

China – Certain Measures Affecting Electronic Payment Services

(DS413)

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

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I. INTRODUCTION

1. Mr. Chairman, and Members of the Panel, thank you for the opportunity to provide our opening statement. The United States looks forward to continuing our discussions with you over the next two days.

2. We have shown that China's measures prevent foreign suppliers from supplying the service that enables credit, charge, debit and other payment card transactions to occur in China for *all* transactions where the card is issued in China and used in China. These transactions constitute the overwhelming number of transactions in China, whether they be RMB-payment card transactions or transactions using foreign currency denominated payment cards issued in China. Instead, China has granted one Chinese domestic company, China UnionPay, Co. Ltd. ("CUP"), a monopoly to supply the service. China's written and oral submissions show nothing to the contrary. In fact, in its defense thus far, China has largely avoided substantive discussion of the challenged measures.

3. We have also shown that the service at issue – electronic payment services ("EPS") for payment card transactions – falls within subsector (d) of China's Schedule of Specific Commitments: "All payment and money transmission services, including credit, charge and debit cards...."¹ EPS is plainly one type of "all" such services.

4. China's principal defense is to argue that it has no relevant commitments. It insists that certain elements of EPS fall within a subsector that China did not include in its Schedule, namely, item (xiv) of the GATS Annex on Financial Services. However, item (xiv), "settlement and clearing services for financial assets, including securities, derivative products and other negotiable instruments," does not cover the service at issue here, based on the ordinary meaning of item (xiv) correctly interpreted in proper context.

5. China's defense requires it to disaggregate the single service that enables the hundreds of millions of payment card transactions to occur each day around the world into an arbitrary

¹ See U.S. July 29, 2011 Response, sections IV and VI; U.S. First Written Submission, paras. 10, 13-28; U.S. Answers to Panel's First Set of Written Questions, paras. 67-80, 87-88, 96-111, 115-126, 137-143; U.S. Second Written Submission, paras. 11-41.

assortment of activities and to classify each separately.² The evidence however establishes that the service at issue is supplied and consumed as an integrated service and falls within subsector (d) of China Schedule.³ China’s approach to classification – that a service must first be disaggregated into subcomponents and then each subcomponent separately classified as a distinct service – would render Members’ concessions meaningless for a wide range of services.

6. China next turns to its mode 1 (cross-border) and mode 3 (commercial presence) market access commitments with respect to subsector (d) in an attempt to limit the scope of the services to which subsector (d) applies. China erroneously conflates its analysis of commitments *within* a particular sector, on the one hand, with an analysis of *where* the service is classified, on the other. Determining in which particular subsector a service should be classified is the first step in the analysis. However, this is a different exercise from the analysis that follows, which examines the commitments undertaken with respect to the service that has been classified in that subsector. While a WTO Member may use a sectoral description to limit the scope of the services covered by a given sector or subsector, limitations inscribed in the market access and national treatment columns cannot change the scope of the sector or subsector.

7. China’s arguments run contrary to this basic understanding of the legal relationship between the various columns in its Schedule. The flaws in China’s approach are most clearly evident from its arguments that the United States has “eviscerated” its own interpretation of subsector (d).⁴ China’s newly coined “embedded services” mantra similarly rests on a wholly flawed understanding of classification of services.⁵ Each of these lines of argumentation fails to recognize the distinction between the classification of a service into a particular subsector and

² See, e.g., China’s Rebuttal Submission, paras. 34-41.

³ See U.S. July 29, 2011 Response, sections IV and VI; U.S. First Written Submission, paras. 10, 13-28; U.S. Answers to Panel’s First Set of Written Questions, paras. 67-80, 87-88, 96-111, 115-126, 137-143; U.S. Second Written Submission, paras. 11-41.

⁴ See China’s Rebuttal Submission, paras. 34-41.

⁵ See China’s Rebuttal Submission, paras. 42-56.

the evaluation of specific commitments based on that classification, which is the approach followed by the United States.⁶

8. Operating from its flawed analytical framework, China uses colorful rhetoric regarding “parallel universes” or what it sees as the “true agenda” of the United States while avoiding the explicit text of its commitments.⁷ Contrary to what China suggests, the U.S. position has been guided by the language and structure of China’s Schedule. To the extent that China is having difficulty reconciling its position regarding its obligations with the text of its Schedule – and its arguments show this to be the case – this is not the fault of the United States; rather it is a reflection of the fact that China’s own Schedule does not support its position. Nowhere is this more apparent than when China requests the Panel to undertake a “thought exercise” to disregard the actual text and to “imagine” that China’s mode 1 market access entry said something different, and then to ascribe to the actual text the meaning of China’s imaginary text.⁸ Imaginary text provides no basis for treaty interpretation in WTO dispute settlement.

9. Finally, it also bears repeating that China had the opportunity to respond to a direct question from the Panel regarding the openness of its market for the service at issue and to substantiate the assertions it made during the first panel meeting.⁹ China declined to answer the Panel’s question.¹⁰ Accordingly, there is absolutely no basis for China’s assertions as to the openness of China’s market or that foreign EPS suppliers face no obstacles in China.

⁶ See U.S. July 29, 2011 Response, sections IV and VI; U.S. First Written Submission, paras. 10, 13-28; U.S. Answers to Panel’s First Set of Written Questions, paras. 67-80, 87-88, 96-111, 115-126, 137-143; U.S. Second Written Submission, paras. 11-41.

⁷ China’s Rebuttal Submission, paras. 41-58.

⁸ China’s Answers to Panel Questions, note 52.

⁹ Questions from the Panel Following the First Substantive Meeting, Question No. 22(b).

¹⁰ China’s Answers to Panel Questions, paras. 15-16.

II. EPS FOR PAYMENT CARD TRANSACTIONS IS A SINGLE, INTEGRATED SERVICE THAT FALLS WITHIN THE ORDINARY MEANING OF “ALL PAYMENT AND MONEY TRANSMISSION SERVICES, INCLUDING CREDIT, CHARGE AND DEBIT CARDS...” (SUBSECTOR (D))

10. The United States has demonstrated that EPS for payment card transactions is a single, integrated service that is properly classified under subsector (d) in China’s Schedule.¹¹ EPS is supplied as coherent whole, and this service enables cardholders’ banks to pay merchants’ banks the amount they are owed. EPS suppliers provide an efficient, timely and reliable means to facilitate the transmission of funds from the holders of payment cards who purchase goods or services to the individuals or businesses that supply them. The network, rules and procedures, and operating system provided by an EPS supplier enable payment card transactions to occur. EPS suppliers receive, check and transmit information that the parties need to conduct the transactions, and enable the transmission of funds between participating entities. Each component of EPS is critical to effectuate payment card transactions. The customers of EPS suppliers – the entities that are participating in the payment card transactions – demand and rely on EPS as a complete, integrated, and unified service.

11. The clear language of subsector (d) compels the conclusion that EPS falls within the ordinary meaning of “payment and money transmission services” as one type of “all” such services. The illustrative list that explicitly provides that the services in subsector (d) “include[s] credit, charge and debit cards” underscores that EPS is integral to the processing of credit, charge, debit and other payment card transactions.

12. China continues to point to the terms “manage” and “facilitate” – descriptive words used by the United States in explaining the service – to argue that EPS for payment card transactions somehow does not qualify as a service falling within “all” payment and money transmission services.¹² This argument is without merit. Descriptions of EPS as “managing,” “facilitating,” or “enabling” the processing of payment card transactions capture the relationship between EPS

¹¹ See U.S. July 29, 2011 Response, sections IV and VI; U.S. First Written Submission, paras. 10, 13-28; U.S. Answers to Panel’s First Set of Written Questions, paras. 67-80, 87-88, 96-111, 115-126, 137-143; U.S. Second Written Submission, paras. 11-41.

¹² China’s Rebuttal Submission, paras. 34-41.

and payment card transactions. EPS suppliers “manage,” “facilitate,” and “enable” the processing of payment card transactions – which, again, is one type of payment service falling within “*all* payment and money transmission services” in subsector (d) of China’s Schedule.

13. China also misrepresents the U.S. position. Invoking a theory it styles as “embedded services,” China argues that the classification of EPS for payment card transactions into subsector (d) somehow violates “the principle of mutual exclusivity.”¹³ The United States has not advanced a theory of “embedded services” – whatever meaning that phrase may have. The fact that an individual element of a single, integrated service may, in a different context, also constitute a separate service in itself does not have any impact on the classification of a service as a integrated service falling within a single subsector.

14. The absurdity of China’s position is revealed by a simple example. The harmonized tariff nomenclature of the World Customs Organization includes tariff lines for assembled passenger cars, as well as various separate and distinct tariff lines for the individual automotive components that comprise the car (for example, the chassis, wheels, doors, bumpers, seats, engine, pistons, filters, belts). When a fully assembled car is imported into a country, would anyone seriously argue that what has been imported should be classified not as a car, but rather treated as separate, independent, and unrelated parts, with each part being assessed its own import duty? Of course not. Yet, that is precisely the result that China argues for here with its theories of disaggregation and “embedded services.”¹⁴ Indeed, China’s position – that a service must first be disaggregated into subcomponents and then each subcomponent separately classified as a distinct service – would render Members’ concessions meaningless for a wide range of services.

15. China’s arguments are even more difficult to sustain when viewed against the breadth of subsector (d) covering “all payment and money transmission services, including credit, charge, and debit cards.”¹⁵ And when asked by the Panel to identify where the remaining elements of

¹³ China’s Rebuttal Submission, paras. 42-49.

¹⁴ China’s First Written Submission, paras. 90-122.

¹⁵ China’s First Written Submission, paras. 90-122.

EPS should be classified, China declined even to provide a response to the Panel’s question.¹⁶ This is not surprising. Without the supply of EPS, payment card transactions could not occur. Without the entire system supplied by the EPS supplier, no issuer would be able individually to offer a card that is as widely accepted by merchants, and no acquirer could offer merchants a service that can deliver such a large number of cardholders.¹⁷ All of these considerations support the conclusion that EPS for payment card transactions is a single service, that it is intrinsically linked to payment card transactions and that for purposes of classification it should be considered as a whole.

16. Moreover, China asserts that subsector (d) only includes the issuance of payment cards and acquiring services. Clearly, these cannot exhaust the scope of subsector (d). The card alone is not a “payment service.” There is no “payment” in relation to the card alone without the EPS, which is necessary for any card-based payment transaction. Similarly, there is no “payment” by virtue of the merchant’s relationship with a bank without the EPS, again, which is necessary for any card-based payment transaction. Nor is EPS an input service for either the issuance of payment cards or acquiring services. China also points to the 2001 Scheduling Guidelines and argues that the United States is “trying to imply a right for an altogether different service supplier to supply an uncommitted input service to the supplier of the committed service.”¹⁸ EPS for payment card transactions is a distinct service from the issuance of payment cards and acquiring services and China’s reliance on the 2001 Scheduling Guidelines is misplaced.

17. Finally, China invokes “object and purpose” in support of its position.¹⁹ China’s arguments, however, run directly counter to the object and purpose of the *General Agreement on Trade in Services* (the “GATS”). Indeed, the “progressive liberalization” called for in the preamble of the GATS could never be achieved where, as under China’s theory, a recognized, integrated service that is supplied and consumed as such, could not be classified in one

¹⁶ See China’s Answers to Panel’s Questions, paras. 20-25.

¹⁷ See U.S. July 29, 2011 Response, section IV; U.S. First Written Submission, para. 10; U.S. Answers to Panel’s First Set of Written Questions, paras. 67-80, 87-88, 96-111, 115-126, 137-143; U.S. Second Written Submission, paras. 11-41.

¹⁸ China’s Rebuttal Submission, paras. 50-53.

¹⁹ See China’s Rebuttal Submission, paras. 27-29.

subsector. Moreover, regarding China's argument that the object and purpose of the GATS calls for greater "transparency," China's own theory would render Members' services schedules indecipherable and impossible to reconcile with the commercial reality of the services they are supposed to reflect. How could transparency possibly be achieved where a Member can purport to liberalize a particular subsector through specific commitments but then dismantle an integrated service that would otherwise fall within that subsector and argue that various pieces constitute separate "services" for which that Member has undertaken no commitments?

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

18. As the foregoing discussion makes clear, China's arguments regarding subsector (d) are anchored to a flawed premise, cannot be reconciled with the text of its commitments, and are contrary to how the service at issue operates in practice. Moreover, China's position hinges on an exceedingly narrow reading of subsector (d). China's interpretation fails to give meaning to the word "all" in the sectoral description of "all payment and money transmission services, including credit, charge, and debit cards..." At the same time that it reads out the word "all" and pushes for an extremely narrow reading of subsector (d), however, China advocates an overly broad interpretation of "settlement and clearing services for financial assets" that is inconsistent with its proper context.

19. China continues to assert that certain elements of EPS for payment card transactions constitute separate services that are classified in a sector, item (xiv) of the GATS Annex on Financial Services, for which China has made no market access or national treatment commitments.²⁰ China's overly broad reading is also combined with an incorrect understanding of the services in item (xiv) that fails to account for fundamental, recognized differences in the operation and risk profile of financial services under item (xiv) and services related to retail payment processing, such as EPS for payment card transactions.

²⁰ See China's Rebuttal Submission, paras. 2-33; China's First Written Submission, paras. 79-89.

20. China also erroneously focuses exclusively on the term “financial asset” and interprets that term completely divorced from its context. Whether focusing on the individual words “financial” or “asset,” or on the term “financial asset,” China’s approach is flawed and fails to analyze words in their proper context.²¹ The customary rule of interpretation reflected in Article 31(1) of the *Vienna Convention on the Law of Treaties* establishes that the “ordinary meaning” cannot be analyzed independently from the other interpretive elements described in Article 31, including “context.”²²

21. The ordinary meaning of the services described in item (xiv) is evidenced by the words, the illustrative list in item (xiv), the additional context provided by paragraph 5 of the Annex on Financial Services, and other sources, including the United Nations, the OECD, the World Bank, International Monetary Fund (“IMF”), Bank for International Settlements (“BIS”), and BIS Committee on Payment and Settlement Systems (“CPSS”), which all confirm that the ordinary meaning of item (xiv) does not include EPS for payment card transactions. Moreover, even if one were to erroneously attempt to disaggregate the component parts of EPS, no element of EPS falls within item (xiv). In short, the same rules of treaty interpretation that compel the conclusion that EPS for payment card transactions fall within subsector (d) also compel the conclusion that EPS for payment card transactions do not fall within item (xiv).

22. The ordinary meaning of the term “financial assets” that China has put forward is incorrect and contradicted by several sources. The United States has cited to the IMF’s explanation that “a financial asset is negotiable if it is actively or inactively traded in a secondary market.”²³ In addition, the United States identified the Uniform Commercial Code (“UCC”) definition of “financial asset,” which is in accord with the IMF’s explanation.²⁴ Similarly, the BIS CPSS “glossary of terms used in payments and settlement systems” clearly illustrates that

²¹ China’s Rebuttal Submission, para. 5.

²² Draft Articles on the Law of Treaties with Commentaries (1966), page 219 (Exhibit US-77); *Vienna Convention on the Law of Treaties*, Art. 31(1) (a treaty shall be interpreted “in good faith 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.”).

²³ International Monetary Fund, Monetary and Financial Statistics Compilation Guide, section 4.14, page 70 (Exhibit US-80).

²⁴ UCC, Article 8, Section 8-102(9) (Exhibit US-75). *See also* U.S. Answers to Panel Questions, note 1.

the terms “clearing” and “settlement” each have different meanings in the respective payment and securities contexts, confirming that context is crucial and all the terms in item (xiv) must be taken into account in determining the ordinary meaning of “settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments.”

23. The BIS CPSS glossary definitions relating to payments systems, including EPS for payment card transactions, are drawn from different source documents than those for securities settlement systems.²⁵ China’s interpretation of “financial asset” fails to account for the fact that “settlement and clearing services for financial assets” is a substantially different financial service than EPS for payment card transactions, which is a type of retail payment service. The CPSS has explained that “[r]etail payments are generally classified as cash payments or non-cash payments,” which are subclassified into “cheque payments, direct funds transfers and card payments.”²⁶ The United States provided a detailed explanation of the many practical differences between the systems used to settle and clear investment instruments of the kind referenced in item (xiv) and the systems used to settle and clear retail payment instruments, like payment cards.²⁷

24. Because credit card receivables can be used to create asset-backed securities, China also argues that there is “no distinction whatsoever between the issuing bank’s claim against the cardholder and the acquiring bank’s claim against the issuing bank.”²⁸ China is wrong here too. The assets that are used to create credit card asset-backed securities are *not* the obligations between issuing and acquiring banks that are processed by EPS suppliers on a daily basis. The relevant assets are the loans that are extended from the issuing bank to the cardholder. EPS suppliers are not involved in the processing of such loans.

25. For example, the United States would refer the Panel to Exhibit US-103, an excerpt from a paper prepared in connection with a workshop held by the Philadelphia Federal Reserve Bank

²⁵ See U.S. Second Written Submission, paras. 42-93.

²⁶ Bank for International Settlements, Committee on Payment and Settlement Systems, Retail payments in selected countries: A comparative study, September 1999, page 3 (“BIS CPSS Retail Payments I”) (Exhibit US-81).

²⁷ U.S. Second Written Submission, paras. 48-74.

²⁸ China’s Rebuttal Submission, para. 11.

in 2002, entitled “An Overview of Credit Card Asset-Backed Securities.” Under the heading “The Process of Securitizing Credit Card Assets,” the paper provides the following explanation:

The process of securitizing credit card receivables is very similar to that of securitizing mortgages and other loan obligations. A card issuer sells a group of receivables to a trust. The trust then issues securities backed by those receivables. To illustrate, consider a card issuer that makes credit card loans to a group of 100 customers. Each customer maintains a card balance of \$1000. The card issuer decides to securitize these customers’ receivables by grouping their balances together and creating a \$100,000 “package.” This package is sold to a trust, or “special purpose entity,” created solely to buy the loans from the bank. Once the package is in the trust, the trustee creates bonds (i.e., securities) that are backed by the \$100,000 of credit card loans and sold to investors in blocks.²⁹

26. China cites the Basel Committee on Banking Supervision, Report on Special Purpose Entities (Exhibit CHI-76) (“Basel Report”), for the proposition that credit card receivables are financial assets.³⁰ However, the Basel Report makes it clear that the “assets” are not the obligations between the issuing and acquiring banks, but instead are receivables that generate income or cash flow (that is, the loan). Thus, this source actually supports the proposition that the “financial assets” are *the loans between the issuing bank and the cardholders*.

27. China quotes the Basel Report for the proposition that “Securitisation is a structured finance process that consists of the pooling and repackaging of cash flow producing financial assets into securities that are sold to investors. These securities are termed ‘asset-backed securities.’”³¹ However, as this quote makes clear, the relevant receivable standing behind an asset-backed security must be a “*cash flow producing financial asset*.” The cash flow producing asset is the loan or extension of credit by the bank to the consumer/cardholder. Page 1 of the Basel Report for which China provides excerpts in Exhibit CHI-76 states:

Asset securitisations are usually undertaken by banks and finance companies, and typically involve issuing bonds that are backed by the cashflows of income-

²⁹ Exhibit US-103, page 3.

³⁰ Exhibit CHI-76, pages 47-48.

³¹ China’s Rebuttal Submission, note 10.

generating assets (ranging from credit card receivables to residential mortgage loans).³²

28. Again, it is the loan between the issuer and cardholder that generates income, not the obligation as between the issuer and acquirer. Thus, the authority that China cites provides further evidence that the term “financial assets” refers to receivables that generate income.

29. The United States has provided extensive evidence demonstrating that retail receipts, such as a claim on a payment card, are not of the same type as the items included in the illustrative list in item (xiv).³³ In this regard, the evidence is clear that payment cards transactions are not like “securities, derivative products, or other negotiable instruments.”³⁴

30. China’s argument that clearing and settlement services for certain types of retail payment instruments such as checks are covered by item (xiv)³⁵ is also flawed. Item (xiv) covers only those types of “negotiable instruments” that qualify as “financial assets,” and instruments such as personal checks do not fall within that category. The System of National Accounts (SNA), an international standard system of national accounts, prepared jointly by the United Nations, the OECD, the World Bank, the IMF, and the European Commission, distinguishes between financial claims that are negotiable and those that are not, and according to the SNA the term “negotiable instrument” does not include retail payment instruments such as checks.³⁶

31. Finally, paragraph 5(a) of the Annex provides additional context that supports the U.S. interpretation.³⁷ The terms “financial assets” and “negotiable instruments” also appear item (x) of the Annex, which covers, “Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise.” As used in item (x), these terms refer

³² Exhibit US-104.

³³ See U.S. Second Written Submission, paras. 42-102; U.S. Answers to the Panel’s First Set of Written Questions, 67-80.

³⁴ See U.S. Second Written Submission, paras. 75-93; U.S. Answers to the Panel’s First Set of Written Questions, 67-80.

³⁵ China’s Answers to Panel’s Questions, para. 50.

³⁶ See U.S. Second Written Submission, paras. 88-93; U.S. Answers to First Set of Panel’s Written Questions, para. 74; Exhibit US-70.

³⁷ See U.S. Second Written Submission, paras. 94-102.

to tradeable investment assets, rather than “interbank claims for payment.” Thus, the context for item (xiv) indicates that “negotiable instruments” and “financial assets” are not retail payment vehicles like payment cards. Additional context is item (viii) of the Annex, which contains the most specific and accurate description of the service for purposes of classifying EPS for payment card transactions.

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

32. Turning to China’s commitments, it is plain from the text that China has taken mode 1 market access commitments for “all payment and money transmission services, including credit, charge and debit cards...” The word “Unbound” in the market access column of its Schedule is qualified. The phrase “except for the following” is further elaborated by two sentences that describe elements of the service within subsector (d) for which China has taken mode 1 commitments. The qualifying phrase and specific elaboration following the word “Unbound” must be given meaning. For its part, in response to the Panel’s questions, the United States prepared a chart in which it identified several aspects of EPS that are covered by the mode 1 market access commitment undertaken by China.³⁸

33. Meanwhile, China’s reaction to the U.S. response underscores its attempt to conflate the classification of a service in a particular subsector, on the one hand, with the interpretation of market access limitations, on the other. China states that “the United States needs the service at issue to be in two places at once: in subsector (d) and in subsectors (k) or (l).”³⁹ Sequence is critical to a proper analysis. Step one is to classify the service: the service at issue is a single, integrated service that falls within subsector (d). Step two is to discern China’s commitments for subsector (d), such as China’s mode 1 commitments. This is a separate and distinct exercise from step one. Yet China continues to muddle the discussion of these separate steps.

34. China’s arguments fail to give any meaning to the extensive language qualifying the term “Unbound” in its mode 1 commitments. They essentially reduce to the single point that all of the

³⁸ U.S. Answers to the Panel’s First Set of Written Questions, paras. 121-126.

³⁹ China’s Rebuttal Submission, para. 59.

extensive language qualifying the term “Unbound” in its mode 1 market access commitments was provided simply to confirm language already existing elsewhere in China’s Schedule. According to China the additional wording should be given no meaning whatsoever.⁴⁰ If China wished to be fully “Unbound,” that is, not to have *any* mode 1 commitments, it should not have qualified its commitments; rather it should have left the word “Unbound” unqualified. However, as its Schedule reflects, China did not do so. It is not credible to argue that the additional language is merely for greater certainty to repeat China’s commitments in subsectors (k) and (l). Such an argument fails to give meaning to this treaty language. Perhaps knowing this, China implores the Panel to “imagine” instead different treaty language rather than the actual words in its Schedule.⁴¹

35. The services defined by the sector and subsector descriptions cannot be altered by the commitments made in the market access or national treatment columns. While a WTO Member may define the scope of services covered by its commitments, limitations inscribed in the market access and national treatment columns cannot change the scope of the sector description itself.

36. Elements of CUP’s own activities are described in terms similar to the “excepted” elements that are set out in China’s mode 1 market access commitments, and China’s regulatory system similarly describes a primary activity of CUP as exchanging information among financial institutions.⁴² Moreover, the concept that a service may include elements of “provision and transfer of financial information, and financial data processing” was recognized, for example, in paragraph 8 of the Uruguay Round Understanding on Commitments in Financial Services. The provision and transfer of financial information and data processing is central to the supply of many different financial services, and, according to the Understanding, signatory WTO Members cannot frustrate their commitments by, for example, blocking the ability to communicate and process information.

⁴⁰ See, e.g., China’s Rebuttal Submission, para. 75.

⁴¹ China’s Answers to Panel Questions, note 52.

⁴² U.S. Second Written Submission, paras. 109-113.

37. Now let's turn to China's mode 3 market access commitments for subsector (d). The presence of the term "financial institution" in China's schedule does not create a separate and independent limitation.⁴³ The Schedule states that "[c]riteria for authorization to deal in China's financial services sector are solely prudential." There is nothing in China's Schedule that indicates it may condition the supply of a service on the criteria listed in the market access commitment column and also require that another Member's supplier meet additional (and unspecified) criteria to be recognized as a "foreign financial institution." Such a limitation would have needed to be imposed explicitly in its Schedule, and China did not do so. Finally, even if it were the case that the term "financial institution" somehow served as a limitation in China's Schedule, the definition of "financial institution" offered by China is too narrow. Many definitions are much broader, and some explicitly include "an operator of a credit card system."⁴⁴

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

38. China's measures limit the number of suppliers of EPS. The United States identified 19 instruments in the U.S. panel request and is challenging each of them independently. The United States has also identified six separate categories of requirements that constitute six separate measures that are implemented through the operation of several instruments operating in conjunction. These are:

- Requirements that mandate the use of CUP and/or establish CUP as the sole supplier of EPS.⁴⁵
- Requirements that RMB denominated payment cards issued in China bear the CUP logo.⁴⁶

⁴³ U.S. Second Written Submission, paras. 116-129.

⁴⁴ U.S. Second Written Submission, paras. 124-129.

⁴⁵ See U.S. July 29, 2011 Response, sections V.B, V.C, V.D; U.S. First Written Submission, paras. 12, 31, 37-72; 79-92; U.S. Answers to Panel Questions, paras.13-16, 23-36, 62-66; U.S. Second Written Submission, sections V.B.1, and VI.B.

⁴⁶ See U.S. July 29, 2011 Response, sections V.B, V.C, V.E; U.S. First Written Submission, paras. 12, 31, 37-72; 93-101; U.S. Answers to Panel Questions, paras.13-15, 17, 23-36, 62-66; U.S. Second Written Submission, sections V.B.2, and VI.B.

- Requirements that all automated teller machines (“ATM”), merchant card processing equipment, and POS terminals in China accept CUP cards.⁴⁷
- Requirements on acquiring institutions to post the CUP logo and be capable of accepting all payment cards bearing the CUP logo.⁴⁸
- Broad prohibitions on the use of non-CUP cards.⁴⁹
- Requirements pertaining to card-based electronic transactions in China, Macao and Hong Kong.⁵⁰

39. Notwithstanding China’s professed confusion with respect to the “measures” and “instruments” at issue, paragraph 85 in China’s rebuttal submission makes clear that China understands precisely the relationship between the instruments and measures as challenged by the United States. Moreover, these six measures just described remain inconsistent with China’s obligations despite the two instruments China states were repealed (Document Nos. 94 and 272) and the one instrument China claims to have replaced (Document No. 66 replaced by Document No. 53)).

40. Nor has the United States sought to expand the scope of the dispute as China contends with respect to closed-loop or three-party model transactions and the services supplied by merchant and issuer processors.⁵¹ In this regard, from the outset the United States has explained that the service supplied for payment card transactions in a three-party model falls within subsector (d).⁵² Three-party transactions include (1) those EPS systems that also perform the

⁴⁷ See U.S. July 29, 2011 Response, sections V.B, V.C, V.F; U.S. First Written Submission, paras. 12, 31, 37-72; 102-110; U.S. Answers to Panel Questions, paras.13-15, 18, 23-36, 62-66; U.S. Second Written Submission, sections V.B.3, and VI.B.

⁴⁸ See U.S. July 29, 2011 Response, sections V.B, V.C, V.G; U.S. First Written Submission, paras. 12, 31, 37-72; 111-115; U.S. Answers to Panel Questions, paras.13-15, 19, 23-36, 62-66; U.S. Second Written Submission, sections V.B.4, and VI.B.

⁴⁹ See U.S. July 29, 2011 Response, sections V.B, V.C, V.H; U.S. First Written Submission, paras. 12, 31, 37-72; 79-117; U.S. Answers to Panel Questions, paras.13-15, 20, 23-36, 62-66; U.S. Second Written Submission, sections V.B.5, and VI.B.

⁵⁰ See U.S. July 29, 2011 Response, sections V.B, V.C, V.I; First Written Submission, paras. 12, 31, 37-72; 79-117; U.S. Answers to Panel Questions, paras.13-15, 21, 23-36, 44-51, 62-66; U.S. Second Written Submission, sections V.B.6, and VI.B.

⁵¹ China’s Rebuttal Submission, paras. 103-114.

⁵² See, e.g., U.S. July 29, 2011 Response, para. 41.

functions of issuer and acquirer internally (*e.g.*, American Express) and (2) “on-us” transactions occurring in a four-party system (*e.g.*, Visa and MasterCard) where the issuer and the acquirer are the same entity. In these three-party transactions, the role of the EPS provider may vary by circumstance, but it is still EPS that is being provided.⁵³ In some markets and systems, three-party transactions are processed over the EPS supplier’s network in the same manner as transactions involving a different issuer and acquirer. For example, in the United States, so-called three-party “on us” Visa transactions are processed over VisaNet.

41. In addition, the service supplied by issuer processors and merchant processors also falls within subsector (d). Issuer and merchant processors provide a transaction processing service to issuers and acquirers that enables or helps issuers and acquirers utilize an EPS supplier and participate in an EPS network. Issuers and acquirers are the customers of a service supplied by these third-party processors. Third-party processors may provide network gateway access to the networks of EPS suppliers, fraud detection and reporting, and cardholder or customer support. Much of this requires a direct connection to the network of an EPS supplier.

VI. CHINA’S MEASURES ARE INCONSISTENT WITH ARTICLE XVII OF THE GATS

42. The measures at issue affect the supply of services and accord less favorable treatment to foreign suppliers of EPS.⁵⁴ Some measures 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. Other measures promote CUP’s position in the marketplace such as by imposing certain requirements on every key player in a card-based electronic payment transaction. The United States has explained how China’s measures affect every aspect of a card-based electronic payment transaction and the key players, including issuers (all cards issued in China for domestic RMB transactions must bear the

⁵³ See, *e.g.*, U.S. Panel Request, page 1 and note 1; U.S. July 29, 2011 Response, para. 41; *see also* U.S. July 29, 2011 Response, paras. 38-54.

⁵⁴ U.S. First Written Submission, section VII; U.S. Second Written Submission, section VI.

CUP logo), merchants (all merchant card processing equipment and POS terminals must accept CUP cards), and acquiring institutions (which must post CUP logo and accept CUP cards).⁵⁵

43. China’s national treatment arguments rest on an incorrect understanding of the relationship between GATS Article XVI and GATS Article XVII and the operation and effect of GATS Article XX:2. China asserts that “[n]or do the parties dispute that the types of measures listed under Article XVI:2 can be either discriminatory or non-discriminatory.”⁵⁶ To the extent that China’s statement is intended to mean that Article XVI:2 disciplines a facially discriminatory quantitative measure, this is incorrect, and it also misses the point. The only type of measure described in Article XVI:2 that appears inherently discriminatory is in subparagraph (f), dealing with “limitations on the participation of foreign capital.”

44. The Article XX:2 rule for scheduling measures that violate market access and national treatment in the market access column does not mean that Article XVI:2 disciplines both the discriminatory and non-discriminatory aspects of quantitative measures as China contends.⁵⁷ Article XX:2 merely recognizes that a single measure may have elements that violate both market access and national treatment obligations. China’s reference to Article XVI:2(f) misses the point.⁵⁸ The measure described in subparagraph (f) is discriminatory, but it is the only listed type of measure that is so. The fact that this particular type of measure also operates in a discriminatory manner does not mean that Article XVI:2 should be read generally as addressing discrimination. Rather, it is consistent with the rest of Article XVI:2 to understand that Article XVI:2(f) addresses the market access restriction resulting from this type of measure, and to understand the other paragraphs as covering the specific measures they describe.

VII. CONCLUSION

45. 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

⁵⁵ U.S. First Written Submission, section VII; U.S. Second Written Submission, section VI.

⁵⁶ China’s Rebuttal Submission, para. 116.

⁵⁷ China’s Rebuttal Submission, para. 116.

⁵⁸ China’s Rebuttal Submission, para. 118.

GATS. The United States again thanks the Panel for its continued service in this dispute and looks forward to responding to any questions the Panel may have.