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determine whether service suppliers on either side of the dividing line are, or are not, 'like'.

Therefore, to the extent that, under the measure at issue, a difference of treatment between foreign -invested enterprises that would, if not prohibited, engage in the wholesale of imported reading materials and wholly Chinese -owned enterprises that are permitted to supply this service is based exclusively on the origin of service suppliers, the 'like' service suppliers requirement in Article XVII is met, as long as there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin. In our view, there is no doubt that under the measure at issue, there will, or can, be foreign -invested enterprises prohibited from engaging in the wholesale of imported reading materials that are the same in all material respects as wholly Chinese -owned enterprises permitted to supply this service, except for their origin. We also note that the parties do not dispute the likeness of the service suppliers under the measures at issue. We thus consider that, for the measure at issue, the 'like' service suppliers requirement in Article XVII is met." <sup>6</sup>

7. In *China – Electronic Payment Services*, the Panel found that the difference of treatment was "not exclusively linked to the origin of service suppliers, but to other factors". Hence, the Panel decided to undertake "a more detailed analysis of the likeness issue". <sup>7</sup> The Panel started by noting that:

"In approaching this matter, we do not assume that without further analysis we may simply transpose to trade in services the criteria or analytical framework used to determine 'likeness' in the context of the multilateral agreements on trade in goods. We recognize important dissimilarities between the two areas of trade – notably the intangible nature of services, their supply through four different modes, and possible differences in how trade in services is conducted and regulated." <sup>8</sup>

8. The Panel in *China – Electronic Payment Services* then considered the ordinary meaning of the term "like" and the context of the phrase "like services". The Panel deduced from the wording of Articles XVII:1 and XVII:3 that "Article XVII seeks to ensure equal competitive opportunities for like services of other Members" and that "like services are services that are in a competitive relationship with each other (or would be if they were allowed to be supplied in a particular market)". <sup>9</sup> The Panel further stated:

"Furthermore, we note that Article XVII is applicable to all services <sup>10</sup>, in any sector, and that services – which are intangible – may be provided through any of the four modes of supply. As well, Article XVII refers to 'like services and service suppliers'. In the light of this complexity, 'like services and service suppliers' analyses should in our view take into account the particular circumstances of each case. In other words, we consider that determinations of 'like services', and 'like service suppliers', should be made on a case -by- case basis. <sup>11</sup>

In the light of the above, we consider that a likeness determination should be based on arguments and evidence that pertain to the competitive relationship of the services being compared. As in goods cases where a panel assesses whether a particular product is a 'like product', the determination must be made on the basis of the evidence as a whole. If it is determined that the services in question in a particular

<sup>6</sup> Panel Report, *China – Publications and Audiovisual Products*, paras. 7.975 -7.976.

<sup>7</sup> Panel Report, *China – Electronic Payment Services*, para. 7.697.

<sup>8</sup> Panel Report, *China – Electronic Payment Services*, para. 7.698.

<sup>9</sup> Panel Report, *China – Electronic Payment Services*, para. 7.700.

<sup>10</sup> (footnote original) Except for services supplied in the exercise of governmental authority. See

Article I:3(b) of the GATS.

<sup>11</sup> (footnote original) For a similar view with regard to 'like products' determinations in the context of Article III of the GATT 1994, see Appellate Body Reports, *EC – Asbestos*, para. 101; and *Japan – Alcoholic Beverages II*, DSR 1996:I, 97, at p. 113.

case are essentially or generally the same in competitive terms, those services would, in our view, be ' like ' for purposes of Article XVII. <sup>12</sup> <sup>13</sup>

9. Referring to the Panel in EC – Bananas III (Ecuador) which had found that "to the extent that entities provide [] like services, the

complaining party, to demonstrate that the formal difference in treatment by China has modified the conditions of competition in favour of wholly Chinese -owned wholesalers.

The demonstration of 'less favourable treatment' of foreign services or service suppliers under Article XVII must proceed through careful analysis of the measure and the market. In examining the national treatment obligation applying to trade in goods, the Appellate Body in US – FSC (Article 21.5 – EC) stated:

The examination of whether a measure involves 'less favourable treatment' of imported products within the meaning of Article III:4 of the GATT 1994 must be grounded in close scrutiny of the 'fundamental thrust and effect of the measure itself'. This examination cannot be rest on simple assertion, but must be founded on a careful analysis of the contested measure and of its implications in the marketplace. At the same time, however, the examination need not be based on the actual effects of the contested measure in the marketplace.

We consider that this statement by the Appellate Body is relevant also to an analysis under Article XVII of the GATS, since an examination of 'less favourable treatment' involves, in goods as well as services cases, an analysis of the effects of a measure on conditions of competition."<sup>16</sup>

13. In China – Electronic Payment Services, the Panel observed that Article XVII:3 of the GATS provides useful clarification regarding the concept of "less favourable treatment":

"[Article XVII:3] states that formally identical or different treatment of

service suppliers '. As its text indicates, the '

character in the application of the national treatment provision; it does not provide cover for actions which might modify the conditions of competition against services and service suppliers which are already disadvantaged due to their foreign character.

We therefore find that lack of technical feasibility only excludes the supply of some repair and maintenance services on machinery and equipment through modes 1 and 2 from Canada's national treatment obligation. We also find that any eventual inherent disadvantages due to the foreign character of services supplied through modes 1 and 2 do not exempt Canada from its national treatment obligation with respect to the CVA requirements." <sup>21</sup>LBodv