

China – Certain Measures Affecting Electronic Payment Services

(DS413)

**OPENING STATEMENT OF THE UNITED STATES OF AMERICA
AT THE FIRST MEETING OF THE PANEL WITH THE PARTIES**

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TABLE OF REPORTS CITED

Short Title	Full Case Title and Citation
<i>China – Publications and Audiovisual Products</i>	Panel Report, <i>China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products</i> , WT/DS363/R and Corr.1, adopted 19 January 2010, as modified by Appellate Body Report WT/DS363/AB/R
<i>EC – Bananas III</i>	Appellate Body Report, <i>European Communities – Regime for the Importation, Sale and Distribution of Bananas</i> , WT/DS27/AB/R, adopted 25 September 1997
<i>US – Gambling</i>	Appellate Body Report, <i>United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services</i> , WT/DS285/AB/R, adopted 20 April 2005

I. INTRODUCTION

1. Mr. Chairman, and Members of the Panel, thank you for the opportunity to provide our opening statement on some of the issues that you will be considering over the next few days. Today we focus on some of the assertions that China has made in its first written submission.

2. At the outset, we can agree with China that, in certain respects, this is indeed a “simple dispute.”¹ When China joined the World Trade Organization (“WTO”) in 2001, it made important commitments with respect to electronic payment services (“EPS”) for payment card transactions. China explicitly acknowledged its commitments in 2005 and recognized that by 2006 its payment card market would be “opened to the outside world in an all-around manner.”² Simply put, China has not honored its WTO commitments.

3. Under the terms of China’s Schedule of Specific Commitments on Services, China committed to provide both market access and national treatment for “all payment and money transmission services, including credit, charge and debit cards” for domestic currency transactions. Yet, despite these commitments, China continues to maintain a government-mandated domestic monopoly, enabling only its national champion, China UnionPay, Co. Ltd. (“CUP”), to provide these services, thereby blocking foreign service suppliers. The measures at issue establish a monopoly and systematically discriminate against and restrict foreign EPS suppliers while favoring China’s own supplier of EPS.

4. This dispute is about a payment service that is central to transactions involving credit cards, charge cards, debit cards, and other types of payment cards. The service at issue is complex, as China notes,³ and the United States would not disagree. At the same time, however, the complexity of this service does not in any way alter its fundamental nature. Without this service, payment and money transmission with respect to card-based transactions could not take place.

¹ China’s First Written Submission, para. 1.

² Document No. 103, Article III (Exhibit US-1).

³ China’s First Written Submission, para. 2.

5. For instance, many of you here have likely recently purchased something at a store, dined at a restaurant, booked a hotel, or bought a plane ticket. In connection with your purchase, you were asked: “And how would you like to pay for that?” I suspect that you said something along the lines: “I’ll pay with my credit card,” or “I’ll pay with my debit card.” Some of you may well have been even more specific: “I’ll pay with my Visa card,” or “I’ll pay with my CUP card... my MasterCard... or my Amex card.” You get the point. In each case, the question is the means by which to make payment – in most cases, this involves payment card transactions, and the payment and money transmission necessary to effectuate the transaction cannot take place without EPS. While we are seldom interested in the particular details for precisely how that service is provided, we know what the service is and rely upon it. And the name of China’s monopoly supplier of the service at issue in this dispute – China UnionPay – makes clear that it involves payment services. Beyond this the United States has provided ample evidence from various sources that confirm that payment services are at the core of EPS for card-based transactions.

6. To date, China has chosen a path that steers clear of a discussion of the measures at issue and even goes so far as to boldly assert that “there is neither a need nor a legal basis to proceed to an evaluation of whether the measures that the United States challenged in this dispute are inconsistent with Articles XVI and XVII of the GATS.”⁴ China’s assertion can be readily dismissed.

7. The measures that have established and maintain CUP’s monopoly clearly prevent foreign EPS suppliers from competing in China. In fact, with its recounting of “the historical origin of the measures”⁵ that are before the Panel, China all but concedes that it created a monopoly for CUP so that the Chinese market would not be “taken over” by foreign EPS suppliers. In its words, “China wanted to achieve the same network effects associated with interbank payment cards, but without having the Chinese market taken over by the same network operators that had come to dominate other markets.”⁶ China’s efforts in this regard to cast

⁴ China’s First Written Submission, para. 1.

⁵ China’s First Written Submission, paras. 38-57.

⁶ China’s First Written Submission, para. 54.

certain foreign suppliers as “notorious for their anticompetitive practices”⁷ are inaccurate, unsupported, and at the end, not only irrelevant to the question before the Panel but highly ironic. Indeed, if China’s true concern was avoiding anticompetitive activity in its market, it is curious that it would choose to address that concern by establishing a monopoly.

8. China focuses on two areas while avoiding engaging in a substantive review of the WTO-consistency of the challenged measures. First, China deconstructs, disaggregates and renames certain components of EPS that are central to payment card transactions, in an apparent effort to turn them into a different type of service for which it has no commitments. Second, China offers tortured interpretations of its Services Schedule in an apparent attempt to diminish the breadth of its explicit commitments for all payment and money transmission services, including credit, charge, and debit cards. China’s arguments under both paths fail and provide no shield to its WTO-inconsistent measures.

9. In terms of our statement today, we will first discuss the scope of EPS and respond to China’s arguments. We will then discuss the proper interpretation of China’s commitments. Finally, we will provide a brief overview of China’s market access and national treatment violations.

II. EPS FOR PAYMENT CARD TRANSACTIONS FALL WITHIN THE ORDINARY MEANING OF “ALL PAYMENT AND MONEY TRANSMISSION SERVICES, INCLUDING CREDIT, CHARGE AND DEBIT CARDS...” (SUBSECTOR (D))

10. EPS is the service through which transactions involving credit, charge, debit and other payment cards are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated. China’s commitments pertain to “all payment and money transmission services, including credit, charge and debit cards,” indicating that the scope of the commitment covers the service that is essential to payment card transactions. EPS suppliers are at the heart of this service. Without EPS, these payment card transactions could not occur.

⁷ China’s First Written Submission, para. 53.

11. The Appellate Body has confirmed that the customary rules of treaty interpretation reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* (“*Vienna Convention*”) apply to the interpretation of specific commitments in a Member’s GATS Schedule.⁸ As the Appellate Body has explained, “[i]n order to identify the ordinary meaning, a Panel may start with the dictionary definitions of the terms to be interpreted. But dictionaries alone are not necessarily capable of resolving complex questions of interpretation, as they typically aim to catalogue *all* meanings of words – be those meanings common or rare, universal or specialized.”⁹ The Appellate Body has further stated that “the sectors and subsectors in a Member’s Schedule must be mutually exclusive.”¹⁰

12. The language of subsector (d) itself makes clear that EPS for payment card transactions fall within this subsector of China’s Schedule. The services listed in Sector 7B include:

- (d) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts (including import and export settlement);¹¹

13. First, as detailed extensively in the U.S. July 29 Response and the U.S. First Written Submission,¹² EPS is the service through which transactions involving payment cards are processed and through which transfers of funds between institutions participating in the transactions are managed and facilitated. EPS clearly falls within the ordinary meaning of “payment and money transmission services” as one type of “all” such services.

14. Second, the phrase “all payment and money transmission services” is modified with an illustrative list that explicitly provides that it “include[s] credit, charge and debit cards.” This explicit reference is in line with the recognition that EPS is integral to the processing of credit, charge, debit and other card-based electronic payment transactions, and without this service, payment card transactions could not occur. As the United States has noted, EPS suppliers such

⁸Appellate Body Report, *United States – Gambling Services*, paras. 159-160.

⁹Appellate Body Report, *United States – Gambling Services*, para. 164 (footnotes omitted).

¹⁰Appellate Body Report, *United States – Gambling Services*, para. 180.

¹¹ Section II, 7 (Financial Services), B (Banking and Other Financial Services) of the Schedule (circulated in WT/ACC/CHN/49/Add.2 and WT/MIN(01)/3/Add.2).

¹² U.S. July 29 Response, paras. 147-163; U.S. First Written Submission, paras. 10, 22-28.

as Visa, MasterCard, CUP, JCB, and American Express are names recognized around the world as credit cards and charge cards. The reference to debit cards covers EPS suppliers for debit card transactions like Visa, MasterCard, Discover, First Data, Pulse, NYCE, STAR, and PLUS.¹³

15. Forced to confront the ordinary meaning of the terms “payment,” “transmission,” “money,” and “credit, charge, and debit cards,”¹⁴ China argues that only card issuance and card transaction acquiring services fall within subsector (d).¹⁵ On a very basic level, this argument lacks merit. Issuing and acquiring services themselves cannot effectuate payment and money transmission for card-based transactions. In a card-based transaction, EPS is required for payment and money transmission to actually take place. The United States also notes that this question is not before the Panel, as payment card issuing and payment card transaction acquiring are distinct services from EPS. In any event, the explicit inclusion of “credit, charge and debit cards,” in the illustrative list of “all payment and money transmission services” confirms that EPS for payment card transactions clearly falls within subsector (d).¹⁶

16. As the United States has demonstrated, suppliers of the service at issue in this dispute are described as supplying, or characterize themselves as supplying, “electronic payment services” for “payment card” transactions and as operating within the “global payments industry.”¹⁷ And, outside of China, the competition to provide services for card-based electronic payment transactions is intense. EPS suppliers explain that they compete “in the global payment marketplace against all forms of payment, including paper-based forms (principally cash and checks)” and “card-based payments (including credit, charge, debit, ATM, prepaid, private-label and other types of general purpose and limited use cards).”¹⁸

17. China also returns to its familiar refrain that the United States has “invented” the term “electronic payment services for payment card transactions.” The term is apt and is an accurate

¹³ U.S. July 29 Response, para. 149.

¹⁴ See U.S. July 29 Response, paras. 150-180.

¹⁵ China’s First Written Submission, para. 96.

¹⁶ See, e.g., Third Party Written Submission of Australia, 18 October 2011, para. 18.

¹⁷ See U.S. July 29 Response, paras. 55-61, 164-178.

¹⁸ U.S. July 29 Response, para. 55, citing Visa 2008 IPO Prospectus, page 147 (Exhibit US-3).

description of the service at issue and widely used in the industry. The United States notes the broad agreement from third parties Australia, the EU, and Korea on this threshold point.¹⁹ China’s latest response, curiously, is to table its own preferred terms – “network operators” and “network services” – terminology that purportedly is “objectively based on prior usage.”²⁰ China cites certain decisions and submissions involving domestic antitrust law as support for the proposition that this is the correct nomenclature for the service suppliers and the service at issue, respectively.²¹

18. The relevant market for specific services for purposes of an antitrust analysis may be different than the common usage of a term. For example, a federal U.S. appeals court defined separate markets for business travel and leisure travel for the very same flight.²² The fact that in certain U.S. antitrust cases the term “network services” has been used in describing the issue before that court is not particularly informative of the particular service at issue in this dispute. These cases cannot meaningfully guide the Panel’s analysis.

19. If, however, the Panel wished to look at the treatment of EPS suppliers, such as Visa and MasterCard in U.S. antitrust case law, it would also see their services described as “payment services” – the term referred to by the United States in this dispute and one explicitly set forth in China’s Schedule. For example, a U.S. federal appellate court stated that “Visa USA provides *payment services* to its 6,000 members which individually issue credit cards to consumers.”²³ Similarly, a U.S. federal district court stated that “the court has found *payment services* to be the relevant market. In this market, VISA has little power.”²⁴

¹⁹ See Australia’s Third Party Submission, paras. 4-20; EU’s Third Party Submission, paras. 9-28; Korea’s Third Party Submission, paras.8-20.

²⁰ China’s First Written Submission, para. 24.

²¹ China’s First Written Submission, para. 25.

²² *Spirit Airlines v. Nw. Airlines*, 431 F.3d 917, 933 (6th Cir. 2005) (Exhibit US-64) (holding that a reasonable trier of fact could find that leisure or price-sensitive airline passengers represent a distinct market) .

²³ *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 960 (10th Cir. 1994) (Exhibit US-65) (emphasis added).

²⁴ *National Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 596 F. Supp. 1231, 1265 (S.D. Fla. 1984), *aff’d* 779 F.2d 592 (11th Cir. 1986) (Exhibit US-66) (emphasis added).

20. China also argues that “the market for network services is distinct from the market in which financial institutions issue payment cards and acquire payment card transactions.”²⁵ The United States would agree that payment card issuance services and merchant acquiring services are distinct from EPS for processing payment card transactions. This of course does not mean that EPS for payment card transactions does not fall within subsector (d) as one type of “all” payment and money transmission services for purposes of China’s Schedule.

III. CHINA’S MODE 1 AND MODE 3 COMMITMENTS FOR “ALL PAYMENT AND MONEY TRANSMISSION SERVICES, INCLUDING CREDIT, CHARGE AND DEBIT CARDS...”

China’s Mode 3 Commitments

21. China argues that its mode 3 commitments in subsector (d) apply only to services supplied by banks because subsector (d) falls under the heading of “banking services.”²⁶ This argument lacks merit, as the term “banking services” is not limited in this manner. As even China has recognized, major U.S. EPS suppliers, as well as CUP, were formally operated as associations of banks – and from their inception they were clearly performing “banking services.” The nature of the service that an entity supplies does not change merely because that entity assumes a new corporate form. In analyzing a service for purposes of a GATS commitment, one must look at the characteristics and nature of the service to classify that service. Where the identity of the supplier is relevant, the sectoral description must clearly indicate that to be the case. For example, in China’s Schedule, there are sectors described as “Motor vehicle financing by non-bank financial institutions.” The absence of a qualification in subsector (d) indicates that it covers all of the indicated services, regardless of the type of entity that supplies those services.

22. Indeed, it is evident from China’s Schedule itself that the term “banking services” listed in China’s Schedule, including those listed in subsector (d) are not limited to those provided by banks as China claims. In addition to the explicit reference to “non-bank financial institutions” in China’s Schedule, there are references to “foreign finance companies” in the market access column and to “foreign financial leasing corporations” in the additional commitments column.

²⁵ China’s First Written Submission, para. 24

²⁶ See China’s First Written Submission, para. 132.

23. In addition, “financial service supplier” is defined in the Annex on Financial Services to the GATS as follows: “A financial service supplier means any natural or juridical person of a Member wishing to supply or supplying financial services but the term ‘financial service supplier’ does not include a public entity.” This definition covers not only banks but other suppliers of financial services, which supply or wish to supply financial services within the meaning of the Annex.

24. For similar reasons, China’s argument that its mode 3 market access and national treatment commitments for subsector (d) are limited to foreign financial institutions, and that EPS suppliers do not qualify, must also fail. China asserts that “because the United States has failed to demonstrate that what it calls ‘electronic payment service suppliers’ are foreign financial institutions, its claims relating to mode 3 of subsector (d) must fail.”²⁷ Although China includes certain limitations with respect to foreign financial institutions, this does not mean that its commitments are limited to foreign financial institutions. Such a limitation would have needed to be imposed explicitly.

25. It is telling that China’s mode 1 commitment begins with “unbound except for . . .”, while the mode 3 commitment has no such limiting language. The other Members cited by China seeking to limit their commitments in similar circumstances have prefaced the commitment with “unbound except,” or “the service may only be supplied by . . .” The absence of similar prefatory language used by China shows that the term “financial institution” is not a limitation on the type of service supplier that may benefit from China’s commitment.

26. Even if the term “financial institutions” in item B of China’s mode 3 commitment were found to apply to all instances of supply of the listed services, China’s argument still fails. China’s view is that the presence of the term “financial institutions” creates a separate and independent limitation. In other words, China argues it may condition the supply of a service on the criteria listed in column 2 and *in addition* require that another Member’s supplier meet additional (and unspecified) criteria to be recognized as a “financial institution.” Nothing in China’s Schedule supports this view. In fact, the Schedule states that “[c]riteria for authorization

²⁷ China’s First Written Submission, para. 132.

to deal in China’s financial services sector are solely prudential.” Thus, under China’s Schedule, the only limitations China may impose are prudential restrictions and the explicitly listed limitations – defunct restrictions on geographic scope and use of domestic currency, and ongoing requirements applicable to banks.

27. Finally, the definition of “financial institution” offered by China is far too narrow. There are many definitions, however, that are much broader, and some explicitly include “an operator of a credit card system.”²⁸ Moreover, the narrow definition that China now offers is not consistent with how the term is used in China’s Schedule.

China’s Mode 1 Commitments

28. China argues that, assuming EPS for payment card transactions do fall within subsector (d), the United States has failed to demonstrate that China has any mode 1 market access commitments. However, China’s Schedule explicitly includes mode 1 commitments for subsector (d) and provides as follows:

(1) Unbound except for the following:

- Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;
- Advisory, intermediation and other auxiliary financial services on all activities listed in subparagraphs (a) through (k), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

29. It is plain from the text that China has taken mode 1 commitments for “all payment and money transmission services, including credit, charge and debit cards...” The word “Unbound” is followed by the qualifying phrase “except for the following,” which in turn is further elaborated by two sentences that describe elements of the services within subsector (d) for which China has taken mode 1 commitments. A fundamental tenet of treaty interpretation requires that the qualifying phrase “except for the following” and the further specific elaboration following the word “Unbound” should be given meaning. China focuses solely on the term “Unbound.” If

²⁸ For example, “Financial institution” is defined in *Black’s Law Dictionary, 6th Edition*, West Publishing Co., St. Paul, MN (1990) as including “...an operator of a credit card system...” (Exhibit US-67).

China wished to in fact be fully “Unbound,” that is, not to have any commitments, it would have left the word “Unbound” unqualified. However, as the Schedule reflects, China did not do so.

30. In addition to the textual arguments, the commercial reality of how EPS for payment card transactions is supplied also supports the view that China made cross-border commitments. A supplier of EPS enables cardholders’ banks to pay merchants’ banks the amount they are owed. EPS suppliers supply, directly or indirectly, a system that typically includes the following:

- the processing infrastructure, network, and rules and procedures that facilitate, manage, and enable the transmission of transaction information and payments, and which provide system integrity, stability and financial risk reduction;
- the process and coordination of approving or declining a transaction, with approval generally permitting a purchase to be finalized or cash to be disbursed or exchanged;
- the delivery and transmission of transaction information among participating entities;
- the calculation, determination, and reporting of the net financial position of relevant institutions for all transactions that have been authorized in a given period; and
- the facilitation, management and/or other participation in the transfer of net payments owed among participating institutions.²⁹

31. Much of the activity described involves the transfer of financial information and financial data processing, and much of this occurs on a cross-border basis. Recognizing this commercial reality, it is not surprising that China made cross-border commitments for subsector (d) for EPS for payment card transactions to the extent that the activities entail the provision and transfer of financial information and financial data processing.

IV. THE SERVICE AT ISSUE IS NOT “SETTLEMENT AND CLEARING SERVICES FOR FINANCIAL ASSETS, INCLUDING SECURITIES, DERIVATIVE PRODUCTS, AND OTHER NEGOTIABLE INSTRUMENTS”

32. China asserts that it “made no market access or national treatment commitments in respect of item (xiv) in the *Annex*, ‘settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments’”³⁰ China then concludes that

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

³⁰ China’s First Written Submission, para. 79.

“the ordinary meaning of this subsector includes the provision of clearing and settlement services for retail payment instruments, including interbank payment cards.”³¹

33. China’s argument displays a fundamental misunderstanding of item (xiv), the service at issue in this dispute, and also cannot be reconciled with the plain language of subsector (d). The terms “clearing” and “settlement” are typically used to describe processes governing the transfer of value from one party to another. The value transferred could be a share of stock or a funds transfer payment for any purpose. In both cases, there is clearing and settlement of the value transferred from one party to another. Importantly, the terms “settlement” and “clearing” have meaning only in relation to the object of the transfer and the meaning of these terms must be interpreted in context.

34. In classifying EPS for payment card transactions under item (xiv), China ignores the ordinary meaning of the provision, the scope of which is limited to investment instruments, such as securities, derivatives, and other negotiable instruments. The context-specific nature of these terms is evident from the international institutional framework that establishes separate regimes for payment systems and securities settlement systems. China has cited the Committee on Payment and Settlement Systems (“CPSS”), a part of the Bank for International Settlements (“BIS”), as providing helpful authority in the areas at issue in this dispute. The CPSS is charged with developing the multilateral framework that governs payment systems, on the one hand, and securities settlement systems, on the other hand – two very distinct systems.

35. The CPSS provides guidance concerning payment systems (which include suppliers of EPS for payment card transactions) and securities settlement systems. The CPSS “glossary of terms used in payments and settlement systems” clearly illustrates that the terms “clearing” and “settlement” each have different meanings in the respective payment and securities contexts. The definitions relating to payments systems, including EPS for payment card transactions, are drawn from different source documents than those for securities settlement systems.

36. For example, the CPSS glossary defines the concepts of “clearance” and “settlement” with respect to securities settlement systems based on the definition contained in the

³¹ China’s First Written Submission, para. 84.

“Recommendations for securities settlement systems” and “Delivery versus payment in securities settlement systems.”³² On the other hand, the CPSS glossary uses “Payment systems in the Group of Ten countries” (the “Red Book”), “Payment systems in the European Union” (the “Blue Book”), and the “Report on electronic money” as the sources for defining “clearance” and “settlement” in the context of payments systems.³³ Further, the term “clearing institution” is specifically defined as being part of a payment system, not a securities settlement system.

37. With these distinctions in mind, it is clear that “settlement and clearing services for financial assets,” as explicitly qualified in item (xiv) of the GATS are clearing and settlement services for assets like derivative products, stocks, or bonds. In contrast, EPS for payment card transactions are used to clear and settle payments associated with the transfer of goods and services, not financial assets.

38. “Settlement and clearing services for financial assets” refers to the transmission by a clearinghouse of trade data between sellers and purchasers of securities, derivatives, and similar marketable instruments that generate a payment stream or evidence a right to payment. Such settlement and clearing services involve the process of passing information, payment, and title to the underlying financial instrument between the parties to a trade. The process is mechanical, occurs in its entirety after the underlying trade has been executed, and is designed to eliminate any discretionary or conditional component that would affect the validity of the underlying trade (and, in fact, often is irrevocable after submission to the clearinghouse).³⁴

39. The “authorization, clearing and settlement” of payment card transactions refers to the comprehensive financial service provided by the EPS supplier in connection with a payment card transaction to facilitate the transfer of monetary value between participating banks to discharge

³² In the context of securities settlement, the definitions of “clearance” and “settlement” in the CPSS Glossary (Exhibit US-68) are drawn from the “Delivery versus payment in securities settlement systems” (“DVP”), “Recommendations for securities settlement systems (“SSS”)” and “Disclosure framework for securities settlement systems,” (“SDF”).

³³ In the context of payment systems, the definitions of “clearance,” “clearing,” and “settlement” in the CPSS Glossary (Exhibit US-68) are drawn from “Payment systems in the European Union” (“Blue Book”), “Implications for central banks of the development of electronic money” (“EM-CPSS”), “Report on electronic money” (“EM-ECB”), “Security of electronic money” (“EM-Sec”), “Payment systems in the Group of Ten countries” (“Red Book”), and “Retail payments in selected countries: a comparative study” (“Retail”).

³⁴ See *Red Book: United States*, 448-49 (2003).

one bank's payment obligation to the other arising from an underlying purchase and sale of goods or services by the bank's customers. EPS associated with the exchange of a good or service is materially different than clearing and settlement services for financial assets, like securities and derivative products. Those types of assets are fixed assets that are capable of being repeatedly bought and sold and transferred from one individual to another without a change in the nature of the asset. This is not the case with specific electronic payment transactions, which deal with the transfer of funds from a specific customer to a specific merchant associated with the sale of a specific good or service at a specific point in time through the financial institutions representing the two parties. Each electronic payment is unique and cannot be re-sold or transferred to a third party as is the case with securities, derivatives and other negotiable instruments.

40. All of this is also entirely consistent with the explicit reference to "credit, charge and debit card" payment transactions in item (viii) ("all payment and money transmission services...") and the lack of any similar reference to card transactions in item (xiv).

V. CHINA'S MEASURES ESTABLISHING AND SUPPORTING CHINA UNIONPAY'S MONOPOLY ON THE SUPPLY OF EPS ARE INCONSISTENT WITH ARTICLE XVI OF THE GATS

41. As the United States has demonstrated, China made mode 1 and mode 3 market access commitments with respect to "All payment and money transmission services, including credit, charge and debit cards..." a category that encompasses EPS for payment card transactions. In accordance with its GATS Schedule, China committed not to maintain any limitations on the number of foreign suppliers of EPS, including through the imposition of a domestic monopoly.

42. The measures imposed by China on the supply of EPS are inconsistent with Article XVI of the GATS because they limit the number of suppliers of EPS for RMB-denominated transactions that are paid in RMB. China maintains numerous measures that ensure CUP's privileged position by explicitly and effectively limiting the number of foreign EPS suppliers. China's State Council and the People's Bank of China ("PBOC") approved and authorized only one entity, CUP, to process inter-bank card-based payment transactions.³⁵ CUP's Articles of

³⁵ The People's Bank of China, The Reply of the People's Bank of China on the Opening of China UnionPay Co., Ltd., Yin Fu No. [2002] 64, para.1.

Association, which had to be approved by the PBOC and the State Council in order for CUP to engage in business, explicitly sets forth some of CUP’s objectives, including:

- “To establish and operate a single nationwide inter-bank card information and switching network;”
- “to provide advanced electronic payment technologies and specialized services in connection with the inter-bank bank card information switching;”
- “to engage in bankcard technological innovation;”
- “to manage and operate the brand of ‘UnionPay’;” and
- “to formulate the code and technical standards for inter-bank card transactions, and to mediate and arbitrate any business disputes arising out of inter-bank transactions.”³⁶

43. Several of China’s measures have secured the realization of CUP’s stated objectives. The terms of certain measures are explicit in their requirements or prohibitions that establish CUP as the exclusive supplier of EPS for RMB denominated and paid domestic payment card transactions in China. Other measures establish requirements or prohibitions that effectively preclude foreign EPS suppliers from being in the market.

44. China has established and maintains a monopoly structure that ensures that CUP is the sole entity that can provide EPS for domestic purchases denominated and paid in RMB in China – the vast majority of all payment card transactions in China.³⁷ Chinese measures that create the monopoly structure and restrict the supply of EPS by foreign suppliers affect every element of the electronic payment system and all of the key participants (issuers, acquiring institutions, merchants, and EPS suppliers themselves) and card-based electronic payment transactions.³⁸ Again, and quite notably, China has chosen not to offer substantive rebuttal to U.S. claims related to the challenged measures or to the CUP monopoly.³⁹

³⁶ The Articles of Association of China UnionPay Co., Ltd., Article 12 (Exhibit US-20).

³⁷ See, e.g., U.S. First Written Submission, paras. 9-22, 37-72; U.S. July 29 Response, paras. 77-138.

³⁸ See, e.g., U.S. First Written Submission, paras. 9-22, 37-72; U.S. July 29 Response, paras. 77-138.

³⁹ China’s First Written Submission, para. 13 (“China will not devote a significant amount of attention in this submission to the challenged measures or the alleged ‘monopoly’ that is the foundation of the U.S. claims.”).

VI. CHINA’S MEASURES ESTABLISHING AND SUPPORTING CHINA UNIONPAY’S MONOPOLY ON THE SUPPLY OF EPS ARE INCONSISTENT WITH ARTICLE XVII OF THE GATS

45. Nor does China offer a substantive rebuttal to the U.S. national treatment claims. Rather, China simply contends that the U.S. national treatment claims “do nothing more than repeat the monopoly allegations that are the basis for its market access claims under Article XVI.”⁴⁰ China is wrong. The measures imposed by China affecting suppliers of EPS for payment card transactions are also inconsistent with Article XVII of the GATS.

China’s Measures Affect the Supply of EPS

46. As the United States has demonstrated, China maintains numerous measures affecting the supply of EPS under modes 1 and 3. The measures operate to prevent market access irrespective of the mode. As a threshold matter, the terms “affecting” and “supply of services” have been construed broadly by the Appellate Body.⁴¹

47. The measures at issue affect the supply of services in two principal ways. First, there are measures that impose a limitation such that CUP is the sole entity that can process certain transactions, such as domestic RMB transactions. This of course means that foreign suppliers of EPS are prevented from supplying the service at all. Second, there are measures that promote CUP’s position in the marketplace such as by imposing certain requirements on every key player in a card-based electronic payment transaction, including issuers (all cards issued in China for domestic RMB transactions must bear the CUP logo), merchants (all merchant card processing equipment and POS terminals must accept CUP cards), and acquiring institutions (which must post the CUP logo and accept CUP cards).

48. China’s measures ensure that CUP is the sole supplier of certain transactions such as interbank transaction and transactions denominated and paid in RMB.⁴² These provisions

⁴⁰ China’s First Written Submission, para. 14.

⁴¹ Appellate Body Report, *EC – Bananas III (AB)*, para. 220 (footnote omitted).

⁴² See Document No. 37 (Exhibit US-40); Document No. 57 (Exhibit US-41); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 16 (Exhibit US-44); Document No. 66 (Exhibit US-45); Document No. 8 (Exhibit US-46); Document No. 219 (Exhibit US-47); Document No. 254 (Exhibit US-48); Document No. 103 (Exhibit US-1); Document No. 153 (Exhibit US-49); Document No. 149 (Exhibit US-50); Document No. 53 (Exhibit US-51).

discriminate against foreign suppliers of EPS by either categorically precluding their participation in the market, and/or by adversely modifying the conditions of competition among the key participants – issuers, acquiring institutions, merchants, and the EPS supplier – in card-based electronic payment transactions.

49. China’s measures require that any payment cards used only for RMB purchases in China, as well as any dual currency cards issued in China, bear the CUP logo.⁴³ No other EPS provider is afforded such a privilege. Since any issuer of payment cards in China is required to have access to the CUP system (and to pay for that privilege), the issuer has no reason to seek an alternative supplier of EPS. The requirement also means that even if a card was issued for a foreign EPS supplier, CUP would also gain as the CUP logo would be on the card as well.

50. China’s measures require all automatic teller machines, merchant card processing equipment and point of sale terminals accept CUP cards.⁴⁴ No foreign EPS supplier is afforded a similar privilege. To the extent a foreign supplier of EPS was to create or secure access to a POS, then CUP would also gain as well because of this requirement.

51. China’s measures require that all acquiring institutions in China post the CUP logo and to accept all bankcards bearing that logo.⁴⁵ Again, no foreign EPS supplier is afforded a similar privilege.

52. These measures affect the supply of EPS within the meaning of Article XVII because they directly regulate the terms on which they may be provided in China.

Foreign Service Suppliers and CUP are “Like” Service Suppliers

53. It is important to note that the measures at issue provide disparate treatment solely according to the identity of the EPS supplier: CUP or not CUP. The EPS supplied is the same,

⁴³ See Document No. 37 (Exhibit US-40); Document No. 57 (Exhibit US-41); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 129 (Exhibit US-53); Document No. 219 (Exhibit US-47).

⁴⁴ See Document No. 37 (Exhibit US-40); Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43).

⁴⁵ See Document No. 94 (Exhibit US-42); Document No. 272 (Exhibit US-43); Document No. 153 (Exhibit US-49); Document No. 149 (Exhibit US-50).

and therefore is “like services.” In addition, the Panel in *China - Publications and Audiovisual Products* found that in these circumstances the requirement of “like service suppliers” is satisfied:

When origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the “like service suppliers” requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin.⁴⁶

54. Outside of China, with the ability to operate from its protected home market, CUP has become a significant and increasingly active participant in this competition and EPS suppliers describe CUP as a competitor.⁴⁷ CUP’s success in the global market for card-based electronic payment transactions reflects and is in accord with the “purpose of the company,” which is to foster “and promote the rapid development of China’s bank card industry.”⁴⁸ It is clear that CUP provides services for payment card transactions “like” those provided by foreign suppliers of EPS for payment card transactions and that the basis for the differential treatment by China in its measures is ultimately one of origin, and the “like service suppliers” requirement of Article XVII is therefore satisfied.

55. China’s own documents demonstrate China’s concern about the potential competition its domestic supplier of EPS would face from foreign EPS suppliers:

By 2006, the RMB bank card operation shall be opened to the outside world in an all-around manner, and accordingly the bank card industry of our country is facing a comparatively big challenge and we should make use of the limited time to enhance the international competitiveness of our industries.⁴⁹

56. It is unsurprising that the measures at issue here are meant to favor the domestic Chinese entity and accordingly discriminate on that basis.

57. The Panel in *China – Publications and Audiovisual Products* explained:
a measure that prohibits foreign service suppliers from supplying a range of

⁴⁶ Panel Report, *China - Publications and Audiovisual Products*, para. 7.975.

⁴⁷ See U.S. July 29 Response, paras. 55-61; see also, e.g., Visa 2008 IPO Prospectus, page 147 (Exhibit US-3); MasterCard 2009 Annual Report, page 20 (Exhibit US-5).

⁴⁸ The Articles of Association of China UnionPay Co., Ltd., Article 11 (Exhibit US-20).

⁴⁹ Document No. 103, Section III (Exhibit US-1).

services that may, subject to satisfying certain conditions, be supplied by the like domestic supplier cannot constitute treatment ‘no less favourable,’ since it deprives the foreign service supplier of any opportunity to compete with like domestic suppliers. In terms of paragraph 3 of Article XVII, such treatment modifies conditions of competition in the most radical way, by eliminating all competition by the foreign service supplier with respect to the service at issue.⁵⁰

VII. CONCLUSION

58. The United States respectfully requests that the Panel find that China’s measures are inconsistent with China’s obligations under Article XVI:1 and XVI:2(a) and Article XVII of the GATS. The United States thanks the Panel for its service in this dispute and looks forward to responding to any questions the Panel may have.

⁵⁰ Panel Report, *China - Publications and Audiovisual Products*, para 7.979.