also recognized that affordable, reliable services are essential inputs for tradable goods—consider transportation of manufactures and agricultural products to

25 China—Electronic Payment Services Panel Report, supra note 9, ¶ 8.1 (summarizing the Panel’s findings).
26 Id.
27 Id.
28 Id.
29 GATS preamble, supra note 7. Participants concluded negotiations in 1994 as part of the Uruguay Round and the resulting agreement came into force in 1995.
domestic and foreign markets, for example. At the same time, services were becoming a bigger share of the global economy and of trade. Liberalizing trade in services promised the static gains from trade familiar from goods market liberalization—efficiency gains from cross-border specialization according to comparative advantage—and dynamic spillover gains, as cheaper and better services can lubricate production in other parts of the economy.

In addition to technological feasibility and economic desirability, favorable domestic politics were a necessary ingredient in making GATS a reality because the modes of trade, and thus forms of barriers to trade, are more complicated for services. Services are intangible and, unlike goods, are delivered through more varied modes of supply. Consider the four modes of international supply of services covered by GATS, introduced as part of the definition of trade in services in GATS Article I:

- **Mode 1 Cross-border supply.** A consumer receives services from abroad through telecommunications or postal infrastructure. Examples include market research reports, teledicine, distance training, or architectural drawings.
- **Mode 2 Consumption abroad.** A person travels and consumes services abroad, for example, as a tourist, student at a foreign university, or patient at a foreign hospital.
- **Mode 3 Commercial presence.** A service is provided by the local affiliate, subsidiary, or representative office of a foreign firm, such as a bank, hotel chain, or law firm. Commercial presence thus includes the important category of foreign direct investment.
- **Mode 4 Presence of natural persons.** This includes services provided by employees who migrate to work in the local affiliates or offices of foreign firms, such as an American who transfers to the London office of an American accounting firm, as well as the services of a person who goes abroad to work independently, say, as an engineering consultant.

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32 See id. at 17.
33 See id. at 1.
34 See id. at 4.
35 GATS art. I:2, supra note 7.
Barriers to these types of trade can, unsurprisingly, take many forms—explicitly discriminatory quotas, like limits on foreign capital, local sourcing requirements, or tariffs on goods like motion pictures that primarily embody services; standards, like banking prudential requirements, which might be stricter for foreign firms; licensing requirements for professional services and restrictive visa or work permit policies; local-supplier government procurement policies; discriminatory access to distribution networks; or even more subtly, failure to enforce domestic antitrust laws against national champions. Liberalization thus required that domestic regulations enter into the picture, in addition to barriers to cross-border trade flows and movement of foreign service providers or consumers. During the heyday of the Washington Consensus, many emerging markets were deregulating domestic services markets in order to attract foreign direct investment, which brought financing plus managerial and technological expertise. This reduction in domestic regulations was a necessary complement to opening international trade because seemingly source-neutral domestic


38 See Anu Bradford, Antitrust Law in Global Markets, in RESEARCH HANDBOOK ON THE ECONOMICS OF ANTITRUST LAW 283, 301–08 (Einer Elhauge ed., 2012) (discussing two forms of protectionism through domestic antitrust laws: laws that discriminate as written—for example, a country may enact very strict antitrust laws for an industry in which it is a net importer—and biased enforcement of an otherwise neutral antitrust law).


41 See, for example, ECONOMIC GROWTH IN THE 1990s: LEARNING FROM A DECADE OF REFORM ch. 3 (Roberto Zagha & Gobind T. Nankani eds., World Bank, 2005).
regulations (not just clearly discriminatory measures like tariffs) can be indirect barriers to trade.\textsuperscript{42}

2. The substance and structure of GATS commitments: disciplines and schedules.

The agreement creates three types of obligations or disciplines\textsuperscript{43}—unconditional, conditional, and specific:

- **Unconditional.** Found in Part II of GATS, these are mandatory obligations, also called top-down, because they apply automatically to all services.\textsuperscript{44} This category includes a commitment to transparency\textsuperscript{45} and a "Most-Favoured-Nation" (MFN) provision that prohibits a Member from discriminating among its trading partners; it must treat each Member just as well as any other.\textsuperscript{46}

- **Specific.** These disciplines, found in Part III of GATS, are opt-in. They are often called bottom-up obligations because they apply only to the extent that a Member chooses to include various subsectors in its schedule of specific commitments; the default is no commitment.\textsuperscript{47} These obligations are purely optional for each sector and arise out of negotiations among Members, applying to only those sectors that each Member includes in its schedule—and only to the extent stated in the schedule. The disciplines of "Market Access" (Article XVI) and "National Treatment" (Article XVII) are in this category.\textsuperscript{48} Thus, neither access to another Member's domestic market nor treatment equivalent to that enjoyed by domestic suppliers is guaranteed. Instead, they are negotiable for each sector and mode of supply.\textsuperscript{49}

\textsuperscript{42} See id.

\textsuperscript{43} The text and associated literature generally use "obligations" or "disciplines" to refer to the major principles of GATS and "commitments" to refer to the extent to which a country has agreed to abide by these disciplines. See GATS preamble, supra note 7. Confusingly, the obligations in Part III of GATS are called "Specific Commitments" but they are, in fact, "disciplines."

\textsuperscript{44} See, for example, GATS arts. II–III, supra note 7. See also NELLIE MUNIN, LEGAL GUIDE TO GATS 22–25 (2010).

\textsuperscript{45} GATS art. III, supra note 7.

\textsuperscript{46} GATS art. II:1, supra note 7.

\textsuperscript{47} GATS arts. XVI–XVII, supra note 7. See also MUNIN, supra note 44, at 27.

\textsuperscript{48} See also GATS art. XVIII, supra note 7 (leaving room for the negotiation of additional specific commitments not otherwise captured by Articles XVI and XVII).

\textsuperscript{49} MUNIN, supra note 44, at 27. For an explanation of modes of supply, see supra text accompanying notes 35–36.
These disciplines, found in Part II,\(^{50}\) apply only to subsectors in which a Member has made specific commitments. They are meant to balance Members' domestic regulatory autonomy with trade liberalization.\(^{51}\) Domestic regulation may inevitably have collateral protectionist effects. GATS requires reasonable, impartial administration of domestic regulations in the subsectors where a Member has undertaken specific commitments.\(^{52}\) A related provision permits Members to take measures that enable domestic monopolies, but such measures must still be consistent with the universal MFN obligation and with Members' specific commitments.\(^{53}\)

This Comment focuses on the scheduling, interpretation, and enforcement of specific commitments. Table 1, a simplified excerpt from the United States' schedule for a particular subsector, provides a sample of how a schedule looks in practice, while Appendix A provides a more complete example from China's schedule.

\(^{50}\) See, for example, GATS arts. VI & VIII, supra note 7. See also Muninn, supra note 44, at 24–25.

\(^{51}\) See generally Dejmatsis, International Trade in Services and Domestic Regulations, supra note 39.

\(^{52}\) GATS art. VI, supra note 7. Article VI does not, however, require a Member to prove that a challenged domestic regulation is the least trade-impairing means available to achieve its domestic policy goals.

\(^{53}\) GATS art. VIII, supra note 7.
TABLE 1. Simplified Sample Schedule Based on an Excerpt of the United States’ Schedule54

<table>
<thead>
<tr>
<th>Sector or subsector</th>
<th>Limitations on market access</th>
<th>Limitations on national treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>7. FINANCIAL SERVICES</td>
<td></td>
<td>Mode 1 Cross-border supply: None (full commitment to grant foreign suppliers access to the U.S. market)</td>
</tr>
<tr>
<td>A. INSURANCE ...</td>
<td></td>
<td>Mode 2 Consumption abroad: None (full commitment)</td>
</tr>
<tr>
<td>d) Services Auxiliary to Insurance: i) Brokerage Services</td>
<td>Generally, brokerage firms can offer services in most states by obtaining licenses as “brokers” and in other states by obtaining licenses to operate as “agents.” Brokerage licenses are not issued in FL, IA, KY, MI, MN, MS, OR, TN, TX, VA, WV, WI. (commitment only in some states, and subject to local licensing laws)</td>
<td>Mode 3 Commercial presence: None (full commitment)</td>
</tr>
</tbody>
</table>
| | Mode 4 Presence of natural persons: Unbound, except as indicated in the horizontal section.55 (no commitment) | Mode 4 Presence of natural persons: Brokerage licenses are not issued to non-residents in SD, WY. Brokerage licenses are issued to non-residents for only certain lines of insurance in AL, AR, LA, NM. Higher license fees for non-residents may be charged in AK, AZ, AR, CA, GA, HI, IN, KS, LA, ME, MD, MA, MT, NE, NV, NH, NJ, NM, NC, ND, OH, OK, PA, RI, SC, UT, VT. (commitment in most states, and subject to local licensing laws—which may be discriminatory in many states) |}

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54 Adapted from The United States of America — Schedule of Specific Commitments 60, GATS/SC/90 (Apr. 15, 1994). The content of the commitments has been slightly simplified and explanatory text—identifying each mode of supply by both name and number, and indicating the meaning of “None” and “Unbound”—has been added.

55 The “horizontal section” is the portion of a Member’s schedule where the Member lays out any commitments or restrictions on commitments that will apply to all subsectors that appear in the schedule.
Article XVI:1, part of the market access discipline, establishes that a Member’s schedule sets a ceiling on the barriers to market access that the Member will impose on foreign services and suppliers. Article XVI:2 enumerates six prohibited measures—four quantitative limits on the number of suppliers and amount of services and two inherently discriminatory restrictions on the form and extent of foreign participation. Article XVI:2(a), for example, binds committing Members not to limit the number of service suppliers through “numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test.”

Under Article XVII, on national treatment, a Member commits to treat foreign suppliers no less favorably than domestic suppliers, “in respect of all measures affecting the supply of services,” for the sectors and modes of supply indicated in its schedule. A measure constitutes less favorable treatment if “it modifies the conditions of competition in favour of [domestic] services or service suppliers . . .”

Recall that the market access and national treatment disciplines do not apply to all subsectors automatically—which is why scheduling is so important. In fact, under GATS Article XX (“Scheduling Specific Commitments”), schedules are “an integral part” of the GATS text itself. Article XX:1 requires

56 GATS art. XVI:1, supra note 7 (“[E]ach Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for . . . in its Schedule.”). Note, the GATS text frequently refers to “services and service suppliers.” For the sake of brevity, this Comment sometimes refers to only one or the other.

57 These are limitations on (a) the number of suppliers; (b) the value of traded services; (c) the number of units of the service traded or the number of operations; and (d) the number of people working in the sector. GATS art. XVI:2(a)-(d), supra note 7.

58 These are (e) measures which require some specific type of legal entity or joint venture; and (f) caps on the amount or share of foreign capital. GATS art. XVI:2(e)-(f), supra note 7. One could argue that in subparagraph (e), joint-venture requirements are inherently discriminatory but legal-entity requirements (such as a rule against limited partnerships) are not. For simplicity’s sake, this Comment treats all subparagraph (e) requirements as inherently discriminatory.

59 GATS art. XVI:2.

60 GATS art. XVII:1, supra note 7.

61 GATS art. XVII:3, supra note 7.

62 GATS art. XX:3, supra note 7. In addition to the scheduling information in GATS Article XX, there are three sets of scheduling guidelines, issued between 1993 and 2001, but they do not necessarily resolve all schedule interpretation questions. See Scheduling of Initial Commitments in Trade in Services: Explanatory Note, MTN.GNS/W/164 (Sept. 3, 1993) and Add.1 (Nov. 30, 1993); Committee on Specific Commitments (CSC), Scheduling Guidelines: Background — Note by the Secretariat, S/CSC/W/12 (Oct. 10, 1997); Council for Trade in Services, Guidelines for the Scheduling of Specific Commitments Under the General Agreement on Trade in Services (GATS), S/L/92 (Mar. 28, 2001). As these guidelines are not part of the treaty itself, they are not a primary means of interpretation. See China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.650 n.849; Petros C. Mavroidis, Highway XVI Re-Visited: The Road from Non-Discrimination to Market Access in
each Member to list all subsectors in which it is undertaking market access and/or national treatment commitments. If a subsector is not listed in a Member’s schedule, that country has made no specific commitments in that subsector. But inscribing a subsector in one’s schedule is not all or nothing. The Member can reduce the extent of its commitment in a scheduled subsector by adding “limitations” and “qualifications.” At the extremes, writing “None” next to a subsector indicates no barriers to trade in that subsector, for a particular mode of supply, while “Unbound” indicates that the Member makes no commitment to liberalize. Members may also specify anything that falls in between “None” and “Unbound.” The schedules thus reflect both a “positive list approach”—whereby a Member chooses the sectors in which it will provide foreign competitors with market access and/or nondiscriminatory national treatment—and a “negative list approach”—whereby the Member may restrict and condition its scheduled commitments.

Crucially important for China—Electronic Payment Services, Article XX:2 instructs that “[m]easures inconsistent with both Articles XVI [market access] and XVII [national treatment] shall be inscribed in the column relating to Article XVI [market access]. In this case the inscription will be considered to provide a condition or qualification to Article XVII [national treatment] as well.” Thus, the market access and national treatment columns cannot be read in isolation. This language suggests that an inscribed national treatment commitment is conditioned on, or limited by, the extent of the corresponding market access commitment for the same sector and mode of supply.

GATS, 6 WORLD TRADE REV. 1, 7 (2007) (explaining that while early GATS panels had given greater weight to the scheduling guidelines, the Appellate Body in U.S.—Gambling (see infra note 76) ruled that the guidelines were merely supplementary means of interpretation). (For an explanation of primary and supplementary means of interpretation, see infra text accompanying notes 76–78.) Also, when interpreting a particular Member’s schedule, guidelines promulgated after negotiation of that schedule might be of little import. In this dispute, China, the United States, and commenting third-party Members disagreed about whether the 2001 guidelines should inform the Panel’s interpretation of China’s schedule, which was negotiated before those guidelines were adopted. The Panel did not resolve the issue. China—Electronic Payment Services Panel Report, supra note 9, ¶ 187.

For an example, see infra Appendix A (providing an excerpt from China’s schedule).

GATS art. XX:1, supra note 7. For a given subsector, limitations are entered separately for market access and for national treatment, and individually for each mode of supply. Members may also introduce limitations applicable to all sectors by inscribing them in the “horizontal section” of the schedule. Scheduling of Initial Commitments in Trade in Services: Explanatory Note, supra note 62, at 9–10.

See DELIMATSIAS, INTERNATIONAL TRADE IN SERVICES AND DOMESTIC REGULATIONS, supra note 39, at 30–31; Martín Molinuevo, Article XX GATS: Schedules of Specific Commitments, in WTO—TRADE IN SERVICES, supra note 36, at 451, 455.

GATS art. XX:2, supra note 7. See discussion infra Section III.C.
C. Principles and Problems of Treaty Interpretation and WTO Jurisprudence

According to Article 3.2 of the Dispute Settlement Understanding (DSU), the WTO’s Dispute Settlement Mechanism (DSM) is meant to lend “security and predictability to the multilateral trading system.” The ruling of a Panel or of the Appellate Body should “preserve the rights and obligations of members . . . and [] clarify the [] provisions of [] agreements in accordance with customary rules of interpretation of public international law.” Under DSU Article 19.2, such rulings “cannot add to or diminish the rights and obligations” of Members under GATS. But as an increasing number of commentators have noted, the Appellate Body has violated this stricture in practice.

Instead of focusing “narrowly on the specific facts under review,” Appellate Body reports have made “broad pronouncements on the meaning of the governing agreement.” In discerning that meaning, the Appellate Body has displayed “a belief rooted in civil law tradition that law must be unambiguous and, therefore, there is, in each case, a single correct interpretation of it.” The Appellate Body has treated its chosen interpretation “as the only permissible one, even if this interpretation may add to or diminish the rights and obligations under the relevant provisions”—contrary to the mandate of Article 19.2 and contrary to what Members understood they had bargained for.

The Appellate Body has also limited the acceptable means of reaching that single legitimate interpretation, by equating “customary rules” in DSU Article 3.2 with the rules of interpretation provided for in the Vienna Convention on the

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68 Id.
69 Id.
70 Id. arts 3.2 & 19.2.
72 Greenwald, supra note 71, at 263.
73 Id. See also Cartland, Depayre & Woznoski, supra note 71, at 987 (noting that the Appellate Body seems to prefer the broader work of clarifying the meaning of multilateral agreements).
74 Greenwald, supra note 71, at 263. See also Cartland, Depayre & Woznoski, supra note 71, at 987.
75 Cartland, Depayre & Woznoski, supra note 71, at 987.
Article 31 of the VCLT provides a "general rule of interpretation" of treaties, calling for "good faith interpretation" in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The goal is to discern the one correct meaning by analyzing a limited set of sources. "Supplementary means of interpretation," described in VCLT Article 32, are available only as a last resort, if interpretation pursuant to Article 31 "(a) leaves the meaning ambiguous or obscure" or "(b) leads to a . . . manifestly absurd or unreasonable" result. Even so, the rules are generic enough to cover the gamut of reasonable tools for interpreting treaties—but therein lies the problem:

The VCLT is far from being exact science; it reflects various elements of interpretation, but falls short of establishing with precision the weight to be given to each one of them. Hence, it is not unheard of that, in the name of the VCLT, courts have reached divergent decisions on more or less identical issues. Assurance that one's own schedule, or the schedule of a trading partner, will be interpreted using the VCLT does not actually provide much of a clue about what factors will be decisive in determining the scope of a commitment in the event of a dispute. The point is not that some better rule of interpretation would always create predictable outcomes; the point is that Members could lose patience with and confidence in a system that denies the ambiguities and slippages that inhere in it, thereby potentially masking the actual reasons for any particular outcome.

Members may also be concerned that their intentions, expressed in their own schedules, will be frustrated by "an excessively broad interpretation of [their] specific commitments . . . [which] would constitute an unacceptable impairment of WTO Members' rights to define the scope and content of such

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76 Id.; Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. See also China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.9 ("[T]he meaning of the [Member's] GATS Schedule must be determined according to the rules codified in Article 31 and, to the extent appropriate, Article 32 of the Vienna Convention.").

77 VCLT art. 31(1), supra note 76. The VCLT also makes reasonable allowances for consideration of the parties' subsequent agreements or practices, and for any "special meaning" of a term if it is clear that's what the parties intended. VCLT art. 31(3)-(4).

78 VCLT art. 32, supra note 76.

Any individual Member challenged in a dispute likely reads its own commitments more narrowly than the challenging party. But a Member’s intentions will also be frustrated if the commitments of its trading partners are read more narrowly than the Member expected or hoped. Presumably, each Member has conceded somewhat more than it wishes to be held accountable for, while at the same time aiming to hold all other Members accountable for conceding somewhat more than those other Members ultimately wish to give. In other words, the legal meaning of a Member’s schedule is a compromise. The Appellate Body, and the China—Electronic Payment Services Panel, have expressed it somewhat differently, explaining that the “task of identifying the meaning of a concession in a GATS Schedule, like the task of interpreting any other treaty text, involves identifying the common intention of Members.” It may not seem that reading a Member’s schedule as a compromise is any different from reading it as the expression of the Members’ common intention, but the latter framing can make it difficult for a panel to be transparent about the sources of disagreement, the motivations for the parties’ arguments, and its own rationale for settling on one meaning over others.

It is worth noting that the weaknesses in the China—Electronic Payment Services Panel Report detailed in Section III below reflect larger institutional problems, not any failings by this particular panel. Given the structure and content of the instruments to be interpreted and, in light of existing Appellate Body jurisprudence, the tools available to do so, this Panel—faced with a multi-billion dollar dispute between two interdependent, often battling, sometimes irascible trading giants—worked their way to a moderate, sensible result. But that does not mean that those instruments, those interpretative tools, and that jurisprudential model are without problems.

III. THE CHINA—ELECTRONIC PAYMENT SERVICES PANEL REPORT

The Panel Report addresses three major questions: (A) Which services are the subject of the U.S. complaint, and do those services appear anywhere in China’s schedule? (B) Did China impose the alleged requirements on the supply of electronic payment services, and did the imposed requirements effectively grant UnionPay a monopoly? (C) Finally, what is the legal effect of the seemingly contradictory market access and national treatment commitments that China inscribed in its schedule? The difficulties the Panel faced in answering these

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80 China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.65 (describing the concerns voiced by Ecuador, which exercised the right of third-party Members to weigh in on the dispute).

81 Id. ¶ 7.9 (quoting U.S.—Gambling Appellate Body Report, supra note 76, ¶ 160).
questions, and the limited suitability of the tools it employed, illustrate how challenging it is in the current GATS framework to ensure the predictability of the legal and economic effect of a Member's schedule of specific commitments.

A. A Service Subsector Includes “All Services Essential,” “All Means,” and “All Business Models”

The parties disagreed about how to define electronic payment services and whether and where China had inscribed any liberalization commitments for such services in its GATS schedule of commitments. China argued that the services provided by a firm could be EPS only if (i) the firm was a primary payment card company (PCC), with its own network, like Visa or UnionPay (and not a third-party intermediary); and (ii) the firm did not also perform other, non-EPS payment services such as issuing cards directly to consumers—a service typically performed by banks such as Citibank or HSBC. But the Panel (and the United States) disagreed with the idea that the classification of a service largely depends on the identity or ownership structure of the suppliers. Instead, the Panel concluded that regardless of who the supplier is, EPS constitute a cluster of services that typically includes the following elements:

(i) the processing infrastructure, network, and... procedures that facilitate... information and payment flows and [ ] provide system integrity; (ii) the process... of approving or declining a transaction...; (iii) the delivery of transaction information among participating entities; (iv) the calculation... and reporting of the net financial position of relevant institutions for all transactions...; and (v) the facilitation... the transfer of net payments owed among participating institutions.

Although its discussion was couched in terms of precise “textual analysis,” the Panel got to the right place—its conclusion that what matters is the service, not...
the identity of the supplier—by considering the economic realities of the industry and what industry players actually think and do.

In addition to defining EPS, the Panel also had to locate EPS in China's GATS schedule to determine whether China had made any specific commitments to liberalize trade in EPS. Again, common sense—and not the Panel's extensive and unnecessarily formalist textual analysis—was enough to resolve the question, indicating that EPS are in subsector 7.B(d) of China's schedule. The conclusion is unsurprising: it's hard to imagine that China did not mean to include EPS in the subsector it defined as "all payment and money transmission services." But the Panel went even further:

"The use of the term "all" manifests an intention to cover comprehensively the entire spectrum of "payment and money transmission services"... and an intention to include all services essential to payment and money transmission, all means of payment and money transmission... , and all business models...

This would be a bold claim to make even if China's negotiators had originally drafted these words themselves. And in fact, China merely copied the phrase from a list of definitions in the GATS Annex on Financial Services. An intention to

89 As the European Union put it, Members schedule their commitments by "referring] to the services, not to the participants in the transaction." Australia, Guatemala, and South Korea—the other third parties that participated in—agreed. Id. ¶ 7.40.

90 For example, in deciding that services are the same whether provided by third-party processors (intermediaries between PCCs and other players such as banks that issue cards or work with merchants that accept cards) or by PCCs themselves, the Panel noted that major PCCs—including MasterCard and Visa—see third-party processors as direct competitors. Id. ¶ 7.53. Though not mentioned by the Panel, UnionPay also sees third-party processors as a competitive threat for certain services. See Ke Wang, Research on the Cooperation between Commercial Banks and Third Party Payment, in PROCEEDINGS OF THE 4TH (2012) INTERNATIONAL CONFERENCE ON FINANCIAL RISK AND CORPORATE FINANCE MANAGEMENT, no. 2, 421 (Yangru Wu & Yanxi Li eds., 2012) (analyzing the regulatory and market drivers of third-party processors' ascent in China, and the cooperative and competitive aspects of their relationships with banks and other established market participants).

91 China—Electronic Payment Services Panel Report, supra note 9, ¶¶ 7.78–79.

92 Id. ¶ 7.99 (emphasis added).

93 There are a few instruments that deal specifically with financial services. The scheduled commitments ultimately agreed upon in 1997, three years after the core GATS negotiations had concluded, are usually characterized as the Financial Services Agreement (FSA) or the Fifth Protocol. The FSA is not a separate instrument laying out disciplines other than those already in GATS. Rather, many countries scheduled deeper commitments than they had originally in 1994, and these changes were formally recognized as the Fifth Protocol, which subsequently became known as the Financial Services Agreement of 1997. The other relevant instruments are the Annex on Financial Services and the Understanding on Commitments in Financial Services. The Annex, an early stop-gap measure, provided some general definitions of financial services but didn't actually introduce any commitments. Nor did the Understanding, which was created as an alternative to the GATS Part III framework. The result of an initiative by high-income countries, it...
use the boilerplate terminology hardly manifests an intention to take the expansive view characterized by the Panel.

It is troubling that the Panel attributed such a strong intention in this instance, in which China reproduced the text from the Annex on Financial Services—without considering whose intention it was—and yet elsewhere treated China's alterations of the boilerplate Annex language as having no effect. For example, China added the phrase "(including import and export settlement)" to the version of the language found in the Annex on Financial Services. The Panel concluded that "the parenthetical phrase merely seeks to make explicit ... something that the broad phrase '[a]ll payment and money transmission services ..." already contains implicitly." The awkward grammatical construction—it is a negotiator, not a "parenthetical phrase," that "seeks" and has intentions—signals how abstract schedule interpretation under the VCLT has become, in the name of seeking out the "common intention" of Members.

The Panel did not treat the all services essential / all means / all business models concept as worthy of much explanation or defense. The approach achieved what the Panel needed it to do—rescue the discourse out of the weeds effectively provides a harmonized "model schedule" of sizeable commitments. It is not a part of GATS; rather, some countries (not including China) agreed to follow the Understanding's guidelines in scheduling their GATS commitments in financial services subsectors. See Fifth Protocol to the General Agreement on Trade in Services, Dec. 3, 1997, 2065 U.N.T.S. 160 (hereinafter FSA); GATS, Annex on Financial Services, supra note 7; Understanding on Commitments in Financial Services, LT/UR/U/1 (Apr. 15, 1994). See also Eric H. Leroux, Trade in Financial Services under the World Trade Organization, 36 J. WORLD TRADE 413, 426-32 (2002); MUNIN, supra note 44, at 418-19; Michael J. Trebilcock & Robert Howse, THE REGULATION OF INTERNATIONAL TRADE 379-81 (3d ed. 2005).

The doctrine of effet utile is certainly within the Appellate Body's interpretive toolbox. See, for example, Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline 23, WT/DS2/AB/R (Apr. 29, 1996) ("[I]nterpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."). See also Mark E. Villiger, The Rules on Interpretation: Misgivings, Misunderstandings, Mistruggage? The 'Crucible' Intended by the International Law Commission, in THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION 105, 110 (Enzo Cannizzaro ed., 2011) (explaining that the effet utile principle follows from VCLT Article 31's concern for a treaty's object and purpose).

94 China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.118. See infra Appendix A (providing an excerpt of China's schedule).

95 China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.118. For another example, see the Panel's treatment of the heading "Banking services as listed below," which appears only in China's schedule. Id. ¶ 7.134.

96 See supra text accompanying note 81.

97 The Panel did pause to define (albeit in a footnote) how it was using the word "essential," namely, to "refer to all component services which are needed to complete a payment transaction or money transmission." China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.99 n.142.
of dictionaries and financial treatises.99 But unlike the principle that what matters is the service and not the identity of the supplier, this all-in approach is not a particularly workable tool. It comes dangerously close to contradicting the uncontested principle that “the sectors and subsectors in a Member’s Schedule must be mutually exclusive.”100 And it still requires looking somewhere else to determine the actual limits of the subsector, because otherwise, it could go on forever. It would be naïve to argue that one subsector ends where the next begins, both because it’s tautological, and because it creates uncertainty about what a Member must do in its schedule if it wishes to make specific commitments in some but not all possible service subsectors.

B. The United States Did Not Meet the Evidentiary Burden to Show an Across-the-Board Sole-Supplier Requirement

In the biggest win for China, the Panel rejected the United States’ claim that, for domestic RMB payment card transactions, China’s regulations effectively prohibited the use of non-UnionPay cards, creating a UnionPay sole-supplier requirement.101 The United States had not argued that one particular measure mandated an economy-wide monopoly.102 Instead, it argued that instruments expressly requiring that some transactions be processed by UnionPay and imposing business specifications and technical standards for all transactions “work together... to explicitly or implicitly restrict entry,... impose technical barriers to entry... [and] make[ ] it ‘economically unviable’ to enter” into the Chinese market.103 The net effect was to “implicitly recognize that [UnionPay] is the sole supplier of EPS services for RMB denominated transactions.”104

99 See id. at nn.120–28 (filling two pages and citing a half-dozen sources in order to define “payment,” “money,” and “transmission”).

100 Id. ¶ 7.177 (quoting U.S.—Gambling Appellate Body Report, supra note 76, ¶ 180 n.219).

101 Id. ¶ 7.507.

102 The Panel distinguished between a monopoly (a de jure or de facto state-authorized sole supplier) and an exclusive supplier (any one of a small number of suppliers, among whom competition is substantially prevented by the state). The Panel noted that the United States’ allegations were more consistent with an exclusive-supplier model, but the United States’ own claims, and thus much of the Panel’s discussion, referred to a monopoly or sole-supplier requirement. China—Electronic Payment Services Panel Report, supra note 9, ¶¶ 7.587–88.

103 Id. ¶ 7.487.

104 Id. ¶ 7.483 (emphasis added). For example, the United States objected that even if a foreign supplier convinced an issuer to issue a card, China’s issuer requirements would effectively bar the foreign supplier from compromising UnionPay’s prominent logo or obtaining any market share “to the certain exclusion” of UnionPay. Id. ¶ 7.298. See also id. ¶ 7.390 (summarizing the United States’ concerns about government-assisted “entrench[ment]”).
The Panel was not entirely unsympathetic. In some places, it seemed that the panelists felt constrained by the highly legalistic framework in which they operate, and wished that the United States had marshaled better evidence. The Panel did make a nod to the importance of branding and the challenge of breaking into the market because of UnionPay's legal advantages:

[The instruments in question place [UnionPay] in a unique position . . . .] Even though the relevant instruments would not prevent acquirers or merchants from accepting other cards, [UnionPay] has a significant foothold in the market. The fact that [UnionPay] does not have to invest in promoting its brand to issuing institutions (because issuer requirements are mandatory), and does not have to invest in persuading banks to acquire transactions for the [UnionPay] brand (because acquirer requirements are also mandatory) further solidifies [UnionPay's] privileged position.

But these legal advantages were not enough to "sustain the assertion that the instruments produce economic effects that are so significant that they preclude other EPS suppliers from operating in the market." As long as it was technologically feasible for a foreign EPS provider, say, Visa, to run a parallel network—with Visa-branded payment cards, business standards and technical specifications matching Visa's practices in other countries, and Visa-compatible terminal equipment—then, according to the Panel, China had not imposed a sole-supplier requirement for domestic RMB transactions. The Panel found

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105 See, for example, id. ¶ 7.463–64 (asking, in the exasperated tone of a parent, why the United States did not timely submit evidence of a UnionPay operating rule prohibiting any UnionPay-compatible (and thus UnionPay-branded) cards from displaying the name or logo of any company deemed to be a potential competitor of UnionPay: "We are unclear why the United States did not identify these regulations earlier.").

106 Acquirers, which are often banks, work with merchants, signing them up to accept a particular type of card (known as aggregating or acquiring transactions), connecting them to payment networks, and maintaining merchant accounts. China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.15.

107 Issuers, such as Citibank or CapitalOne, interact directly with consumers (soliciting cardholders, establishing terms such as credit limits and interest rates, collecting payment) and with payment card networks (in order to authorize transactions and transmit funds). Id. ¶ 7.14.

108 Id. ¶ 7.503.

109 Id. ¶ 7.504.

110 China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.299 ("We find no basis to conclude that the issuer requirements that relate 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."); id. ¶ 7.334 ("[T]he relevant provisions . . . do not state that the terminal equipment that must be capable of accepting bank cards bearing the Yin Lian/UnionPay logo must not be capable of accepting, at the same time, bank cards bearing the logo of different EPS suppliers."); id. ¶ 7.360 ("[W]e have no basis . . . to conclude that the acquirer requirement that mandates the posting of the Yin Lian/UnionPay logo prevents the posting of other EPS suppliers' logo, much less the acceptance by acquirers of bank cards that are capable of being processed over an inter-bank network in China other than that of [UnionPay].").
that none of the instruments identified by the United States would, alone or in combination, prevent Visa from running a parallel network—provided the cards and terminal equipment bore the UnionPay logo and were interoperable with UnionPay’s terminals and cards.\footnote{Id. ¶ 7.504 (“[G]iven the lack of concrete evidence, we are unable to conclude that [UnionPay] is the sole supplier. Assertion without more is simply not enough.”).}

The Panel may have defined what constitutes a barrier to trade in this very narrow fashion out of some hesitation to apply an effects test, despite precedent that an effects test might be appropriate. In a previous GATS dispute, the Appellate Body suggested that if a measure \textit{in effect} limits the number of suppliers, it is prohibited by Article XVI:2(a), regardless of the form of the measure:

\begin{quote}
\textbf{[T]he reference, in Article XVI:2(a), to limitations on the number of service suppliers “in the form of monopolies and exclusive service suppliers” should be read to include limitations that are in form \textit{or in effect}, monopolies or exclusive service suppliers…. [I]t is clear that the thrust of sub-paragraph (a) is not on the \textit{form} of limitations, but on their \textit{numerical}, or \textit{quantitative}, nature.} \footnote{U.S.—Gambling Appellate Body Report, supra note 76, ¶¶ 230–32.}
\end{quote}

Inexplicably, the lesson that the \textit{China—Electronic Payment Services} Panel took from this passage was that it “must focus, not on whether [the challenged measures] formally or explicitly institute a monopoly or an exclusive service supplier, but on whether they constitute a limitation that is numerical and quantitative in nature.”\footnote{\textit{China—Electronic Payment Services} Panel Report, supra note 9, ¶ 7.593.} In other words, the Panel skipped over the first italicized phrase, “\textit{or in effect},” which was the Appellate Body’s main point, and instead emphasized the numerical nature of prohibited measures—as if there were any substantive difference between a barrier to entry and a limitation on the number of entrants. The Panel ideally wanted the United States to provide a smoking gun—“specific legal provisions designating a company as the single supplier in a market.”\footnote{Id. ¶ 7.504.} But the Panel also said that the United States might have satisfied its burden by providing “economic analyses and econometric studies [\ldots] alleging actual economic and trade \textit{effects} of particular measures.”\footnote{Id. (emphasis added).} At the end of the day, the Panel could not clearly say whether it is appropriate to use an effects test to determine if challenged measures violate Article XVI:2(a), or precisely what evidence would be enough to satisfy such a test.

One reason for the Panel’s puzzling reasoning may be its failure to address head-on that an electronic payment system, like many services covered by

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\begin{itemize}
\item \footnote{Id. ¶ 7.504 (“[G]iven the lack of concrete evidence, we are unable to conclude that [UnionPay] is the sole supplier. Assertion without more is simply not enough.”).}
\item \footnote{U.S.—Gambling Appellate Body Report, supra note 76, ¶¶ 230–32.}
\item \footnote{\textit{China—Electronic Payment Services} Panel Report, supra note 9, ¶ 7.593.}
\item \footnote{Id. ¶ 7.504.}
\item \footnote{Id. (emphasis added).}
\end{itemize}
Market Access & National Treatment

GATS, creates a very specific type of market—namely, a two-sided market, or platform, that exhibits network externalities. An EPS supplier, say, “CardPay,” supplies a platform to two markets. CardPay must market its cards to consumers, on one side, and also sign up merchants (the other side of the market) to accept these cards, either by itself acting as an issuer and acquirer, or by paying others to do so. Because the market is two-sided, there are, in a sense, double the network externalities (and double the coordination problems). One set of positive externalities, or complementarities, arises from increased participation of parties on the other side of the network. The more merchants there are who accept CardPay, the more demand there will be among consumers for CardPay-branded payment cards, and thus willingness to sign up for a card with a higher interest rate or fees than a less widely accepted card. Likewise, the more consumers there are who have CardPay cards, the more worthwhile it will be for a merchant to set up an account with CardPay, install the necessary terminal equipment, and pay the fees charged for each transaction. The other set of positive externalities arises from the benefit to existing participants of new participants joining the same side of the network. Additional CardPay cards in the hands of consumers benefit existing CardPay card-holders because as the market deepens, more merchants will accept the card; similarly, CardPay-

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117 See supra notes 107 and 106 for the definition of issuers and acquirers, respectively.

118 See Rochet & Tirole, Platform Competition, supra note 116, at 990 (“To succeed, platforms in industries such as software [ ] and [ ] payment systems ... must ‘get both sides of the market on board.’ Accordingly, platforms devote much attention to ... how they court each side while making money overall.”). The second definitive feature of two-sided markets, in addition to the need to bring both sides of the market on board, is the absence of the conditions under which the Coase theorem would predict the same outcome regardless of where the costs are initially placed—in other words, how the platform operator distributes costs across the two sides of the market affects the outcome. Jean-Charles Rochet & Jean Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. ECON. 645, 645 (2006).


120 See Rochet & Tirole, Platform Competition, supra note 116, at 990.
accepting merchants benefit from broad acceptance because it tips more consumers toward carrying CardPay cards.\footnote{See Farrell & Klemperer, supra note 119, at 1974 (“A good exhibits direct network effects if adoption by different users is complementary, so that each user’s adoption payoff, and his incentive to adopt, increases as more others adopt.”); Parker & Van Alstyne, supra note 116, at 1495 (explaining that “the externality benefit can run across markets and back again,” with the benefit of increased same-side participation coming through its effect on participation in the other side of the market).}

Because of the underlying economics of payment card networks, the existence of a single provider (or one that dominates the field) does not necessarily mean that the firm is benefitting from government measures intended to prevent entry by new suppliers, including foreign ones. It is true that the phenomenon of multihoming, in which more than one competing network exists, is common in the payments industry: many consumers carry both MasterCard and Visa, for example, and many merchants accept MasterCard, Visa, Discover, and other cards.\footnote{See, for example, Multinationals in China: Guardian Warriors and Golden Eggs, ECONOMIST (Aug. 24, 2013), http://www.economist.com/news/business/21584045-states-crackdowns-big-firms-are-not-all-about-bashing-foreigners-guardian-warriors-and (describing the complaints and fears of foreign businesses operating in China).} However, while it would be no surprise if the Chinese government were favoring a national champion,\footnote{There is a large, highly technical literature on the mix of conditions that will result in multiple competing platforms. See, for example, Robin S. Lee, Competing Platforms, J. ECON. MGMT. STRAT. (forthcoming), available at http://pages.stern.nyu.edu/~rslee/papers/CompetingPlatforms.pdf.} it is at least conceivable that the conditions necessary for a multihoming equilibrium\footnote{Sujit Chakravorti, Externalities in Payment Card Networks: Theory and Evidence, 9 REV. NETWORK ECON., no. 2, 8 (2010) (providing a useful review of the current state of the field, and nothing that “[n]etwork competition may result in lower social welfare contrary to generally accepted economic principles”).} are not currently present in China, independently of any government intervention to bolster UnionPay. Nor does the dominance of one network necessarily mean the outcome is socially suboptimal.\footnote{Id. (citing Sujit Chakravorti & Roberto Rosson, Platform Competition in Two-Sided Markets: The Case of Payment Networks, 5 REV. NETWORK ECON., no. 1 (2006)).} Platform competition unsurprisingly tends to lower the total fees incurred by merchants and consumers,\footnote{Chakravorti, supra note 125, at 8 (citing Graeme Guthrie & Julian Wright, Competing Payment Schemes, 55 J. INDUST. ECON. 37, 39 (2007)). Recall from supra note 118 that the distribution of costs affects the outcome in a platform industry.} but for a given level of total fees, the existence of multiple platforms may result in a suboptimal distribution of costs between merchants versus consumers.\footnote{See, for example, Rochet & Tirole, Platform Competition, supra note 116, at 992 (citing as an example of multihoming that “merchants accept both American Express and Visa” and “consumers have both Amex and Visa cards in their pockets”).}
Market Access & National Treatment

The core lesson for future panels and disputants is that in the context of platform-like services, the economic models and observations sufficient to establish that an outcome is the result of "particular measures" will need to be different from those evaluated in disputes about trade in goods. If the relationship between legal cause and economic effect is not what traditional models predict it to be, then a poorly tailored effects test could erroneously indicate legal wrongdoing. Yet Members must be held accountable for violating Article XVI:2(a) commitments. It falls to the complaining Member to devote some expert-witness money to the economists building this rapidly evolving field, to help develop reliable economic evidence of the effects of government measures.

C. China Reserved the Right to Limit Market Access—Despite Its National Treatment Commitments

1. The structural relationship between Articles XVI and XVII was previously uncertain.

Though Articles XVI and XVII themselves are silent about their interrelationship, Article XX:2 clearly contemplates overlap between measures prohibited by both Articles XVI and XVII—namely, those quantitative restrictions enumerated in XVI:2(a)—(d) that are also discriminatory against foreign services or suppliers and any restrictions covered by XVI:2(e)—(f), which are inherently discriminatory. As mentioned above, Article XX:2 of GATS instructs that "[m]easures inconsistent with both Articles XVI and XVII shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well." While Article XX:2 was meant to eliminate duplication and confusion, it actually creates a difficult and pressing interpretive problem. It does protect a

128 See supra text accompanying note 115.
130 Nondiscriminatory quantitative restrictions enumerated in Article XVI:2(a)—(d) violate Article XVI but not Article XVII. For the purposes of this Comment, measures covered by Article XVI:2(e)—measures requiring a specific type of legal entity or joint venture—and by Article XVI:2(f)—caps on the value or share of foreign capital in a sector—are inherently discriminatory, and thus violate Article XVII. See, for example, Panagiotis Delimatis, Don't Gamble with GATS—The Interaction between Articles VI, XVI, XVII and XVIII GATS in the Light of the U.S.—Gambling Case, 40 J. WORLD TRADE: 1059, 1072 (2006). See also MUNIN, supra note 44, at 211. Note, however, that the academic literature and even WTO documents have been somewhat muddled on whether XVI:2(e) measures are inherently discriminatory. See supra note 58.
131 GATS art. XX:2, supra note 7.
132 Delimatis, Don't Gamble with GATS, supra note 130, at 1072–73.
Member from unintentional national treatment commitments in subsectors where it intends to grant (somehow limited) market access and national treatment commitments. But significant uncertainty remains:

[Article XX:2] falls short of providing ready answers when a Member undertakes a commitment under one of the columns but not the other. . . . [T]here is nothing in the GATS text that would [determine], in the case of unbound [limits on] national treatment, whether . . . measures . . . inconsistent with both market access and national treatment obligations should be governed by the existence of a full commitment under market access, or rather by the absence of a commitment under national treatment. And, conversely, no GATS provision gives an answer to the question of whether, in the presence of [ ] unbound [limits on] market access, . . . measures inconsistent with both Articles XVI and XVII should be ruled by the existence of a national treatment commitment, or, rather, by the absence of a market access commitment.

It is this latter situation—no limitations on the national treatment obligation, but largely unbound limits on market access—that arises in China—Electronic Payment Services, based on China’s scheduling of mode 1, sector 7.B(d) commitments.

2. China’s withholding of market access means it need not extend national treatment.

According to the Panel, China made the commitments in subsector 7.B(d) illustrated in Table 2. The problem? How to interpret the entry for mode 1, where China made an apparently unfettered national treatment commitment, yet reserved the right to impose any of the Article XVI:2 barriers to market access, each of which either can be or is always discriminatory in form. In other words, if a measure limits market access (for example, by limiting the number of suppliers that can process Hong Kong and Macao RMB transactions to just one) and thereby modifies the conditions of competition in favor of that sole (domestic) supplier by disallowing competition, which provision in the schedule takes precedence—the stated commitments and limitations in the market access column or in the national treatment column?

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133 Id.
134 Id. at 1073.
135 See China—Electronic Payment Services Panel Report, supra note 9, ¶¶ 7.644–70.
TABLE 2. Summary of China’s Commitments in Electronic Payment Services

<table>
<thead>
<tr>
<th>Mode 1. Cross-border supply</th>
<th>Mode 3. Commercial presence</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article XVI. Market Access</td>
<td>Article XVII. National Treatment</td>
</tr>
<tr>
<td>No liberalization commitment. Limitations China may impose on market access are “Unbound.”</td>
<td>Complete liberalization commitment. Limitations China may impose on national treatment are “None.”</td>
</tr>
<tr>
<td>Qualified liberalization commitment. Only limitations China may impose on market access are time-limited geographic, client-type, and licensing requirements and minimum assets or years of experience for certain foreign financial institutions establishing subsidiaries in China; otherwise, “None.”</td>
<td>Qualified liberalization commitment. Only limitations China may impose on national treatment are geographic and client-type restrictions that also apply to market access; otherwise, “None.”</td>
</tr>
</tbody>
</table>

After saying that Article XX:2 is just a “scheduling rule” (which is never defined) and does not create a hierarchy between Articles XVI and XVII, the Panel arrived at its solution—basically, a scheduling hierarchy. By inscribing “Unbound” in the market access column, China reserved the right to impose any of the measures enumerated in Article XVI:2. According to the Panel, China’s inscription of “None” in the national treatment column does not actually mean that China committed not to impose discriminatory measures. China reserved the right to impose any of the measures enumerated in Article

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136 See id.
137 See infra Appendix A (providing an excerpt of China’s schedule), at text accompanying note vii.
138 See infra Appendix A, at text accompanying note vii.
139 See infra Appendix A, at text accompanying note vi.
140 See infra Appendix A, at text accompanying note viii.
141 See, for example, China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.661.
142 In denying that there is any ambiguity about the scope of, and hierarchy between, Articles XVI and XVII, and instead locating the source of ambiguity in the inscription of unbound limitations on market access and no limitations on national treatment in China’s schedule, the Panel appears to be trying to limit the scope of its decision.
XVI:2 even when they are discriminatory in form, in other words, even when they fail to extend national treatment to like services and suppliers of other Members. \textsuperscript{143}

According to the Panel's rule, what China held onto with "Unbound" was not taken away by "None." To put it another way, what China offered with "None" it actually kept, in part, with "Unbound." The Panel did not address the fact that a scheduling hierarchy necessarily dictates the underlying substantive relationship between disciplines—that it is impossible to have just a scheduling rule that does not also require a particular view of the scope of application of Articles XVI and XVII.

3. The requirements actually imposed violated the (limited) commitments in China's schedule.

The United States argued that China violated its market access commitments to "accord services and service suppliers of any other Member treatment no less favorable than that provided for in China's schedule," under Article XVI, and national treatment commitments to accord to foreign "services and service suppliers . . . treatment no less favorable than that it accords to its own like services and service suppliers," under Article XVII. \textsuperscript{144} Coming to three core conclusions, the Panel agreed with some of these claims—but not to the extent hoped for by the United States:

- As noted above, the Panel had found that China made national treatment commitments for both modes 1 and 3 (though for mode 1, the national treatment commitment had no effect). The Panel then concluded that the issuer, acquirer, and terminal equipment requirements modified the conditions of competition in favor of UnionPay, violating China's mode 3 national treatment commitment. \textsuperscript{145}
- The Panel had found that China made no mode 1 market access commitment, but did make a mode 3 market access commitment under Article XVI:2(a)—thus committing not to limit the number of service suppliers for supply via commercial presence in China. According to the Panel, China maintained UnionPay as a monopoly supplier for certain RMB transactions related to cards issued in or transactions occurring in Hong Kong or Macao. Thus, the Panel concluded that China's Hong Kong/Macao requirements gave UnionPay a monopoly for certain

\textsuperscript{143} Id. ¶¶ 7.660–63 (describing their conclusions and how they reached them).

\textsuperscript{144} Request for the Establishment of a Panel by the United States, China—Electronic Payment Services, supra note 17, at 1.

\textsuperscript{145} China—Electronic Payment Services Panel Report, supra note 9, ¶ 8.1(f)(i)–(iii).
transactions, violating China's mode 3 market access commitments under Article XVI:2(a).  

- However, because the Panel had rejected the United States' allegation, on the basis of insufficient evidence, that China maintained UnionPay as an across-the-board monopoly supplier for the processing of all domestic RMB payment card transactions, the Panel then rejected the United States' market access and national treatment claims arising from the alleged sole-supplier requirement.

Both China and the United States claimed victory.

IV. ALTERNATIVE APPROACHES TO RECONCILING INCONSISTENT MARKET ACCESS AND NATIONAL TREATMENT INSCRIPTIONS

For at least a decade, the WTO has been aware of the problem created by the combination of overlap between Articles XVI and XVII, the scheduling convention of Article XX:2, and Members' inscribing different degrees of commitment and limitations on commitment in the market access and national treatment columns of their schedules. However, none of the various councils and committees, nor the Members collectively, have reached an agreement about how to address the problem in interpreting existing commitments. In 2003, the WTO Committee on Specific Commitments (CSC) proposed rules for dealing with internally inconsistent scheduling, but they described the different rules in very general terms, and explained how each would apply in only a few

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146 Id. ¶ 8.1(e)(i), (c(v).
147 Id. ¶ 8.1(e)(ii)-(iv), (e)(vi)-(vii), (f)(vi).
148 See WTO Adopts Electronic Payments Ruling, supra note 23.
149 See Committee on Specific Commitments (CSC), Consideration of Issues Relating to Article XX:2 of the GATS, JOB(03)/213 (Nov. 20, 2003), available as Annex 1 to Council for Trade in Services, Consideration of Issues Relating to Article XX:2 of the GATS: Report by the Chairman of the Committee on Specific Commitments, S/C/W/237 (Mar. 24, 2004). See also Aaditya Mattoo, National Treatment in the GATS: Corner Stone or Pandora's Box?, 31 J. WORLD TRADE 107, 107 (1997) (pointing out, six years before the CSC report, that the relationship between Articles XVI and XVII had “not been clearly delineated” and that “there is a difference between the text of Article XVII and the structure of the Schedules of Commitments, which makes it difficult to interpret the scope of the national treatment obligation”).
150 Consider the absence of sources of authority used by the Panel to resolve the particular issue in this case. See generally China—Electronic Payment Services Panel Report, supra note 9, ¶¶ 7.645–70. See also Mavroidis, Highway XVI re-visited, supra note 62, at 2 (emphasizing that “the negotiators were not on the same page [about the relationship between Articles XVI and XVII] even after they had agreed on the definitive legal texts”).
scenarios. As a result, it's not possible, based on their contribution alone, to discern any universal rules for all situations, or even a piece-wise rule (that is, a rule that prescribes an outcome for every scheduling scenario, but not necessarily by following a single principle in all cases). There is also no consensus in the academic literature on the subject. Finally, no panel has had to directly address the problem of inconsistent inscriptions.

A primary reason for this lack of consensus is that it is impossible to talk about scheduling rules without first agreeing on the substantive scope of Articles XVI and XVII. Understanding the scope of the market access and national treatment disciplines is not a mere academic exercise. Nor is it rendered moot by the Panel's ruling in China—Electronic Payment Services and the progress of negotiations on the TISA. It will be years before the TISA's terms are hashed out and participating countries' commitments made, and even longer before China and others become parties to that agreement. Regardless of the criticisms of GATS, it will retain its vitality as long as no agreement has adequately displaced it, and billions of dollars are at stake in the meaning of Members' existing GATS commitments. So it's important to work with GATS on its own terms and identify approaches for resolving existing ambiguities that are consistent with Members' current schedules.

Section IV.A below addresses the relationship between a scheduling rule and a substantive rule about the scope of the disciplines. Section IV.B then evaluates the different possible rules of schedule interpretation.

151 See CSC, Consideration of Issues Relating to Article XX:2, supra note 149, ¶¶ 15–20 (providing a limited treatment of scheduling rules). See also id. ¶ 21 (“The description of the issue, and the various options outlined above are presented merely to provide a basis for discussion.”).

152 See generally Delimatsis, Don't Gamble with GATS, supra note 130, at 1072–75 (summarizing the rules proffered by the CSC, without extending any of them to more complicated scheduling scenarios); Joost Pauwelyn, Rien ne Va Plus? Distinguishing Domestic Regulation from Market Access in GATT and GATS, 4 WORLD TRADE REV. 131, 148–51, 161 (2005) (distinguishing between overlap in the measures subject to scrutiny under Articles XVI and XVII (all measures listed in Article XVI are also subject to Article XVII requirements), as compared to the overlap of measures that violate those articles (a measure may violate only Article XVI, only Article XVII, or both)). Cf Mavroidis, Highway XVI re-visited, supra note 62, at 4, 9 (arguing that Article XVI applies only to discriminatory measures, and not to a neutral domestic regulation like, for example, issuance of licenses for new restaurants subject to an economic needs test based on population density).

153 Another panel came close, but didn't decide the issue in the end. See Panel Report, United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services ¶ 6.426, WT/DS285/R (Nov. 11, 2004) (finding it unnecessary to determine if the challenged measures violated the United States' Article XVII commitments once a violation of Article XVI had been established).

A. Distinguish the Substantive Scope of Provisions from Rules for Interpreting Schedules

It is impossible to have a scheduling rule that does not also require a particular view of the scope of Articles XVI and XVII. The work of the CSC on this issue illustrates the consequences of failing to distinguish the two concepts and also acknowledge their relationship to one another. In its report, the CSC appeared to subscribe to the majority view about the relationship between Articles XVI and XVII, illustrated in Figure 1.155 According to this figure, nondiscriminatory versions of the measures enumerated in Article XVI:2(a)–(d) could violate a market access commitment but not a national treatment commitment; discriminatory measures not enumerated anywhere in Article XVI:2 could violate only a national treatment commitment; and discriminatory versions of the measures enumerated in Article XVI:2(a)–(d) along with inherently discriminatory measures in Article XVI:2(e) and (f) could violate a market access commitment and a national treatment commitment.

![Figure 1. Majority View of the Scope of Articles XVI and XVII](image)

The CSC framed the problem of remaining confusion in the case of different commitment levels as one of schedule interpretation, and did not admit

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155 See CSC, Consideration of Issues Relating to Article XX:2, supra note 149, ¶¶ 4–5. See also Markus Krajewski & Maika Engelke, Article XVII GATS: National Treatment, in WTO—TRADE IN SERVICES, supra note 36, at 396, 416–19 (discussing the standard view, as well as minority views, including that of Petros Mavroidis, who has argued that Article XVI applies to the listed restrictions only when in discriminatory form); MUNIN, supra note 44, at 211 (discussing the overlap of Articles XVI and XVII).

156 Adapted from Pauwelyn, supra note 152, at 161, and CSC, Consideration of Issues Relating to Article XX:2, supra note 149, ¶¶ 4–5. On the classification of XVI:2(e) as inherently discriminatory, see supra notes 58 and 130.
of any ambiguity in the scope of the disciplines.\textsuperscript{157} According to the CSC, a schedule interpretation rule—which would determine the legal effect of differing levels of commitment in market access and national treatment in a Member’s schedule—could not alter the purportedly undisputed overlapping relationship of the substantive disciplines themselves. Yet when the CSC then introduced various approaches for dealing with schedule interpretation, a number of them were framed in terms of the substantive scope of the market access and national treatment disciplines themselves.\textsuperscript{158} A recent paper discussing these issues in the context of \textit{China—Electronic Payment Services} repeated the CSC’s mistakes, apparently taking at face value the CSC’s presentation of different approaches as if each were a distinct rule for interpreting any schedule against a backdrop of disciplines with determinate, unchanging scope.\textsuperscript{159}

Another illustration of logical incoherence about the relationship of the scope of the disciplines and the obligations that result from a given schedule entry can be found in \textit{China—Electronic Payment Services} itself. China argued that Article XX:2 delineates the scope of the market access and national treatment disciplines, as depicted in Figure 2, making Articles XVI and XVII mutually exclusive in their spheres of application.\textsuperscript{160} The United States disagreed with China’s allocation of measures and also with the notion that each measure was subject to only one discipline.\textsuperscript{161} In practice, however, the United States treated Articles XVI and XVII as mutually exclusive by separating their spheres of application and placing each measure within the scope of only one discipline.\textsuperscript{162} In other words, the only difference between Figures 2 and 3 is the particular allocation; the two disciplines are effectively mutually exclusive in both figures.

\textsuperscript{157} See CSC, \textit{Consideration of Issues Relating to Article XX:2}, supra note 149, ¶ 2-4.

\textsuperscript{158} For example, approach 1 is introduced as a rule for reading entries in a schedule—“The area of the overlap would be allocated to the Market Access Column”—but the description that follows is framed in terms of the reach of the disciplines themselves—“One [solution] could be to state clearly that all measures referred to under paragraph 2(a)-(f) of Article XVI would fall exclusively under the scope of that Article, and that they would be excluded—even in their discriminatory form—from the scope of Article XVII.” \textit{Id.} ¶ 16. At least one observer has noted that implementation of several CSC options would require amending the GATS text. Delimatis, \textit{Don’t Gamble with GATS}, supra note 130, at 1074.

\textsuperscript{159} Wei Wang, \textit{On the Relationship between Market Access and National Treatment under the GATS}, 46 INT’L LAW. 1045, 1060-62 (2012). However, Wang’s paper does offer some useful insights; for example, he helpfully frames the question about the overlap of market access and national treatment as a matter of pre- and post-entry: “[A]re GATS national treatment obligations binding on post-entry measures only”—so that national treatment commitments only apply after market access commitments have been extended—“or both post-entry and pre-entry measures?” \textit{Id.} at 1056.

\textsuperscript{160} \textit{China—Electronic Payment Services} Panel Report, supra note 9, ¶ 7.646.

\textsuperscript{161} \textit{Id.} ¶¶ 7.647, 7.655.

\textsuperscript{162} \textit{Id.} ¶ 7.647.
The Panel agreed with the majority view about the scope of Articles XVI and XVII, flatly rejecting the idea that the two disciplines are mutually exclusive.\(^\text{163}\) But the scheduling rule it settled upon gives the exact same result as China’s mutual exclusivity rule in Figure 2.\(^\text{164}\) Of course, conceding that in practice, under any schedule interpretation rule, market access and national treatment become mutually exclusive, does not answer all possible questions, since obligations will unavoidably depend on the allocation of measures to each discipline and whether those allocations are themselves specific to each schedule. Ultimately, substantive rules are inextricably bound up with scheduling rules.

**Figure 2. China’s View of the Scope of Articles XVI and XVII**\(^\text{165}\)

<table>
<thead>
<tr>
<th>Article XVI: Market Access</th>
<th>Article XVII: National Treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article XVI:2(a)–(d) in nondiscriminatory form</td>
<td>Other discriminatory measures</td>
</tr>
<tr>
<td>Article XVI:2(a)–(d) in discriminatory form; inherently discriminatory</td>
<td></td>
</tr>
<tr>
<td>Article XVI:2(e) and (f)</td>
<td></td>
</tr>
</tbody>
</table>

\(^\text{163}\) Id. ¶ 7.654, 7.658.

\(^\text{164}\) *China—Electronic Payment Services* Panel Report, supra note 9, ¶ 7.664 ("We ... do not find that either of Articles XVI or XVII is substantively subordinate to the other. We find simply that Article XX:2 establishes a certain scheduling primacy for entries in the market access column.").

\(^\text{165}\) Based on id. ¶ 7.646.
FIGURE 3. The United States' Implicit View of the Scope of Articles XVI and XVII

<table>
<thead>
<tr>
<th>Article XVI: Market Access</th>
<th>Article XVII: National Treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article XVI:2(a)–(d) in nondiscriminatory form</td>
<td>Article XVI:2(a)–(d) in discriminatory form; inherently discriminatory Article XVI:2(e) and (f)</td>
</tr>
<tr>
<td></td>
<td>Other discriminatory measures</td>
</tr>
</tbody>
</table>

B. Evaluate Rules for Consistency with the GATS Text and with Members' Expectations

Putting aside any confusion about schedules and scope and substance, what options are on the table? This Section evaluates four rules based on those sketched out in the CSC report, extending them to eight different hypothetical schedules (Scenarios A through H), which are more fully described in Appendix B below. This exercise provides a fuller picture of each rule, compared to the CSC's report, which considered the outcome only for Scenario A ("Unbound" in the market access column, "None" in the national treatment column) and Scenario F ("None" and "Unbound," respectively). It also draws out the implications of the rule adopted by the Panel in China—Electronic Payment Services. Although the Panel suggested that the rule it adopted for the commitments scheduled by China for subsector 7.B(d)—equivalent to Scenario A—follows unavoidably from the provisions of GATS, the Panel doesn't appear to have considered the effect of its rule in other scheduling scenarios.

The following discussion assumes there is agreement on the scope of Articles XVI and XVII, along the lines of the majority view illustrated in Figure

166 Based on id. ¶ 7.647.

167 The eight scenarios do not exhaust every permutation, but do cover a broad range of possibilities. Wang's paper on China—Electronic Payment Services unfortunately does not analyze the rules beyond the very limited scenarios already found in the CSC's work. Wang, supra note 159, at 1058–59.

168 See generally China—Electronic Payment Services Panel Report, supra note 9, ¶¶ 7.645–70.
Market Access & National Treatment

1 above. And, while a more complete description of the scenarios can be found in Appendix B, note that for Scenarios A through E, a greater commitment has been inscribed in the market access column than in the national treatment column; for Scenarios F through H, the greater commitment is inscribed in the national treatment column.

1. Rule 1: Entry in market access column prevails.

Under this interpretive rule, commitments for all the measures enumerated in Article XVI, whether discriminatory or not, would be governed exclusively by the entry in the market access column. At least for Scenario A—the only one that was in dispute before the Panel—this matches the rule of China—Electronic Payment Services. Applying Rule 1 all the way through the eight scenarios, it’s clear that it is not inherently withholding of commitments nor inherently liberalizing. For Scenarios A through E, in which the greater commitment is inscribed in the market access column, the effect is to minimize the scope of commitments; for Scenarios F through H, with a greater commitment in the national treatment column, the effect of the rule is more liberalizing.

There is clearly a sense in which the inscription of “None” in the national treatment column is deprived of effect. It just seems more intuitive to interpret Scenario A (Unbound/None) as indicating something like this:

*We don’t promise to let you in. But if we do let you in, we won’t discriminate against you, compared to domestic services and suppliers. Thus, if we impose a limit on the number of suppliers for a given service, say, limiting it to five, a foreign supplier could be among those five.*

But Rule 1 does not treat the national treatment “None” as a qualification on the market access “Unbound.” This also leads to an awkward result for Scenario D (XVI:2(a)/None): does it really make sense that reserving the right to impose XVI:2(a) (the right to limit the number of suppliers or quantity of services supplied) also reserves the right to discriminate and allow only domestic suppliers to be among the limited group—even though the scheduling Member committed to no limitations on national treatment?

Rule 1 does give effect to Article XX:2, which even in the Panel’s own words is a rule for “scheduling” rather than “substan[ce],” but at the expense of

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169 With some exceptions, this matches up with the CSC’s rule 1. See CSC, Consideration of Issues Relating to Article XX:2, supra note 149, ¶16.

170 See, for example, China—Electronic Payment Services Panel Report, supra note 9, ¶7.661.

171 That is, “Unbound” in the market access column and “None” in the national treatment column.

172 That is, “None except for XVI:2(a)” in the market access column and “None” in the national treatment column.

173 China—Electronic Payment Services Panel Report, supra note 9, ¶7.664.
Article XVII, which is a crucial discipline that is fundamental to GATS. By its own terms, Article XVII clearly operates “in respect of all measures affecting the supply of services.” So inscribing a measure as a limitation on market access should not remove that measure from the scope of “all measures affecting the supply of services,” such that an inscribed national treatment commitment concerning that measure is meaningless. As a proponent of this result has conceded, the rule can be explained only by giving more weight to Article XX:2 than to Article XVII, an approach that contradicts the clearly subordinate status of the scheduling rule in Article XX:2 relative to the fundamental commitment of national treatment laid out in Article XVII, and which belies the Panel’s assertion that it properly treated Article XX:2 as a rule of scheduling convenience rather than substance.

2. Rule 2: Entry in national treatment column prevails.

Under this interpretive rule, all discriminatory measures (including quantitative measures in XVI:2(a)-(d) when in discriminatory form, as well as the inherently discriminatory measures in XVI:2(e)-(f)) would be governed by the national treatment entry. Only nondiscriminatory market access measures (XVI:2(a)-(d) in nondiscriminatory form) would be governed by the market access entry. At least for Scenario A, this rule achieves the outcome favored by the United States in China—Electronic Payment Services. Like Rule 1, Rule 2 is not inherently withholding of commitments nor inherently liberalizing. But unlike Rule 1, Rule 2 does not give greater weight to Article XX:2 than to the phrase “all measures” in Article XVII, and in this respect is more consistent with the treaty text. Rule 2 treats the national treatment entry as a qualification on the market access entry, in that it makes the national treatment entry a qualification on the use of discriminatory forms of the measures in Article XVI:2(a)-(d) and the use of the inherently discriminatory measures in Article XVI:2(e)-(f).

Rule 2 does have its own problems, though; it renders some language mere surplusage, and renders other language (in particular, subparagraphs XVI:2(e) and XVI:2(f) of the treaty text) ineffective. As a result, any scheduling language based on the coverage of those measures by Article XVI would be either

174 GATS art. XVII:1, supra note 7.
175 MARKUS KRAJEWSKI, NATIONAL REGULATION AND TRADE LIBERALIZATION IN SERVICES: THE LEGAL IMPACT OF THE GATS ON NATIONAL REGULATORY AUTONOMY 115 (2003) (finding “a strong argument for a lex specialis relationship between Article[s] XVI and XVII for discriminatory restrictions on market access”).
176 See China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.664.
177 With some exceptions, this matches up with the CSC’s rule 2. See CSC, Consideration of Issues Relating to Article XX:2, supra note 149, ¶ 17.
178 See China—Electronic Payment Services Panel Report, supra note 9, ¶ 7.647.
ineffective or at least surplusage. For example, in Scenario E (XVI:2(f)/None), the scheduling country’s effort to retain the right to impose XVI:2(f) measures would fail; the phrase “except for (f)” would be rendered ineffective. In Scenarios C (all but XVI:2(f)/None) and H (XVI:2(f)/Unbound), the phrase “except for (f)” would be surplusage, as the result intended by that language would be achieved even without it.

Finally, Rule 2 leads to an awkward result for Scenarios F through H, where the deeper commitment is inscribed in the market access column. Perversely, Rule 2 would mean that domestic quantitative regulations would be prohibited, but discriminatory versions of those regulations would be allowed in these scenarios. This result is perverse because GATS commitments are meant to tackle head on Members’ barriers to trade; any limitations on a Member’s freedom to adopt regulations typically considered domestic in focus are simply a collateral result.179

3. Less-liberalizing entry (Rule 3) or more-liberalizing entry (Rule 4) prevails.

Rule 3—always letting the less-liberalizing of the market access and national treatment entries govern—avoids the awkward result in Scenarios F through H created by Rule 2, but there is no basis in the treaty text for this rule. The main thing to recommend it is that there will be no unpleasant surprises for the scheduling Member—but its trading partners might feel that they got less than they bargained for. Similarly, Rule 4—abiding by the more-liberalizing entry—avoids the awkward result of Rule 1 in Scenarios A through D, in which the scheduling Member is free to discriminate after foreign suppliers are allowed in door, but also lacks textual support. And conversely, while the scheduling country might find itself obligated to extend greater concessions than it intended, its trading partners would not have their expectations dashed.

C. Concede That No Rule Can Satisfy All Goals

This analysis reveals that no one rule can be completely consistent with the GATS text and with Members’ expectations. Rules 1 and 2 have more basis in the treaty text than Rules 3 and 4, but lead to awkward or even preposterous results in some situations. The adoption of Rule 3 or 4, on the other hand, would be more clearly a political choice—a choice to err on the side of less

179 See generally Delimatis, International Trade in Services and Domestic Regulations, supra note 39. See also Mavroidis, Highway XVI re-visited, supra note 62, at 9 (going even farther and arguing that Article XVI was never intended to bind a Member’s regulation of domestic supply, and applies only to discriminatory measures).
Given that no rule can claim greater theoretical purity than the others, a reasonable approach would be to minimize disruptions of the current balance of commitments among countries. In this approach, the selection of the best rule becomes an empirical question, which could be framed in two ways.

First, a WTO panel could ask, in each dispute that comes before it, which rule would result in the smallest total shift in welfare, comparing the chosen outcome to both the scheduling Member’s factually plausible understanding of its own schedule and the complaining Member’s understanding of that schedule. But of course, the rule from one dispute would not be applicable to other disputes, and as discussed in Section II.C, the DSB has shown a strong distaste for multiplicity of meaning. This approach would also lead to more litigation, as Members would find it harder to gauge the strength of their claims by consulting past cases.

Second, a WTO committee (with the help of the Members) could comb through existing schedules to identify instances of potential conflict between market access and national treatment inscriptions. The committee could then apply to every Member’s schedule each of the four rules sketched out in the report of the Committee on Specific Commitments in 2003 and further developed in this Comment. The objective function to be minimized could then be any number of things: total number of schedules or entries affected; total number of adverse outcomes for the Member whose schedule would be subject to the most adverse interpretations; total number of adverse outcomes for developing countries; the total amount of supply in the domestic market of the scheduling Member subject to an adverse outcome; same, but using the share of the subsector in the Member’s gross national product, in percentage points; and so on. This approach would provide consistency and prevent future disputes, and is thus the more desirable one, but there may well not be enough momentum within the WTO for such an undertaking.

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180 Wang takes the view that the choice of which rule to follow is “more a choice of conservatism or liberalism than a technical problem.” Wang, supra note 159, at 1065.

181 See CSC, Consideration of Issues Relating to Article XX:2, supra note 149, ¶¶ 15–20.

182 That is, the target of the optimization problem (which in this case would be a minimization problem).
V. LOOKING AHEAD: RECOMMENDATIONS FOR FUTURE GATS DISPUTES AND THE INTERNATIONAL TRADE IN SERVICES AGREEMENT

A. China—Electronic Payment Services: Problems and Possible Solutions

The China—Electronic Payment Services Panel Report reveals a number of challenges for the DSB and parties to GATS disputes. Greater clarity about how to define the scope of scheduled subsectors would help resolve just the sort of threshold question to which the China—Electronic Payment Services Panel had to devote roughly fifty pages, in its two-hundred page report. As many GATS sectors take the form of two-sided networks, more direct engagement by the parties and the DSB with the rapidly advancing economic modeling of platform competition will likely be central to establishing evidentiary burdens and identifying the smoking gun in GATS disputes. Finally, it is all but certain that the issue of inconsistent market access and national treatment commitments will come up again. The China—Electronic Payment Services Panel Report does not provide sufficient guidance about how to resolve inconsistencies that take forms other than that in China’s schedule, and may not even properly apply to a different case with the same Unbound/None scheduling conundrum.

As the analysis in Section IV and Appendix B has shown, there is no rule of schedule interpretation that is entirely consistent with the GATS text and which would give a reasonable result, relative to the expectations of the scheduling Member and its trading partners, in all scheduling scenarios. The China—Electronic Payment Services Panel erred, not so much in choosing a reasonable outcome for this case, but in portraying this outcome as the result of the purportedly nonhierarchical Articles XVI and XVII and of a singular rule of schedule interpretation consistent with the fixed, certain meaning of Article XX. Reading the Panel’s discussion of these Articles, one cannot help but feel that the internal inconsistencies within GATS are being swept under the rug, whether intentionally or not. To conclude that systemic problems are not actually problems risks undermining the credibility, and thus “security and predictability,” of GATS obligations. A perhaps more politically sustainable route would be to admit that there is a problem and then take a pragmatic, empirical, harm- or surprise-minimizing approach to approximating the

\[^{183}\text{See supra Section III.A.}\]
\[^{184}\text{See supra Section III.B.}\]
\[^{185}\text{See supra Sections III.C and IV.}\]
\[^{186}\text{DSU, supra note 67, 1869 U.N.T.S. at 407.}\]
common intention of Members, based on ferreting out and resolving existing problems in Members’ schedules, as outlined in Section IV.C. If there is insufficient momentum for taking on the project of analyzing all existing schedules, and for agreeing on the metric to be minimized, a less satisfying but initially easier approach would be to simply limit the precedential impact of the interpretation of any one ambiguous schedule entry on other disputes. Panels could base their case-by-case rulings on the plausible prior expectations of the parties to the particular dispute, again with the goal of minimizing surprises and approximating the common intention of the parties to the dispute.

B. The TISA: Finally Getting It Right?

To the extent that there currently is momentum to negotiate around services trade liberalization, it is focused not on GATS but on the nascent Trade in Services Agreement, or TISA.\(^{188}\) Initiated by the so-called “Really Good Friends of Services” group of countries,\(^ {189}\) the negotiations began in late 2012, and publicly announced in early 2013, are motivated by four factors. First, technological change, particularly in information technology, has dramatically expanded the scope for trade in services compared to the landscape when GATS was negotiated twenty years ago.\(^ {190}\) Second, the evolution of several developing-country economies to invest not only in agriculture and manufacturing but also services has contributed to making services an even larger share of global output.

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187 As under the current structure, nonparty Members would still have the right to weigh in on the dispute before the Panel.

188 Current sources have come to refer to the agreement as the Trade in Services Agreement, abbreviated as TISA or TiSA. See, for example, Sauvé, supra note 8, at 2 (“Initially called the ‘International Services Agreement’ (ISA), ... [it has since been renamed the ‘Trade in Services Agreement’ (TISA).”); Request for Comments on Additional Participants in Trade in Services Agreement, 78 Fed. Reg. 55135, supra note 8. Early on, the United States spoke of an International Services Agreement (ISA), while the EU used the phrase Plurilateral Agreement on Services. See, for example, De Micco, supra note 8 (“The agreement was called the ‘international services agreement’ by the United States and the ‘plurilateral services agreement’ by the EU.”). The term plurilateral echoes the titles of certain existing WTO agreements to which only some WTO Members are parties (such as the Plurilateral Agreement on Trade in Civil Aircraft), and reflected the EU’s strong interest in keeping any new agreement tethered to the WTO. De Micco, supra note 8. For additional background on the TISA, see generally DAVID A. GANTZ, LIBERALIZING INTERNATIONAL TRADE AFTER DOHA: MULTILATERAL, PLURILATERAL, REGIONAL, AND UNILATERAL INITIATIVES ch. 7 (2013).


190 Sauvé, supra note 8, at 5.
and trade,¹⁹¹ and a new area of focus for developing-country governments hoping that services will be “a conduit for ‘leapfrogging’ traditional paths of economic growth.”¹⁹² Third, “[f]rustration over the glacial pace of multilateral market opening and over the inability of services to gain adequate traction in the [Doha Round of negotiations] . . . has prompted a large and growing number of WTO Members to turn¹⁹³ away from GATS, and instead toward multisectoral regional and bilateral PTAs¹⁹⁴ and toward the services-focused TISA. Finally, the TISA negotiations also reflect the discontent of many high-income, service-intensive economies—particularly the United States—with the shallowness of GATS commitments¹⁹⁵ and the perceived inefficacy of the DS¿ in holding China accountable for the commitments that these countries thought (or hoped) they had bargained for.¹⁹⁶ The China—Electronic Payment Services Panel’s rejection of the United States’ effective monopoly claims, and reading of China’s commitment inscriptions in the least liberalizing manner, could push the United States to turn its back on GATS (and the WTO) as the right instrument (and forum) for opening markets to U.S. service suppliers.

Liberalizing trade in services presents its own unique challenges, apart from any disagreement among countries about the appropriate pace and pattern of opening. First, as noted in Section II.B.1, trade in services, and the associated trade barriers, are fundamentally different from trade in goods and goods-oriented protectionism. Services are intangible and are delivered through varied modes of supply¹⁹⁷ and, unlike tariffs, barriers to trade in services are embedded in domestic regulation, nontransparent, and difficult to quantify.¹⁹⁸ As a result,

¹⁹¹ Hufbauer, Jensen & Stephenson, supra note 8, at 3 (noting that one- to two-thirds of the labor force is now employed in services in low- and middle-income countries, respectively, as compared to three-fourths in high-income countries, and that the share of developing countries in services exports has roughly doubled in the past twenty-five years, to about one fifth of the global total).
¹⁹² Id. at 4 (explaining that services are now understood as an “enabler,” promoting growth throughout the economy by greasing than chains that link production in agriculture, manufacturing, and final service industries).
¹⁹³ Sauvé, supra note 8, at 6.
¹⁹⁴ See supra notes 4–6.
¹⁹⁵ See, for example, Sauvé, supra note 8, at 5 (“The Uruguay Round’s negotiating harvest in services was a mere (and meek) down payment, richer on rules (even if incomplete) than on market opening commitments.”).
¹⁹⁶ On the perception among U.S. policymakers that the DS¿ has failed to hold China accountable under the Antidumping Agreement and the Agreement on Subsidies and Countervailing Measures, see generally Cartland, Depayre & Woznoski and Greenwald, supra note 71.
¹⁹⁷ For an explanation of modes of supply, see supra text accompanying notes 35–36.
¹⁹⁸ See MUNIN, supra note 44, at 11; Hoekman, Assessing the General Agreement, supra note 37, at 90 (citing regulated telecommunications monopolies and oligopolistic markets for financial services, as well as self-regulating professional services, as examples of highly regulated services).
the tools for combating protectionism in trade in goods can be ineffective against the protectionist measures inhibiting trade in services. Second, while easily quantifiable indicators like the value of bilateral trade flows can be used to set objectives, evaluate the position of others, and assess negotiating progress in goods-trade negotiations, the complexity of identifying and quantifying barriers to trade in services has tended to shift the focus of service-trade negotiations away from the identification, quantification, and reduction of barriers, to "absolute sectoral reciprocity" instead.\(^9\) In the GATS negotiations, that focus promoted a narrative of tit-for-tat rather than general recognition of gains for all from liberalization.\(^200\)

Will the TISA negotiations be any more successful than the original GATS negotiations? There is already one significant reason to worry about the TISA negotiations—the lack of transparency. So far, the negotiating countries have made public very little information\(^201\) and have operated as a "closed club"\(^202\) made up of primarily high-income countries.\(^203\) This approach echoes the "us against them/build it and they'll beg to join" attitude that has characterized other negotiations that subsequently failed to get developing-country buy-in: the Understanding on Commitments in Financial Services, which no developing countries adopted, and the abandoned Multilateral Agreement on Investment.\(^204\)

The GATS negotiations, by contrast, were much more transparent and inclusive of all WTO Members, but the depth of the resulting commitments was disappointing.

Given the lack of transparency, it is difficult to know how the substance of the TISA will be different from GATS, and whether it will improve upon GATS, but some clues are available. The United States apparently favored a negative list approach for scheduling of services,\(^205\) which would be a more

\(^{199}\) Hoekman, Assessing the General Agreement, supra note 37, at 92.

\(^{200}\) Id.

\(^{201}\) As one author has noted, "[a] proxy of the (inadequate) level of transparency of the proposed plurilateral negotiations can be derived from the paucity of information on TISA yielded from a simple 'Googling' of the proposed agreement's acronym." Sauvé, supra note 8, at 5 n.6.

\(^{202}\) Id. at 7.

\(^{203}\) See supra note 8 for a list of participants.

\(^{204}\) Sauvé, supra note 8, at 7. For a discussion of the Understanding on Commitments in Financial Services, see supra note 93. The Multilateral Agreement on Investment (MAI) grew out of the Organization for Economic Cooperation and Development (OECD) in the mid-1990s and floundered when it became a focal point for anti-globalization protests. On the MAI, see, for example, Amrita Ray Chaudhuri & Hassan Benchekkroun, The Costs and Benefits of ILAs to Developing Countries: An Economic Perspective, in IMPROVING INTERNATIONAL INVESTMENT AGREEMENTS 93, 97 (Armand de Mestral & Céline Lévesque eds., 2013).

aggressive tool for liberalization, and would avoid some of the problems discussed in Section III.A above. While a positive list would mean that participants would be liberalizing only in those sectors specifically listed, under a more ambitious negative list approach, all service sectors would be liberalized except for those specifically exempted by each country. The European Union rejected the U.S. proposal and the parties reached a compromise for scheduling of market access commitments in services. A country would schedule a positive list of the sectors in which it would grant market access, but, employing a negative list approach within each broad listed sector, the country could specifically exempt subsectors from that general rule—just as in GATS. However, in a significant departure from GATS, the TISA will likely employ a negative list approach for national treatment. The United States successfully argued for an ambitious national treatment commitment that would in principle be applied on a horizontal basis to all service sectors and modes of supply, with any exemptions listed in each country's schedule of commitments.

The currently contemplated hybrid structure might make the task of defining services even more complicated than it has proven under GATS, because it will require an approach to schedule interpretation that fits with both negative and positive scheduling. But the structure does appear to avoid the problem at the heart of the China—Electronic Payment Services dispute: as long as a schedule extends a market access commitment, there is no question about the national treatment commitment.

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206 De Micco, supra note 8, at 12.
207 Id.
208 Compromise “Hybrid” Approach for Services Deal Largely Follows GATS, supra note 205.
209 For an explanation of horizontal commitments, see supra note 55.
210 The list of exemptions would be the “negative list” of services—setting out those services for which a country is not committing to extend national treatment.
211 There remains, of course, the problem of how GATS and TISA commitments can relate to each other. As a matter of politics, the lack of transparency in the negotiation process will be a barrier to widespread adoption and perceived legitimacy. Sauvé, supra note 8, at 7. As to the law, it is unclear how to reconcile commitments made under radically different architectures, id. at 11, especially where GATS commitments alone are already ambiguous.
## APPENDIX A: EXCERPT OF CHINA’S SCHEDULE

<table>
<thead>
<tr>
<th>Sector or sub-sector</th>
<th>Limitations on market access</th>
<th>Limitation on national treatment</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>7. FINANCIAL SERVICES</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A. All Insurance . . .</td>
<td>(1) [Cross-border supply] Unbound* except for the following:</td>
<td>(1) [Cross-border supply] None</td>
</tr>
<tr>
<td>B. Banking and Other Financial Services (excluding insurance and securities)</td>
<td>- Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;</td>
<td>. . .</td>
</tr>
</tbody>
</table>
| | - 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.vi | (3) [Commercial presence] None 
| | d. All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers draft (including import and export settlement) | 
| | . . . | . . . |
| | (3) [Commercial presence]vii | . . . |
| | A. Geographic coverage . . . | . . . |
| | B. Clients . . . | . . . |
| | C. Licensing . . . | . . . |
| | [Additional conditions—for example, total assets, years of operation—on certain financial institutions establishing subsidiaries in China] . . . otherwise, none. | . . . |
| Other financial services as listed below:vi | (1) [Cross-border supply] None | (1) [Cross-border supply] None |
| k. Provision and transfer of financial information, and financial data processing and related software by supplier of other financial services; | . . . | . . . |
| l. 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. | (3) [Commercial presence] None | (3) [Commercial presence] None |
| | (Criteria for authorization to deal in China’s financial services sector are solely prudential (in other words, contain no economic needs test or quantitative limits on licenses). Branches of foreign institutions are permitted.) | None |

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vi Geographical coverage. 
vii Banking services as listed below:

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vi Geographical coverage. 
vii Banking services as listed below:

The headings “Banking services as listed below” and “Other financial services as listed below” are unique to China's schedule: they do not appear in the Annex on Financial Services (see supra note 93) or in other WTO Members' schedules. *China—Electronic Payment Services Panel Report*, supra note 1, ¶ 7.124.

Agreeing with the United States, the Panel found that this subsector—7.B(d)—included electronic payment services (EPS). *Id.* ¶ 7.204. The wording exactly matches subsector 5(a)(viii) in the Annex on Financial Services, except for one difference: China has added the parenthetical phrase “(including import and export settlement).” (The drafters have also deleted the “s” at the end of “drafts,” probably inadvertently.) *Id.* ¶ 7.106.

The list of scheduled subsectors continues through (i), and then jumps to (k). This means China has not made any specific or conditional commitments in subsectors (g)–(i).

"Unbound" for (d) means that China reserves the right to restrict market access—except for the two identified areas (in italics), where China does make a market access commitment. The Panel found that those two areas simply refer to the full market access commitment ("None") in subsectors (k) and (l); see infra note vi.

The United States argued that EPS fall within these two categories of services, and that these categories of services fit within subsector 7.B(d). This reading would mean that China had committed to impose no limitations on market access for mode 1 trade in EPS. The Panel rejected this reading, finding the mention of these two items to be a redundant reference to the full market access commitment for mode 1 trade in subsectors 7.B(k) and 7.B(l). *China—Electronic Payment Services Panel Report*, supra note 1, ¶ 7.524.

The listed sets of limitations for (d) mean that China does make a market access commitment, but that commitment is subject to the qualifications listed in A–C. China committed that within five years of accession, in other words, by 2006, it would phase out all geographic restrictions and any non-prudential restrictions on ownership or juridical form of foreign financial institutions (FFIs) (including suppliers of EPS). However, China still requires FFIs to have three years (two of them profitable) of commercial-presence experience in licensed foreign currency business before moving into domestic currency business. *Id.* ¶¶ 7.572–73, 7.575.

"None" for (d) means that China has made an absolute commitment to unfettered national treatment of foreign services—which, nevertheless, the Panel found to be limited by the "Unbound" market access inscription.

The listed sets of limitations for (d) mean that China does make a national treatment commitment that is limited by the relevant qualifications listed in the mode 3 entry in the market access column.

See supra note ii.
### Appendix B: Schedule Interpretation Rules in Practice

<table>
<thead>
<tr>
<th>Limitations on:</th>
<th>Scenario A</th>
<th>Scenario B</th>
<th>Scenario C</th>
<th>Scenario D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Market Access</td>
<td>Unbound</td>
<td>Unbound except for XVI:2(a) (no quota on number of suppliers)</td>
<td>Unbound except for XVI:2(f) (no cap on share of foreign capital)</td>
<td>None except for XVI:2(a) (reserve right to use quota on number of suppliers)</td>
</tr>
<tr>
<td>National Treatment</td>
<td>None</td>
<td>None</td>
<td>None</td>
<td>None</td>
</tr>
<tr>
<td>Rule 1. Market access column entry governs overlap</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>May use</td>
<td>XVI:2(a)–(d) in any form; XVI:2(c)–(f)</td>
<td>XVI:2(b)–(d) in any form; XVI:2(e)–(f)</td>
<td>XVI:2(a)–(d) in any form; XVI:2(e)</td>
<td>XVI:2(a) in any form</td>
</tr>
<tr>
<td>May not use</td>
<td>Discriminatory measures not enumerated by Article XVI:2</td>
<td>Discriminatory measures not enumerated by Article XVI:2; XVI:2(a)</td>
<td>Discriminatory measures not enumerated by Article XVI:2; XVI:2(f)</td>
<td>Discriminatory measures not enumerated by Article XVI:2; XVI:2(b)–(d); XVI:2(c)–(f)</td>
</tr>
<tr>
<td>Rule 2. National treatment column entry governs overlap</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>May use</td>
<td>Non-discriminatory forms of XVI:2(a)–(d)</td>
<td>Non-discriminatory forms of XVI:2(b)–(d)</td>
<td>Non-discriminatory forms of XVI:2(a)–(d)</td>
<td>Non-discriminatory forms of XVI:2(a)</td>
</tr>
<tr>
<td>May not use</td>
<td>Discriminatory measures not enumerated in XVI:2; discriminatory versions of XVI:2(a)–(d); XVI:2(c)–(f)</td>
<td>Discriminatory measures not enumerated in XVI:2; discriminatory versions of XVI:2(b)–(d); XVI:2(e)–(f); XVI:2(a) in any form</td>
<td>Discriminatory measures not enumerated in XVI:2; discriminatory versions of XVI:2(a)–(d); XVI:2(e)–(f)</td>
<td>Discriminatory measures not enumerated in XVI:2; discriminatory versions of XVI:2(a); any version of XVI:2(b)–(d); XVI:2(c)–(f)</td>
</tr>
<tr>
<td>Rule 3. Less-liberalizing entry governs overlap</td>
<td></td>
<td></td>
<td></td>
<td>Same as Rule 1</td>
</tr>
<tr>
<td>Rule 4. More-liberalizing entry governs overlap</td>
<td></td>
<td></td>
<td></td>
<td>Same as Rule 2</td>
</tr>
</tbody>
</table>

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See *supra* Section IV.B for a full discussion of the Rules and Scenarios.

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<table>
<thead>
<tr>
<th>Limitations on:</th>
<th>Scenario E</th>
<th>Scenario F</th>
<th>Scenario G</th>
<th>Scenario H</th>
</tr>
</thead>
<tbody>
<tr>
<td>Market Access</td>
<td>None except for XVI:2(f) (reserve right to use cap on share of foreign capital)</td>
<td>None</td>
<td>None except for XVI:2(a) (reserve right to use quota on number of suppliers)</td>
<td>None except for XVI:2(f) (reserve right to use cap on share of foreign capital)</td>
</tr>
<tr>
<td>National Treatment</td>
<td>None</td>
<td>Unbound</td>
<td>Unbound</td>
<td>Unbound</td>
</tr>
</tbody>
</table>

**Rule 1. Market access column entry governs overlap**

- **May use**
  - Scenario E: XVI:2(f)
  - Scenario F: Discriminatory measures not enumerated by Article XVI:2
  - Scenario G: Discriminatory measures not enumerated by Article XVI:2; XVI:2(a) in any form
  - Scenario H: Discriminatory measures not enumerated by Article XVI:2; XVI:2(f)

- **May not use**
  - Discriminatory measures not enumerated by Article XVI:2; XVI:2(a)–(d); XVI:2(e)
  - XVI:2(a)–(d); XVI:2(c)–(f)
  - XVI:2(b)–(d); XVI:2(c)–(f)
  - XVI:2(a)–(d); XVI:2(e)

**Rule 2. National treatment column entry governs overlap**

- **May use**
  - Discriminatory measures not enumerated by Article XVI:2; XVI:2(a)–(d) but only if discriminatory; XVI:2(c)–(f)
  - Discriminatory measures not enumerated by Article XVI:2; XVI:2(a)–(d) but only if discriminatory; XVI:2(e)–(f)
  - Discriminatory measures not enumerated by Article XVI:2; XVI:2(a)–(d) but only if discriminatory; XVI:2(e)–(f)

- **May not use**
  - Discriminatory measures not enumerated by Article XVI:2; XVI:2(a)–(d); XVI:2(e)–(f)
  - Non-discriminatory forms of XVI:2(a)–(d)
  - Non-discriminatory forms of XVI:2(b)–(d)
  - Non-discriminatory forms of XVI:2(a)–(d)

**Rule 3. Less-liberalizing entry governs overlap**

- Same as Rule 1
- Same as Rule 2

**Rule 4. More-liberalizing entry governs overlap**

- Same as Rule 2
- Same as Rule 1

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*Winter 2014*