

China – Certain Measures Affecting Electronic Payment Services

(DS413)

COMMENTS OF THE UNITED STATES OF AMERICA
ON CHINA'S COMMENTS ON THE U.S. RESPONSE
TO CHINA'S REQUEST FOR A PRELIMINARY RULING

August 30, 2011

I. INTRODUCTION

1. Despite its excessive rhetoric, China's comments confirm an essential point: China was well aware from the U.S. panel request what the "matter" at issue is in this dispute. With its request for a preliminary ruling in this case China simply seeks to know, in advance of the U.S. first written submission, all potential "permutations" of the arguments that the United States intends to make.¹ While China's tactics have resulted in a delay in the Panel's evaluation of the merits of the case, China has failed to demonstrate any deficiency in the U.S. panel request.

2. China initially based its request for a preliminary ruling principally on the argument that the term "electronic payment services" in the U.S. panel request is "a term of the United States' own making" and that "it does not correspond to any of the services subsectors set forth in China's Schedule of Specific Commitment."² China also asserted that "the panel request hinges upon a singular definition of the services at issue" and that the panel request "provides no explanation of how 'electronic payment services – a term that nowhere appears in China's Schedule – relates to China's specific commitments."³ Even a cursory review of the text of the U.S. panel request demonstrates that China is wrong.

3. Although China complains about the "unprecedented" size and nature of the U.S. July 29 submission,⁴ the size of the U.S. July 29 response is a function of the United States responding to the many vague and unsubstantiated assertions that underpin China's request for a preliminary ruling. Prominent among China's contentions were purported concerns regarding the term "electronic payment services for payment card transactions" as used in the U.S. panel request. China asserted that the term was unfamiliar and wholly invented by the United States, and that China could discern no relationship between that term and any of its GATS commitments set out in the U.S. panel request.⁵

4. The description of the service as set out in the U.S. panel request – "electronic payment services for payment card transactions"⁶ – clearly falls within subsector (d) of China's schedule – "all payment and money transmission services, including credit, charge, and debit cards." Moreover, the description of electronic payment services for payment card transactions is drawn from industry sources and reflects a broad and common understanding within this sector. The United States confirmed the clarity of the U.S. panel request in this regard in the U.S. July 29 response to China's request for a preliminary ruling.⁷

¹ See Request for Preliminary Ruling by China, 5 July 2011, para. 12.

² Request for Preliminary Ruling by China, 5 July 2011, para. 2.

³ Request for Preliminary Ruling by China, 5 July 2011, para. 9.

⁴ See, e.g., Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, paras. 1, 24.

⁵ See, e.g., Request for Preliminary Ruling by China, 5 July 2011, paras. 2, 3, 9, 12.

⁶ See U.S. Request for the Establishment of a Panel, *China – Certain Measures Affecting Electronic Payment Services*, WT/DS413/2, February 11, 2011 ("U.S. panel request"), page 1, including notes 1 and 2.

⁷ Submission of the United States of America in Response to China's Request for a Preliminary Ruling, July 29, 2011, sections III, IV and VI.

5. Indeed, China now appears to have abandoned its core argument that the term “electronic payment services” is somehow confusing. China offered no rebuttal to the U.S. July 29 response on this point, including evidence submitted by the United States to demonstrate that the description of the sector at issue in this dispute that is set out in the U.S. panel request is a clear and accepted description of the service, reflecting a broad and common understanding within this sector.⁸ While China also refers again to its initial argument that the U.S. request was inadequate because it did not “relate” the provided definition of electronic payment services to China’s commitments,⁹ China offers no response to the evidence put forth by the United States demonstrating that the term “electronic payment services” plainly corresponds to subsectors set forth in China’s GATS schedule that were referenced in the U.S. panel request.¹⁰ Nor does China respond to the legal support for the U.S. position regarding the sufficiency of the request as reflected in the Appellate Body’s findings in *EC – Computer Equipment*.¹¹

6. Apart from assertions that the United States is attempting to “cure” a defective panel request,¹² and arguments that continue to display a fundamental misunderstanding regarding the difference between “claims” and “arguments” for purposes of DSU Article 6.2, it is clear from China’s reply that specific issues of disagreement have now been narrowed to only two.¹³ First, China again purports to be confused regarding the modes of service at issue based on the U.S. panel request. There is no basis for any alleged confusion, as the modes of services are set out in the commitments explicitly identified in the U.S. panel request. Second, China also repeats its well-worn mantra regarding the reference in the U.S. panel request to the three mutually exclusive subsectors in China’s schedule and that this too is perplexing to China. These arguments were and remain unavailing. Whether a complainant can prevail on separate claims advanced under potentially mutually exclusive subsectors in a Member’s GATS schedule is a substantive legal issue to be decided on the merits based on the evidence and legal arguments presented to the Panel. The U.S. panel request thus puts China on notice as to China’s market access and national treatment commitments, including the modes of supply, that are before the Panel.

7. As is clear from the text of the U.S. panel request itself, and as demonstrated again in the July 29 U.S. response, the U.S. panel request meets each of the requirements under Article 6.2 of the DSU. The U.S. panel request is in writing, indicates that consultations were held, identifies

⁸ As explained in detail in the July 29 U.S. response, the description of the sector at issue in this dispute that is set out in the U.S. panel request is a clear and accepted description of the service, reflecting a broad and common understanding within this sector. Suppliers of the services at issue in this dispute who work within this sector are described as supplying, or characterize themselves as supplying, “electronic payment services” and as operating within the “global payments industry.” See Submission of the United States of America in Response to China’s Request for a Preliminary Ruling, July 29, 2011, section IV.

⁹ Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, para. 14.

¹⁰ Submission of the United States of America in Response to China’s Request for a Preliminary Ruling, July 29, 2011, sections IV and VI.

¹¹ Appellate Body Report, *EC – Computer Equipment*, para. 70.

¹² Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, paras. 6, 21.

¹³ Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, para. 7.

the specific measures at issue, and provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

II. THE U.S. PANEL REQUEST SATISFIES DSU ARTICLE 6.2

8. The Appellate Body has stated that “compliance with the requirements of Article 6.2 must be determined on the merits of each case, having considered the panel request as a whole, and in the light of attendant circumstances.”¹⁴

9. Below the United States demonstrates that (A) the U.S. July 29 response is not seeking to “cure” the U.S. panel request, as the request fully complies with the requirements of DSU Article 6.2; (B) China continues to display a fundamental misunderstanding of the concepts of “claims” and “arguments” for purposes of DSU Article 6.2; (C) the reference to three mutually exclusive subsectors in China’s Schedule does not render the U.S panel request defective; and (D) the U.S. panel request provides notice as to China’s market access and national treatment commitments, including the modes of supply, that are before the Panel.

A. The Four Corners of the U.S. Panel Request Comply With DSU Article 6.2; The United States has not Sought, Nor Needs, to “Cure” Anything Through its July 29 Submission

10. China argues that the U.S. July 29 response is an attempt by the United States to “cure” a defective panel request.¹⁵ China’s argument, while predictable, is baseless. As an initial matter, the United States would agree that a subsequent submission by a Party cannot cure a deficient panel request. However, there are no deficiencies in the U.S. panel request. The sufficiency of the U.S. panel request with the requirements of Article 6.2 is apparent from the four corners of the document itself. China casts the U.S. July 29 response as amounting to “belated and inadequate efforts by the United States to draw missing connections.”¹⁶

11. There are no missing connections in the U.S. panel request. In addition to specifying, with precision, the service at issue: “electronic payment services for payment card transactions,”¹⁷ the panel request identifies the specific measures being challenged, the specific commitments at issue in China’s schedule, and the specific obligations that are the subject of the U.S. complaint. The U.S. panel request contains a detailed narrative of the claims that the United States is making as an additional basis for China to understand “the legal basis of the complaint” and contains information “sufficient to present the problem clearly.” Moreover, the U.S. panel request “sets forth *facts and circumstances describing the substance of the dispute*” and, thus, the “request is sufficiently detailed to set forth the legal basis of the complaint so as to

¹⁴ Appellate Body Report, *United States – Carbon Steel*, paras. 126 and 127.

¹⁵ Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, paras. 4-7.

¹⁶ Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, para. 7.

¹⁷ U.S. panel request, page 1 and notes 1 and 2.

inform the defending Member . . . and potential third parties of the claims made.”¹⁸ The U.S. panel request meets each of the requirements of Article 6.2.¹⁹

B. China’s Seeks U.S. Arguments, But DSU Article 6.2 Requires Only That Claims Be Set Out, Not the Arguments in Support of Those Claims

12. Compliance with DSU Article 6.2 mandates only that a panel request set out claims, and not the arguments in support of those claims. The Appellate Body has confirmed this fundamental principle in unambiguous terms:

We accept the Panel’s view that it was sufficient for the Complaining Parties to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements. In our view, there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel’s terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties.²⁰

13. There clearly is no obligation to set out “detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements.”²¹ There is no need for the United States to develop the arguments that support the claims identified in its panel request. China seeks explanations, however, that go beyond what is required by Article 6.2 of the DSU and instead asks the United States to provide China the U.S. arguments as to “why” China’s measures breach the identified obligations.²² Similarly, China’s arguments that the services do not fall within the specified sectors²³ is a defense by China to the claims – a defense it will be free to make in its first written submission. There is no failure to satisfy the requirements of Article 6.2. And China’s arguments in this regard demonstrate that China does in fact understand the matter raised in the U.S. panel request.

¹⁸ Panel Report, *Mexico – Corn Syrup*, para. 7.15.

¹⁹ In addition, China incorrectly asserts that the U.S. July 29 submission contains arguments that are “not germane” to the question before the panel and that the U.S. submission “resembles” a first submission. Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, paras. 2-3. China overlooks the fact that the information provided in the U.S. July 29 submission directly responds to an issue China originally raised regarding the meaning of “EPS.” Moreover, the U.S. July 29 submission does not present arguments demonstrating that the measures breach the concessions. Those arguments will be presented to the Panel as part of the U.S. first written submission.

²⁰ Appellate Body Report, *EC – Bananas*, para. 141.

²¹ Appellate Body Report, *EC – Bananas*, para. 141.

²² See, e.g., Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, para. 20 (the U.S. panel request “merely lists the three subsectors and makes an *undifferentiated* set of claims that the challenged measures are inconsistent with China’s market access and national treatment commitments.”)

²³ See, e.g., Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, para. 6; China’s Request for a Preliminary Ruling, 5 July 2011, paras. 2-3, 9.

C. Reference to Three Mutually Exclusive Subsectors in China’s Schedule Does Not Render the U.S Panel Request Defective

14. China continues to argue that reference in the U.S. panel request to the three subsectors “made it impossible for China to understand how the U.S. claims in respect to the challenged measures relate to the different commitments that China has made in each of those subsectors.”²⁴ This argument lacks any credibility and is yet another example of overstatement combined with an incorrect understanding of the legal requirements for assessing the sufficiency of a panel request. As the United States has already observed:

Whether a complainant can prevail on separate claims advanced under potentially mutually exclusive subsectors in a Member’s GATS schedule is a substantive legal issue to be decided on the merits based on the evidence and legal arguments presented to the Panel. Identifying potentially mutually exclusive claims in the U.S. panel request is not a failure under Article 6.2 to provide a summary of the legal basis of the complaint. In the three subsectors identified in the U.S. panel request, China undertook both market access and national treatment commitments for modes (1) and (3) as specified in its Schedule. The U.S. panel request thus puts China on notice as to China’s market access and national treatment commitments, including the modes of supply, that are before the Panel.²⁵

15. China’s argument would seemingly mean that whenever a complaining party advances mutually exclusive claims – such as a GATT 1994 Article II claim (in the event the measure is a border measure) and a GATT 1994 Article III claim (in the event the measure is an internal charge) – then this would render the panel request inconsistent with Article 6.2 of the DSU. Such an argument has no basis.

16. China once again appears to acknowledge the claims in the U.S. panel request, but then seeks more – China seeks a detailed explanation of the U.S. legal arguments as to exactly how China’s measures put it in breach of these commitments.²⁶ China concedes that specific commitments and claims are identified in the U.S. panel request,²⁷ but asks for more than what is required by DSU Article 6.2. With its request for a preliminary ruling, China seeks to have specific legal arguments presented as to how the measures at issue breach commitments identified in the U.S. panel request. China is not entitled to see how the United States will present its legal arguments in advance of the U.S. first submission. Yet, that is precisely what China seeks with its preliminary ruling request.

²⁴ Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, para. 6.

²⁵ Submission of the United States of America in Response to China’s Request for a Preliminary Ruling, July 29, 2011, para. 22.

²⁶ See, e.g., Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, paras. 12, 16, 18.

²⁷ Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, paras. 20-21.

D. The U.S. Panel Request Provides Notice as to China’s Market Access and National Treatment Commitments, Including the Modes of Supply, that Are Before the Panel

17. China then asserts that the United States “pretends that the panel request actually did put China on notice as to which modes of supply were at issue.”²⁸ Rather than ascribe motives – as China appears to do throughout its comments – or speak in terms of “pretense” – the United States simply observes that it considers remarkable the apparent position of China that it is uncertain as to the modes of supply at issue with respect to the GATS commitments it has undertaken. With respect to each of the subsectors identified in the U.S. panel request, China undertook both market access and national treatment commitments for modes (1) and (3) as specified in its Schedule. The commitments for each mode of supply for items (d), (k), and (l) in China’s Schedule are specified therein, and the U.S. panel request thus puts China on notice as to China’s market access and national treatment commitments, including the modes of supply, that are before the Panel.

18. China once again appears to acknowledge the claims that are before the Panel in light of the U.S. panel request, but in addition seeks a detailed legal explanation of exactly how China’s measures put it in breach of these commitments.²⁹ China argues that the United States would be required to set forth “separate claims” that certain aspects of the measures are inconsistent with one subsector while “other aspects” are inconsistent with other subsectors.³⁰ This is wrong. As the panel in *EC – Trademarks and Geographical Indications* explained:

The European Communities further contends that it is entitled to know which provision or aspect of Regulation No. 2081/92 is supposed to violate certain obligations and in which way such a violation is deemed to occur. In the Panel’s view, the European Communities is seeking the arguments, rather than just the claims, of Australia. That being said, the Panel wishes to assure the European Communities that it is fully entitled to know the arguments of Australia during the course of the proceedings. Those arguments must be set out and may be clarified in Australia’s submissions.³¹

19. However, Article 6.2 of the DSU does not require those arguments to be set out in the request for establishment of a panel. In other words, China concedes that claims are identified in the U.S. panel request, but then seeks more than that. China is looking for precise legal arguments as to exactly how the measures at issue breach these commitments. China is not, however, entitled to see how the United States will present its legal arguments in advance of the U.S. first submission.

²⁸ Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, para. 9.

²⁹ China’s Request for a Preliminary Ruling, paras. 9-12; Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, paras. 20-21.

³⁰ Reply by China to U.S. Comments on Request for Preliminary Ruling, 25 August 2011, para. 20.

³¹ Panel Report, *EC – Trademarks and Geographical Indications*, para. 7.2.

20. Also misplaced is China’s reference to the U.S. submission in *US – Lamb*.³² China’s does not need to “guess” about the matter that is before it. Here, the U.S. panel request describes the service at issue, identifies China’s GATS commitments, sets out the measures being challenged, refers to the applicable GATS Articles, and provides a detailed narrative explanation. By any objective assessment, the panel request “provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly,” as is required by DSU Article 6.2.

21. China is not forced to guess about any of this. It is clear, however, that China is seeking more than what is required by DSU Article 6.2. China seeks to know all of the “permutations” of the arguments the United States will make in advance of the U.S. first written submission.³³ China is on notice as to the service at issue, its GATS commitments, the specific measures at issue, the relevant GATS Articles, and, thus, the U.S. claims. As the *US – Lamb* panel stated, quoting the Appellate Body: “‘Article 6.2 of the DSU requires that the claims, and not the arguments, must all be specified sufficiently in the request for the establishment of a panel.’” Thus, the complainants were not required under the DSU to develop their factual and legal arguments on all these issues before filing their first submissions to the panel.”³⁴ China’s arguments in its request for a preliminary ruling and in its August 25 comments belie China’s assertions that it does not know what matter is identified in the U.S. panel request. China is looking for precise legal arguments as to exactly how the measures at issue breach its commitments. As the Appellate Body and the *US – Lamb* panel have made clear, however, China is not entitled to see how the United States will present its legal arguments in advance of the U.S. first submission.

III. CONCLUSION

22. The U.S. panel request is fully consistent with DSU Article 6.2. Nothing in China’s request for a preliminary ruling or in its August 25 comments demonstrate otherwise. The U.S. panel request is in writing, indicates that consultations were held, identifies the specific measures at issue, and provides a brief summary of the legal basis of the complaint sufficient to present the problem clearly. Accordingly, the United States respectfully requests that the Panel reject in its entirety China’s request for preliminary ruling.

³² Reply by China to U.S. Response to China’s Request for a Preliminary Ruling, 25 August 2011, para. 22 and note 13.

³³ See Request for Preliminary Ruling by China, 5 July 2011, para. 12.

³⁴ Panel Report, *US – Lamb*, para. 5.51 (quoting Appellate Body Reports, *EC – Bananas*, para. 143, *Korea – Dairy*, paras. 123-125).