

China – Certain Measures Affecting Electronic Payment Services

(DS413)

**EXECUTIVE SUMMARY OF THE
FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA**

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I. INTRODUCTION

1. Operating from a protected home market monopoly position, China UnionPay, Co. Ltd. (“CUP”) has thrived since its creation nearly a decade ago. With competitors shut out of China, CUP has solidified its complete domestic market dominance. CUP has also experienced explosive growth abroad. While serving as China’s domestic champion, CUP, has been expanding its payment card issuance and acceptance internationally and enjoys full and unencumbered access to the domestic payment card market in a growing number of foreign countries in which it has chosen to operate (now numbering more than 110).

2. Back in 2001, China made important commitments with respect to electronic payment services (“EPS”) for payment card transactions when it joined the World Trade Organization (“WTO”). EPS enable, facilitate, and manage the transfer of funds between cardholders and merchants and are essential to processing the several hundred million card-based electronic payment transactions that occur daily around the world. In the financial services sector, as set out in China’s Schedule of Specific Commitments on Services, China undertook to provide by December 2006 both market access and national treatment for “all payment and money transmission services, including credit, charge and debit cards.”

3. Yet, at the same time as CUP expands aggressively abroad, China maintains a government-mandated domestic monopoly, enabling only CUP to provide these services in China. China refuses to allow foreign suppliers of EPS to process payment card transactions in China denominated and paid in China’s domestic currency, renminbi (“RMB”). China has also enacted and maintains numerous barriers to prevent foreign suppliers of EPS from establishing the processing infrastructure, network, rules, and procedures that are essential to the processing of card-based electronic payment transactions in China. In addition, China maintains measures that also impact the other key entities in payment card transactions, including the institutions that issue payment cards (“issuing institutions”), acquiring institutions (those that seek to “acquire” transactions using payment cards and that have relationships with merchants), and merchants in terms of requirements pertaining to payment card-processing equipment and point-of-sale (“POS”) terminals.

4. These measures have entrenched CUP’s monopoly position in China and accord less favorable treatment to foreign suppliers of EPS.

II. PROCEDURAL HISTORY

5. On September 15, 2010, the United States requested consultations with China pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), and Article XXII of the *General Agreement on Trade in Services* (“GATS”) with respect to certain restrictions and requirements maintained by China pertaining to electronic payment services for payment card transactions and the suppliers of those services. The United States and China held consultations on October 27 and 28, 2010, but those consultations did not resolve the dispute. The United States submitted its request for the establishment of a panel on February 11, 2011, the Dispute Settlement Body (“DSB”) established a panel on March 25, 2011, and the Panel was composed on July 4, 2011.

6. On July 5, 2011 China filed a request for a preliminary ruling on the consistency of the U.S. panel request with DSU Article 6.2. On July 29, 2011, the United States filed a submission in response to China's request for a preliminary ruling ("U.S. July 29, 2011 Response"). (The U.S. July 29, 2011 Response, in its entirety and including all of the exhibits attached thereto, was subsequently incorporated by express reference into the U.S. First Written Submission, dated September 13, 2011.) On September 7, 2011, the Panel issued its preliminary ruling in which it rejected all of China's claims that the U.S. panel request failed to satisfy the requirements of Article 6.2 of the DSU.

III. FACTUAL BACKGROUND

A. Electronic Payment Services for Payment Card Transactions

7. Card-based electronic payments take many forms, including credit cards, charge cards, debit cards, deferred debit cards, ATM cards, prepaid cards, private label cards and other types of general-purpose and limited-use payment cards. A supplier of EPS enables cardholders' banks to pay merchants' banks the amount they are owed. Suppliers of electronic payment services 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.

8. Electronic payment services 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 that are part of the EPS architecture that allow payment card transactions to be processed to enable merchants to be paid promptly the amounts they are owed, and to ensure that customers pay what they owe. EPS suppliers receive, check and transmit the information that the parties need to conduct the transactions, and manage, facilitate, and enable the transmission of funds between participating entities. The rules and procedures established by the EPS supplier give the payment system stability and integrity, and enable it to efficiently handle net flows of money among the institutions involved in card payments. EPS suppliers also provide their customers with certain guarantees to ensure the integrity of the electronic payment services, including, for

example, instances where customers fail to honor payment cards or where issuers or acquirers fail to fund obligations.

9. EPS, whether provided in connection with open-loop (four-party) systems or closed-loop (three party) systems, encompass both (1) “front-end processing” (which determines whether a payment card user has sufficient funds or is otherwise authorized to make a purchase and provides that information to the merchant or ATM owner), and (2) “back-end processing” (which, among other things, determines, calculates, and instructs banks regarding net payments owed among participating institutions).

B. The Evolution of China’s Payment Card System and the Creation of CUP

10. China’s payment card system was inefficient and fragmented, and limited to local regional transactions. Chinese banks’ independent and uncoordinated efforts undermined the efficacy of payment card use. Bank cards were inconvenient for individual consumers to use because they were not widely accepted by merchants, and the networks’ ad hoc development resulted in some merchants having multiple terminals and others having none. Additionally, consumers could access cash and purchase items only from the POS terminals bearing their respective bank’s logo. Incompatibility between the various bank networks also prevented cross-bank or inter-bank transactions at the national level.

11. Instead of allowing these market inefficiencies to be remedied with the opening of its market to competition, including from foreign suppliers of EPS consistent with its WTO commitments, the Chinese government took steps to consolidate the industry under a domestic champion. First, in January 2001, the PBOC issued a series of measures that standardized bank cards and mandated the use of the “UnionPay” logo. Second, in March 2002, the PBOC approved and authorized the establishment of CUP, a private limited liability corporation whose shares were primarily held by four of China’s state-owned commercial banks.

12. From its inception, CUP was envisioned not only as a means to create a uniform national platform for electronic payment services for card-based electronic transactions, but also as a homegrown company championing a national brand. The Chinese government has taken a deep interest in the development and progress of CUP, and the corporation has hired as its top executives key former PBOC officials.

13. With China’s accession to the WTO in 2001, the Chinese government worked to build CUP’s core capabilities and to prepare it for the arrival of China’s deadline to complete liberalization of the financial sector in 2006. The Chinese government’s efforts to strengthen CUP coincided with measures that resulted in the systematic exclusion of foreign suppliers of EPS from the market.

14. By 2010, CUP had grown its network outside of China, and CUP cards could be used in well over 100 countries, including in Australia, Canada, Malaysia, Singapore, the United Arab Emirates, and the United States. In the years since its inception in 2002, CUP has emerged as a dominant domestic and international player in the EPS market. CUP controls the merchant services network and owns half of the POS terminals in China. In 2007, just five years after

CUP was created, PBOC reported on the company's explosive growth and its mammoth transaction volume (placing it then fourth within the world). Because of its success, CUP briefly considered an initial public offering ("IPO") in 2008, with President Xu Luode stating that he remained open to considering an IPO again if the conditions were right. China continues to sustain CUP's growth and to maintain a regulatory environment that has entrenched CUP's hold over the Chinese payment card market.

C. China's Measures That Maintain CUP's Monopoly on the Supply of EPS and that Affect the Supply of EPS By Foreign Suppliers

15. China maintains the following measures:

- **Requirements that mandate the use of CUP and/or establish CUP as the sole supplier of EPS for all domestic transactions denominated and paid in RMB.** China requires that all transactions denominated and paid in RMB in China be processed and cleared in RMB through CUP, and that where there is a choice, all domestic transactions on dual currency cards be routed in RMB through CUP. See U.S. July 29, 2011 Response, sections V.B, V.C, V.D
- **Requirements that RMB denominated payment cards issued in China bear the CUP logo.** China requires that any bank cards issued in China for RMB purchases in China, including dual currency payment cards issued in China, must bear the CUP logo. This means that issuers – the institutions that issue payment cards to consumers – must have access to the CUP system, and must pay CUP for that access. See U.S. July 29, 2011 Response, sections V.B, V.C, V.E.
- **Requirements that all automated teller machines ("ATM"), merchant card processing equipment, and POS terminals in China accept CUP cards.** China requires that all ATMs, merchant card processing equipment, and POS terminals in China be capable of accepting CUP cards. There are no equivalent requirements for non-CUP cards. See U.S. July 29, 2011 Response, sections V.B, V.C, V.F.
- **Requirements on acquiring institutions to post the CUP logo and be capable of accepting all payment cards bearing the CUP logo.** China requires that all acquiring institutions – the institutions that sign up merchants to accept payment cards – in China post the CUP logo and be capable of accepting all payment cards bearing the CUP logo. An acquiring institution, often a bank, provides POS terminal and processing equipment to merchants so it can process payment cards, maintains the merchant's account, handles relations with the merchant, and ensures that payments are properly credited to the merchant. See U.S. July 29, 2011 Response, sections V.B, V.C, V.G.
- **Broad prohibitions on the use of non-CUP cards.** China prohibits the use of domestically issued non-CUP payment cards where the issuing bank and acquiring bank are different. China also requires that all inter-bank transactions for all bank cards be handled through CUP. See U.S. July 29, 2011 Response, sections V.B, V.C, V.H.

- **Requirements pertaining to card-based electronic transactions in China, Macao and Hong Kong.** China requires that CUP be used to handle all RMB transactions in Macao or Hong Kong using bank cards issued in China. China also requires that CUP be used to handle any RMB transactions in China using RMB cards issued in Hong Kong or Macao. See U.S. July 29, 2011 Response, sections V.B, V.C, V.I.

IV. CHINA'S SPECIFIC COMMITMENTS IN ITS GATS SCHEDULE

A. China's Schedule of GATS Commitments Covers "All payment and money transmission services, including credit, charge and debit cards..." (item d)

16. In Sector 7B, under the Banking and Other Financial Services heading of China's Services Schedule, the services listed include:

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

17. China undertook market access and national treatment commitments with respect to "[a]ll payment and money transmission services," which includes the electronic payment services supplied in connection with "credit, charge and debit cards," and other payment card transactions.

B. EPS Fall Within the Ordinary Meaning of "All payment and money transmission services, including credit, charge and debit cards..." (Item d)

18. 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 any service that is essential to "payment and money transmission" including "credit, charge, and debit cards" payment transactions. EPS suppliers are at the heart of this service.

19. EPS are at the center of all payment card transactions and without these services the transactions could not occur. EPS fall within the ordinary meaning of payment and money transmission services, within item (d) of China's Schedule. The language of item (d) itself makes this abundantly clear.

20. First, EPS involve the services 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 fall within the ordinary meaning of "payment and money transmission services" as one type of "all" such services.

21. 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 are integral to the processing of credit, charge, debit and other payment card-based electronic payment transactions, and without these services, payment card transactions could not occur. EPS suppliers such as Visa, MasterCard, and American Express are names recognized around the world as credit cards and charge cards.

The reference to debit cards covers suppliers of EPS for debit card transactions like Visa, MasterCard, Discover, First Data, Pulse, NYCE, STAR, and PLUS.

V. CHINA’S MEASURES SHOULD BE CONSIDERED BOTH INDIVIDUALLY AND IN CONJUNCTION WITH OTHER MEASURES

22. China maintains a monopoly structure that ensures that CUP is the sole entity that can provide EPS for RMB transactions in China – the vast majority of all transactions in China. Chinese measures that provide for the monopoly structure and restrict the supply of EPS by foreign suppliers affect every aspect of a payment card transaction and all of the key participants in such transactions.

23. As the Panel confirmed in its preliminary ruling, the United States has challenged measures that establish or maintain requirements that fall within six categories. The United States requests the Panel to analyze China’s measures both individually and in conjunction with one another as indicated by the United States.

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

A. GATS Article XVI (Market Access)

24. The measures imposed by China on the supply of electronic payment services 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.

25. Article XVI:2(a) provides that where a Member has made a market access commitment in its Services Schedule, that Member is prohibited from imposing limitations on the number of service suppliers, including through the use of monopolies, quotas, and exclusive service suppliers, unless the Member has included that limitation in its Schedule. Thus, in order to show that a measure is inconsistent with Article XVI:2, it is necessary first to demonstrate that a Member has undertaken a market access commitment and then establish that the measure in question imposes the type of limitation prohibited by Article XVI:2.

B. China Made Extensive Market Access Commitments Covering the Supply of Electronic Payment Services

26. 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 electronic payment services for payment card transactions.

27. China’s own pronouncements confirm its recognition that its WTO accession commitments included providing market access for foreign suppliers of EPS and that any purported limitations on such access were to be eliminated by 2006:

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.

C. China’s Measures Related to China UnionPay and the Use of CUP Payment Cards Operate to Limit The Number Of Foreign Suppliers of EPS

28. First, China imposes requirements that mandate the use of CUP and/or establish CUP as the sole supplier of EPS for all domestic transactions denominated and paid in RMB. These measures require that all transactions denominated and paid in RMB in China must be processed and cleared in RMB through CUP, and where there is a choice, all domestic transactions on dual currency cards must be routed in RMB through CUP.

29. Second, China imposes requirements on issuers of payment cards that any payment cards issued in China must bear the CUP logo. No other payment card logo benefits from such a mandate. Any dual currency card issued in China also must bear the CUP logo. This means that issuers must have access to the CUP system, and pay CUP for that access.

30. Third, China requires that all ATM, merchant card processing devices, and POS terminals in China post the CUP logo and be capable of accepting CUP cards. These requirements extend to all such processing equipment and POS terminals in China and there is no equivalent requirement mandating acceptance for any other card.

31. Fourth, China imposes requirements on acquiring institutions that they post the CUP logo and be capable of accepting all bankcards bearing the CUP logo.

32. Fifth, China imposes broad prohibitions on the use of non-CUP cards for cross-region or inter-bank (or cross-bank) transactions. China also requires that all inter-bank (or cross-bank) transactions for all bankcards be handled through CUP.

33. Finally, China requires that CUP be used to handle all RMB transactions in Macao or Hong Kong using bankcards issued in China. China also requires that CUP be used to handle any RMB transactions in China using RMB cards issued in Hong Kong or Macao.

VII. CHINA’S MEASURES ESTABLISHING AND SUPPORTING CHINA UNIONPAY’S MONOPOLY ON THE SUPPLY OF EPS ARE INCONSISTENT WITH ARTICLE XVII OF THE GATS BECAUSE THEY ACCORD LESS FAVORABLE TREATMENT TO FOREIGN EPS SUPPLIERS

A. GATS Article XVII (National Treatment)

34. The measures imposed by China affecting foreign suppliers of electronic payment services are also inconsistent with Article XVII of the GATS. A national treatment commitment under Article XVII of the GATS obligates a WTO Member to accord services and service suppliers of other Members “treatment no less favorable than that it accords to its own like services and services suppliers.” Article XVII:2 specifies that a Member may accord foreign services or suppliers different treatment to achieve this objective. Article XVII:3 defines treatment as “less favorable” if it “modifies the conditions of competition in favour of services or service suppliers of the Member.”

B. China Made National Treatment Commitments Regarding The Supply of Electronic Payment Services

35. China made mode (1) and mode (3) national treatment commitments with respect to “All payment and money transmission services, including credit, charge and debit cards...” which clearly encompass the electronic payment services at issue here. China thereby committed to provide national treatment within the meaning of Article XVII to foreign suppliers of EPS.

C. China’s Measures Affect the Supply of Electronic Payment Services

36. China maintains numerous measures affecting the supply of electronic payment services under modes (1) and (3). The measures operate to prevent market access irrespective of the mode. The terms “affecting” and “supply of services” have been construed broadly by the Appellate Body.

37. The measures at issue affect the supply of services in two principal ways.

38. 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.

39. 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 CUP logo and accept CUP cards).

40. The following measures affect every aspect of a card-based electronic payment transaction and the key players – issuers, acquiring institutions, merchants, and EPS suppliers – involved in such transactions.

- China’s measures ensure that CUP is the sole supplier of certain transactions such as interbank transaction, transactions denominated and paid in RMB, and transactions in certain border areas such as Hong Kong and Macau. These provisions 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.
- China’s measures requiring 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. 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.

- China’s measures requiring all automatic teller machines, merchant card processing equipment and point of service terminals accept CUP cards. 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.
- China’s measures requiring that all acquiring institutions in China post the CUP logo and to accept all bankcards bearing that logo. No foreign EPS supplier is afforded a similar privilege.

41. These measures affect the supply of electronic payment services within the meaning of Article XVII because they directly regulate the terms on which they may be provided in China.

D. China’s Measures Treat Suppliers of Electronic Payment Services of Other Members Less Favorably than CUP, China’s Like Supplier of EPS

42. The measures at issue provide disparate treatment solely according to the identity of the EPS supplier: CUP or not CUP. The Panel in *China - Publications and Audiovisual Products* found that:

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. We note that similar conclusions have been reached by previous panels. We observe that in cases where a difference of treatment is not exclusively linked to the origin of service suppliers, but to other factors, a more detailed analysis would probably be required to determine whether suppliers on either side of the dividing line are, or are not, “like.”

43. Here, it is self-evident from China’s own documents that China was concerned about the potential competition its domestic supplier of EPS faced from foreign suppliers of EPS and was determined to enhance its industry’s position because, as the Chinese Government stated, it was “facing a comparatively big challenge and we should make use of the limited time to enhance the international competitiveness of our industries.”

44. Therefore, it is unsurprising that the measures at issue here are meant to favor the domestic Chinese entity and accordingly discriminate on that basis.

45. 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. CUP’s Articles of Association are explicit that the company is “to provide advanced electronic payment technologies and specialized services in connection with the inter-bank bank card information switching.” CUP itself recently noted the global reach of its “payment services” around the world.

46. 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.

47. The Panel in *China – Publications and Audiovisual Products* explained:

a measure that prohibits foreign service suppliers from supplying a range of 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.

48. On their face, many of the measures at issue explicitly prohibit any entity other than CUP from supplying services in the Chinese market. China’s measures thus categorically exclude foreign suppliers of EPS from providing EPS on RMB and interbank transactions. Because these measures categorically prohibit foreign EPS suppliers from participating in certain transactions, their treatment is less favorable than that afforded CUP, a Chinese entity, and therefore inconsistent with China’s obligations under GATS Article XVII.

49. China’s measures include those that prevent competition against CUP altogether in regards to certain transactions. Other measures, however, while not *per se* banning competition modify the conditions of competition to disfavor foreign suppliers of EPS as opposed to CUP. These measures include:

- requirements on issuers that payment cards issued in China bear the CUP logo;
- requirements that all ATM and POS Terminals in China Accept CUP cards;
- requirements on acquiring institutions to post the CUP logo; and
- broad prohibitions on the use of non-CUP cards.

50. These measures are inconsistent with Article XVII of the GATS because they accord less favorable treatment to foreign suppliers of EPS than to CUP.

VIII. CONCLUSION

51. The United States respectfully requests that the Panel find that China’s measures, as set out above, are inconsistent with China’s obligations under Article XVI:1 and XVI:2(a) and Article XVII of the GATS. The United States further requests, pursuant to Article 19.1 of the DSU, that the Panel recommend that China bring its measures into conformity with its WTO obligations.