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**UNITED STATES – MEASURES ON CERTAIN SEMICONDUCTOR AND OTHER PRODUCTS,
AND RELATED SERVICES AND TECHNOLOGIES**

REQUEST FOR CONSULTATIONS BY CHINA

Addendum

The following communication, dated 15 September 2023, from the delegation of China to the delegation of the United States, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

1. My authorities have instructed me to request further consultations with the Government of the United States pursuant to Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), Article XXIII of the General Agreement on Trade in Services ("GATS"), Article 8 of the Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), and Article 64.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement") concerning certain measures of the United States related to trade restrictions on certain advanced computing semiconductor chips, supercomputer items, semiconductor manufacturing items and other items, as well as their related services and technologies destined for or in relation to China. This addendum supplements and does not replace China's request for consultations with the United States dated 9 February 2023.¹

2. China considers that these measures are inconsistent with the United States' obligations under various provisions of the covered agreements. Pursuant to Article 4.4 of the DSU, the reasons for this request, including identification of the measures at issue and an indication of the legal basis for the complaint, are given below.

I. Background

3. The United States has maintained and implemented an export control regime of certain items, including certain commodities, software and technology. The export control regime is administered by the U.S. Department of Commerce's Bureau of Industry and Security ("BIS") through the Export Administration Regulations (15 CFR Parts 730-774, "EAR").

4. The EAR covers, among others, exports from the United States and transfer of foreign-produced products containing U.S.-origin components or derived from U.S.-origin technology or software. The list of EAR-controlled "items", including commodities, software and technology, is published in Supplement No.1 to Part 774 of the EAR, namely, the Commerce Control List ("CCL"). Each controlled item is designated with an Export Control Classification Number ("ECCN") consisting of a set of digits and a letter. The CCL covers approximately 2,800 controlled items, far exceeding that of the international export control regime² which covers approximately 1,800 controlled items. In other

¹ WT/DS615/1/Rev.1, G/L/1471/Rev.1.

² International export control regime consists of multilaterally recognized agreements or resolutions, which include but are not limited to, United Nations Security Council Resolution 1540 (2004), the Treaty on the

words, the United States imposes export controls on approximately 1,000 items that are not included in the international export control regime.

5. Apart from items controlled under the ECCN, the EAR also includes an additional "basket category", i.e., the EAR99, which covers any item that is subject to the EAR as defined in §734.3(a) of the EAR but not listed on the CCL.

6. For items subject to the EAR, a license may be required for export, reexport or transfer (in-country) depending on the destination country, receiving party and end use, unless an exclusion or exemption applies. Notably, the destination countries are divided into groups listed in the Commerce Country Chart³ and Country Groups,⁴ and the receiving parties are controlled in the Entity List,⁵ the Military End User List⁶ and the Unverified List.⁷ To ensure the compliance with the EAR, traders from not only the United States but also other WTO Members must go through as many as 29 steps to determine and carry out their EAR obligations.⁸

7. An export control regime should serve to promote global security and facilitate responsible export with respect to the international commitments of non-proliferation. However, the United States abuses its export control regime as a tool to achieve its objectives of maintaining "its leadership in science, technology, engineering and manufacturing sectors".⁹ As a blatant example, the United States implements export control on items for civilian use and on activities of commercial entities, with a view to weaken the scientific and technological development of other WTO Members and to preserve its technology edge.¹⁰

8. To achieve these goals, the United States has amended the EAR and adopted a series of disruptive measures targeting China's development in related sectors and in the global semiconductor supply chain. The United States not only imposes export controls itself on China, but

Non-Proliferation of Nuclear Weapons, the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, and the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

³ The Commerce Country Chart is provided in Supplement No.1 to Part 738 of the EAR.

⁴ The Country Groups are provided in Supplement No. 1 to Part 740.

⁵ The Entity List is provided in Supplement No. 4 to Part 744 of the EAR. The Entity List identifies foreign parties that are prohibited from receiving some or all items subject to the EAR unless the exporter secures a license. BIS can add to the Entity List a foreign party, such as an individual, business, research institution, or governmental organization, for engaging in certain activities. In most instances, license exceptions are unavailable for the export, reexport, or transfer (in-country) to a party on the Entity List of items subject to the EAR. Rather, prior license authorization is required, usually subject to a policy of denial.

⁶ The Military End User List is provided in Supplement No. 7 to Part 744 of the EAR. It identifies foreign parties that are prohibited from receiving items described in Supplement No. 2 of Part 744 of the EAR unless the exporter secures a license.

⁷ The Unverified List is published in Supplement No. 6 to Part 744 of the EAR. It is a list of parties whose bona fides BIS has been unable to verify. No license exceptions may be used for exports, reexports, or transfers (in-country) to unverified parties. A statement must be obtained from such parties prior to shipping items not subject to a license requirement.

⁸ See Part 732 of the EAR where the 29 steps are listed and explained.

⁹ See 50 U.S. Code, section 4811 (Statement of policy): "The following is the policy of the United States: (3) The national security of the United States requires that the United States maintain its leadership in the science, technology, engineering, and manufacturing sectors, including foundational technology that is essential to innovation. Such leadership requires that United States persons are competitive in global markets. The impact of the implementation of this part on such leadership and competitiveness must be evaluated on an ongoing basis and applied in imposing controls under sections 4812 and 4813 of this title to avoid negatively affecting such leadership."

¹⁰ The United States' abuse of export control regime is evidenced in the public speeches of its government officials. For example, on September 16, 2022, the National Security Advisor Jake Sullivan explained the United States' ambition and determination to pursue strength "at home" and "around the world" in his speech at the Special Competitive Studies Project Global Emerging Technologies Summit: "[o]n export controls, we have to revisit the longstanding premise of maintaining 'relative' advantages over competitors in certain key technologies. Given the foundational nature of certain technologies, such as advanced logic and memory chips, we must maintain as large of a lead as possible..... [T]echnology export controls can be more than just a preventative tool." See Remarks by National Security Advisor Jake Sullivan at the Special Competitive Studies Project Global Emerging Technologies Summit, September 16, 2022, at <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/09/16/remarks-by-national-security-advisor-jake-sullivan-at-the-special-competitive-studies-project-global-emerging-technologies-summit/>.

also compels other WTO Members to follow suit by virtue of its extra-territorial control. By overstretching the extent of export controls and by bullying other WTO Members, the United States has caused severe disruption to international trade and risked the disintegration of the global semiconductor supply chain.

9. The above-mentioned disruptive measures are set forth in an interim final rule published by BIS on October 7, 2022 ("Interim Final Rule")¹¹. The Interim Final Rule was exempted from the Administrative Procedure Act (5 U.S.C. 553) requirement for notice of proposed rule-making and became effective from October 7, 2022. According to the Office of the Federal Register, a federal agency may confirm an interim final rule by publishing a final rule in the Federal Register.¹² The Interim Final Rule places trade restrictions on certain advanced computing semiconductor chips, supercomputer items, semiconductor manufacturing items and their related products, services and technologies destined for China, certain Chinese entities and, in some cases, transferred within or exported from China. The Interim Final Rule tightens the control against China's ability to manufacture semiconductor-related products from various regulatory perspectives, including, among others, controlling semiconductor manufacturing equipment and other items for civil use, adding certain Chinese semiconductor companies to the Entity List, imposing a broad end-use control, and imposing broad and vague controls on activities of U.S. corporations and individuals. The Interim Final Rule, with its FDP Rules, even compels other Members to follow suit and exert controls on shipments from outside the United States with respect to non-U.S.-origin items. In combination with applying a presumption-of-denial policy for export control license applications, the Interim Final Rule overstretches the extent and effect of the export control regime to an extreme.

10. In the Background section, the Interim Final Rule clearly expresses that it is designed to "limit the PRC's ability to obtain advanced computing chips or further develop AI and 'supercomputer' capabilities", to limit "the ability to produce indigenously within China these types of advanced [integrated circuits ("ICs ")]" and to "limit the PRC's ability to obtain semiconductor manufacturing capabilities to produce ICs".¹³ The extreme, discriminatory and trade-restrictive nature of the Interim Final Rule reveals its true intent to maintain technology edge and to suppress the normal and commercial development of semiconductor industry in another Member. The measures nullify and impair the benefits legitimately expected by China under the multilateral trade rules, destabilize the global semiconductor supply chain, and also jeopardize the rule-based multilateral trading system that every Member counts on for their legitimate development rights. In China's view, the Interim Final Rule and other disruptive export control measures constitute disguised restrictions on trade that are based on political and economic motivations – notably "leadership in science, technology, engineering and manufacturing" – which cannot be justified by the national security exceptions of the covered agreements.

II. The Measures at Issue

11. As noted, the measures at issue are motivated by political and economic considerations for preserving the United States' "leadership" in technology sectors, and constitute discriminatory and disguised trade restrictions. The measures at issue include but are not limited to:

12. The Export Control Reform Act of 2018 (50 U.S. Code Sections 4801 – 4852), including but not limited to Section 4811 ("Statement of policy");

13. The Export Administration Regulations (15 CFR Parts 730 – 774), including but not limited to the following provisions:

¹¹ See Bureau of Industry and Security, Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, 87 FR 62186, Federal Register/Vol. 87, No. 197/Thursday, October 13, 2022, at <https://www.govinfo.gov/content/pkg/FR-2022-10-13/pdf/2022-21658.pdf>.

¹² See Office of the Federal Register, A Guide to the Rulemaking Process, at https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf

¹³ See Bureau of Industry and Security, Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification, Section I (Background), 87 FR 62186, Federal Register/Vol. 87, No. 197/Thursday, October 13, 2022, at <https://www.govinfo.gov/content/pkg/FR-2022-10-13/pdf/2022-21658.pdf>.

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- 13.1 §732.3(a), §732.3(b)(3), §740.2(a)(9), §742.6(a)(6) and §742.6(b)(10) of the EAR ("ECCN Rules");
- 13.2 §734.9(h), §734.9(i), §742.6(a)(6), §742.6(b)(10) and §744.23 of the EAR ("FDP Rules");
- 13.3 §734.9(e), §744.11(a)(2), and Supplement No. 5 to Part 744 of the EAR ("Entity List and Entity List FDP Rules");
- 13.4 §744.1(a)(1) and §744.23 of the EAR ("End User/End Use Rules"); and
- 13.5 §744.6(c), §744.6(d) and §744.6(e)(3) of the EAR ("U.S. Persons' Activities Rules");
14. The Interim Final Rule, i.e. the Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification (87 FR 62186, Federal Register/Vol. 87, No. 197, October 13, 2022);
15. FAQs for Interim Final Rule – Implementation of Additional Export Controls: Certain Advanced Computing and Semiconductor Manufacturing Items; Supercomputer and Semiconductor End Use; Entity List Modification (published by BIS on October 28, 2022);¹⁴
16. The failure of the United States to publish promptly the Interim Final Rule in such a manner as to enable traders and other interested parties to become acquainted with it, and to administer the Interim Final Rule in a uniform, impartial and reasonable manner.
17. The decisions adding or revising Chinese entities in the Entity List with a Footnote 1 or 4 designation, and the decisions adding or revising the Chinese entities in the Entity List that are in or related to the semiconductor industry, including among others:
- 17.1 The Interim Final Rule (87 FR 62186, Federal Register/Vol. 87, No. 197, October 13, 2022)
- 17.2 Additions and Revisions to the Entity List and Conforming Removal from the Unverified List (87 FR 77505, Federal Register / Vol. 87, No. 242, December 19, 2022);
- 17.3 Additions and Revisions of Entities to the Entity List (88 FR 13673, Federal Register / Vol. 88, No. 43, March 6, 2023); and
- 17.4 Additions of Entities to the Entity List and Removal of Entity from the Entity List (88 FR 38739, Federal Register / Vol. 88, No. 114, June 14, 2023).

18. The measures at issue also include any amendments, replacements, supplements, extension or renewal of the measures listed above¹⁵ as well as any measure relating to, administering or implementing the measures listed above. The following Sections A through F provide an illustrative list of the particular aspects of the measures at issue that China considers to be inconsistent with the covered agreements:

A. ECCN Rules

19. The ECCN Rules add or update, among others, the following ECCN items of the CCL: (i) ECCN 3B090, which controls certain semiconductor manufacturing deposition equipment and specially designed parts, components and accessories for such equipment; (ii) ECCNs 3D001 and 3E001, which control the associated software and technology for items in ECCN 3B090; (iii) ECCN 3A090

¹⁴ See <https://www.bis.doc.gov/index.php/documents/product-guidance/3181-2022-10-28-bis-faqs-advanced-computing-and-semiconductor-manufacturing-items-rule-2/file>.

¹⁵ The measures at issue also include the final rule, if any, published to amend, replace, supplement, extend, renew, supersede or confirm the Interim Final Rule.

for certain advanced integrated circuits ("ICs"); (iv) ECCN 4A090 for commodities containing chips that meet or exceed the performance parameters of ECCN 3A090; (v) ECCNs 4D090 and 4E001 for associated software and technology specially designed or modified for the development or production of computers and related equipment, electronic assemblies, and components specified in ECCN 4A090 for certain reasons. Also, a license is required for the export from China to any destination worldwide of ECCN 3E001 (for 3A090) technology developed by an entity headquartered in China that is the direct product of software subject to the EAR and is for the production of commodities identified in ECCNs 3A090, 4A090, or identified elsewhere on the CCL that meet or exceed the performance parameters of ECCNs 3A090 or 4A090.

20. License applications will be reviewed by BIS with a presumption of denial. The ECCN Rules also limit the availability of most license exceptions for certain exports, reexports, or transfers to or within China.

21. Furthermore, it appears to China that the EAR controls items of an excessively broad coverage. By the "basket category" EAR99 as provided in §732.3(b)(3), the EAR controls "low-technology consumers goods"¹⁶ or "non-sensitive products and potentially sensitive technologies".¹⁷ A license is required when an EAR99 item is destined for any of the embargo country, prohibited end-user, or is being exported in support of a prohibited end-user (including entities designated in the Entity List). Such license requirement on EAR99 will result in discrimination to trade in non-sensitive commercial items destined for certain WTO Members or commercial end-users, such as the Chinese entities designated in the Entity List.

B. FDP Rules

22. The FDP Rules substantially expand the scope of items that are "subject to the EAR" to cover non-U.S.-origin items in the advanced computing and semiconductor sector that are produced outside the United States and are destined for China or listed entities. The FDP Rules published on October 7, 2022 impose license requirements for any foreign-produced item subject to the EAR if such item is either (i) a "direct product" of "technology" or "software" specified under certain ECCNs; or (ii) produced by any plant or "major component" of a plant where the plant or "major component" of a plant itself is a "direct product" of U.S.-origin "technology" or "software" specified under certain ECCNs.¹⁸

23. The FDP Rules consist of the following:

23.1 Advanced Computing FDP Rules: provided mainly in §734.9(h) of the EAR, the Advanced Computing FDP Rules apply if the individual or entity has "knowledge"¹⁹ that the

¹⁶ The description "low-technology consumer goods" of EAR99 is provided by BIS. See <https://www.bis.doc.gov/index.php/regulations/commerce-control-list-ccl>.

¹⁷ The description "non-sensitive products and potentially sensitive technologies" of EAR 99 is provide by the Congressional Research Service, U.S. Export Controls and China, March 24, 2022. See <https://crsreports.congress.gov/product/pdf/IF/IF11627>.

¹⁸ According to the Interim Final Rule of October 7, 2022, the FDP Rules cover different groups of foreign-produced items:

The Advanced Computing FDP Rules apply to a foreign-produced item if : (1) it is the "direct product" of "technology" or "software" subject to the EAR and specified in 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D090, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D002, 5D991, 5E001, 5E991, or 5E002 of the CCL; or it is produced by any plant or "major component" of a plant when the plant or "major component" of a plant itself is a "direct product" of U.S.-origin "technology" or "software" specified in the ECCNs above; and (2) the foreign-produced item is specified in ECCN 3A090, 3E001 (for 3A090), 4A090, or 4E001 (for 4A090) of the CCL; or the foreign-produced item is an integrated circuit, computer, "electronic assembly," or "component" specified elsewhere on the CCL and meets the performance parameters of ECCN 3A090 or 4A090.

The Supercomputer FDP Rules apply to a foreign-produced item if: (1) it is the "direct product" of "technology" or "software" subject to the EAR and specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, 5E991, 5D002, or 5E002 of the CCL; or (2) the foreign-produced item is produced by any plant or "major component" of a plant when the plant or "major component" of a plant itself is a "direct product" of U.S.-origin "technology" or "software" specified in the ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, 5E991, 5D002, or 5E002 of the CCL.

¹⁹ According to Part 772 of the EAR, knowledge of a circumstance (the term may be a variant, such as "know," "reason to know," or "reason to believe") includes not only positive knowledge that the circumstance

foreign-produced item that meets certain conditions is: (1) destined for China or will be incorporated into any "part," "component," "computer" or "equipment" not designated EAR99 that is destined for China; or (2) technology developed by an entity headquartered in China for the "production" of a mask or an IC wafer or die.

23.2 Supercomputer FDP Rules: provided mainly in §734.9(i) of the EAR, the Supercomputer FDP Rules apply to certain items destined for China whenever the exporter has "knowledge" that the foreign-produced item that meets certain conditions will be: (1) used in the design, "development," "production," operation, installation (including on-site installation), maintenance (checking), repair, overhaul or refurbishing of a "supercomputer" (as defined in §772.1 of the EAR) located in or destined for China; or (2) incorporated into or used in the "development" or "production" of any "part," "component" or "equipment" that will be used in a "supercomputer" located in or destined for China.

24. The license applications submitted under the FDP Rules will be reviewed by BIS with a presumption of denial.

C. Entity List and Entity List FDP Rules

25. The EAR maintains an Entity List in Supplement No. 4 to Part 744 of the EAR as a tool to control exports to certain end users. The reasons for an entity to be listed in the Entity List can be very broad.²⁰

26. The procedures for addition to, modification of or removal of an entity from the Entity List are provided in Supplement No.5 to Part 744 of the EAR. Firstly, the addition to the Entity List needs a majority vote of the member agencies of the End-User Review Committee ("ERC")²¹; in contrast, the criteria for the removal from the Entity List is stricter, requiring a unanimous vote of all ERC member agencies. Secondly, the EAR provides an internal review and remedy mechanism for the member agencies of ERC if it is not satisfied with the outcome of the vote for addition to, modification of or removal of the entity. However, once a decision is made by the ERC (or after the internal review and the remedies are exhausted), the decision is final for the entity concerned and cannot be further reviewed through regular EAR interagency review process. Therefore, the entity concerned is afforded with fewer opportunities than the ERC member agencies to seek review and remedies for the administrative decision that imposes restriction on trade.

27. With respect to the Entity List itself, generally, the Entity List identifies non-U.S. entities that are prohibited from receiving some or all items subject to the EAR unless the exporter secures a license. However, for certain Chinese entities, the EAR expands the restrictions by applying Footnote 1 or 4 designation to the entities in the Entity List. Both Footnote 1 and Footnote 4 expand the licensing requirements for foreign produced items by applying broader FDP rules (the Entity List FDP Rules) where a Footnote 1 or 4 designated entity is involved. Because broader FDP rules apply, more foreign produced items will be subject to the EAR and, therefore, require a license. The Entity List FDP Rules apply if there is the knowledge that a foreign-produced item²² will be involved in activities

exists or is substantially certain to occur, but also an awareness of a high probability of its existence or future occurrence. Such awareness is inferred from evidence of the conscious disregard of facts known to a person and is also inferred from a person's willful avoidance of facts.

²⁰ The criteria for revising and adding an entity into the Entity List are provided in §744.11(b) of the EAR. According to §744.11(b), any entities for which there is reasonable cause to believe, based on specific and articulable facts, that the entity has been involved, is involved, or poses a significant risk of being or becoming involved in activities that are contrary to the national security or foreign policy interests of the United States and those acting on behalf of such entities may be added to the Entity List. The criteria listed in paragraphs (b)(1) through (5) are only "an illustrative list of activities" that cannot represent all and any circumstances.

²¹ According to paragraph 1 of the Supplement No.5 to Part 744 of the EAR, the ERC composes of representatives of the Departments of Commerce, State, Defense, Energy and, where appropriate, the Treasury.

²² According to §734.9(e)(1)(i) of the EAR, the export control in Footnote 1 applies to a foreign-produced item if: (1) it is a "direct product" of "technology" or "software" subject to the EAR and specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991 of the Commerce Control List (CCL) in supplement no. 1 to part 774 of the EAR; or (2) the foreign produced item is produced by any plant or 'major component' of a plant that is located outside the United States, when the plant or 'major component' of a plant, whether made in the U.S. or a foreign country, itself is a "direct

of a designated entity with Footnote 1 or 4 on the Entity List, or the aforesaid entity is a party to the transaction.²³ As illustrated above, the United States applies these designations to a number of Chinese entities.

28. For the entities designated with Footnote 1 or 4, the review policy is set forth in the entry in Supplement No. 4 to Part 744 of the EAR. Most of the designated entities will be reviewed by BIS with a presumption of denial.

D. End User/End Use Rules

29. The new End User/End Use Rules expand the scope of controlled items subject to the license requirement by limiting semiconductor manufacturing and supercomputer end use in China. According to §744.23 of the EAR, BIS imposes end-user/end-use controls based upon an individual or entity's knowledge that certain items subject to the EAR are destined for a supercomputer or semiconductor development or production end-use in China.

30. Pursuant to §744.23(a) of the EAR, the following activities are subject to license requirements: (1) any item subject to the EAR being used in the "development" or "production" of ICs at a semiconductor fabrication "facility" located in China that fabricates certain ICs; (2) certain items subject to the EAR being used for the "development," "production," "use," "operation," installation (including on-site installation), maintenance (checking), repair, overhaul or refurbishing of a "supercomputer" located in or destined for China; (3) any item subject to the EAR being used in the "development" or "production" in China of any "parts," "components" or "equipment" specified under certain ECCNs.²⁴ §744.23(b) of the EAR specifies that BIS may inform persons of a new license

product" of U.S.-origin "technology" or "software" that is specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, or 5E991 of the CCL.

According to §734.9(e)(2)(i) of the EAR, the export control in Footnote 4 applies to a foreign-produced item if: (1) it is the "direct product" of "technology" or "software" subject to the EAR and specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D002, 5D991, 5E001, 5E002, or 5E991 of the CCL; or (2) the foreign-produced item is produced by any plant or 'major component' of a plant when the plant or 'major component' of a plant, whether made in the U.S. or a foreign country, itself is a "direct product" of U.S.-origin "technology" or "software" that is specified in ECCN 3D001, 3D991, 3E001, 3E002, 3E003, 3E991, 4D001, 4D993, 4D994, 4E001, 4E992, 4E993, 5D001, 5D991, 5E001, 5E991, 5D002, or 5E002 of the CCL.

²³ According to §734.9(e)(1)(ii) of the EAR, the export control in Footnote 4 apply to a foreign-produced item if: (1) the foreign-produced item will be or will be used in the "production" or "development" of any "part," "component," or "equipment" produced, purchased, or ordered by any entity with a footnote 1 designation in the license requirement column of the Entity List in supplement no. 4 to part 744 of the EAR; or (2) any entity with a footnote 1 designation in the license requirement column of the Entity List in supplement no. 4 to part 744 of the EAR is a party to any transaction involving the foreign-produced item, e.g., as a "purchaser," "intermediate consignee," "ultimate consignee," or "end-user".

According to §734.9(e)(2)(ii) of the EAR, the export control in Footnote 4 apply to a foreign-produced item if: (1) the foreign-produced item will be incorporated into, or will be used in the "production" or "development" of any "part," "component," or "equipment" produced, purchased, or ordered by any entity with a Footnote 4 designation in the license requirement column of the Entity List in Supplement no. 4 to Part 744 of the EAR; or (2) any entity with a footnote 4 designation in the license requirement column of the Entity List in supplement no. 4 to part 744 of the EAR is a party to any transaction involving the foreign-produced item, e.g., as a "purchaser," "intermediate consignee," "ultimate consignee," or "end-user".

²⁴ To be more specific, pursuant to the §744.23 of the EAR, one may not export, reexport, or transfer (in-country) without a license any item subject to the EAR meeting the product scope in paragraph (1) below when you have "knowledge" at the time of export, reexport, or transfer (in-country) that the item is destined for the end-use described in paragraph (2) below.

(1) Product scope. Any of the following items meet the product scope of the prohibition:

(i) An integrated circuit subject to the EAR and specified in ECCN 3A001, 3A991, 4A994, 5A002, 5A004, or 5A992 when you know the item will be used in an end use described under paragraph (2)(i) or (ii);

(ii) computer, "electronic assembly," or "component" subject to the EAR and specified in ECCN 4A003, 4A004, 4A994, 5A002, 5A004, or 5A992 when you know the item will be used in an end use described under paragraph (2)(i) or (ii);

(iii) Any items subject to the EAR when you know the items will be used in an end use described in paragraphs (2)(i) or (ii);

(iv) Any items subject to the EAR and classified in an ECCN in Product Groups B, C, D, or E in Category 3 of the CCL when you know the items will be used in an end use described in paragraph (2)(iv) of this section; or

(v) Any item subject to the EAR when you know the item will be used in an end use described in paragraph (2)(v).

requirement imposed on certain end-users when BIS considers there is an unacceptable risk of use in, or diversion to, the activities specified in §744.23(a)(2) of the EAR.

E. U.S. Persons' Activities Rules

31. The U.S. Persons' Activities Rules restrict U.S. persons from engaging in or facilitating activities supporting the development or production of certain ICs at fabs in China.

32. According to §744.6(c) of the EAR, BIS requires a U.S. person to obtain a license to engage in (or facilitate) shipping, transmitting, transferring or servicing: (1) items not subject to the EAR that the individual or company knows will be used in the "development" or "production" of ICs at a semiconductor fabrication "facility" located in China that fabricates certain ICs; (2) items not subject to the EAR and meeting the parameters of any ECCN in Product Groups B, C, D or E in Category 3 of the CCL that the individual or company knows will be used in the "development" or "production" of ICs at any semiconductor fabrication "facility" located in China, for which the individual or company does not know whether such semiconductor fabrication "facility" fabricates certain ICs; and (3) items not subject to the EAR and meeting the parameters of certain ECCNs regardless of end use or end user.²⁵

F. Procedural Deficiencies

33. The United States did not publish promptly the Interim Final Rule in such a manner as to enable traders and other interested parties to become acquainted with it and therefore failed to administer the measures in a uniform, impartial and reasonable manner. In or around September 2022, certain semiconductor companies were reported to be informed by BIS of the future publication of the Interim Final Rule and were required to halt their exports in advance.²⁶ In other words, the United States enforced certain trade-restrictive measures before the promulgation of such measures.

34. In addition, the procedural discrepancy for adding to and removing from the Entity List as mentioned in Part II.C above constitutes an instance for the United States' failure to administer its export control regime in a uniform, impartial and reasonable manner. The imprecisely and uncertainly broad scope of EAR99, which results in restrictions on non-sensitive and commercial items and on commercial entities that should not have been restricted under the export control regime, also reflects the United States' failure to administer its export control regime in a uniform, impartial and reasonable manner.

(2) End-use scope. The following activities meet the end-use scope of the prohibition:

(i) The "development," "production," "use," operation, installation (including on-site installation), maintenance (checking), repair, overhaul, or refurbishing of a "supercomputer" located in or destined to the PRC;

(ii) The incorporation into, or the "development" or "production" of any "component" or "equipment" that will be used in a "supercomputer" located in or destined to the PRC; or

(iii) The "development" or "production," of integrated circuits at a semiconductor fabrication "facility" located in the PRC that fabricates integrated circuits meeting any of the following criteria:

(A) Logic integrated circuits using a non-planar transistor architecture or with a

"production" technology node of 16/14 nanometers or less;

(B) NOT AND (NAND) memory integrated circuits with 128 layers or more; or

(C) Dynamic random-access memory (DRAM) integrated circuits using a "production" technology node of 18 nanometer half-pitch or less; or

(iv) The "development" or "production" of integrated circuits at any semiconductor fabrication "facility" located in the PRC, but you do not know whether such semiconductor fabrication "facility" fabricates integrated circuits that meet any of the criteria in paragraphs (2)(iii)(A) through (C); or

(v) The "development" or "production" in the PRC of any "parts," "components," or "equipment" specified under ECCN 3B001, 3B002, 3B090, 3B611, 3B991, or 3B992.

²⁵ See §744.6 (c)(2) of the EAR.

²⁶ For instance, NVIDIA Corporation filed a report to the United States Securities and Exchange Commission on August 26, 2022 that the United States imposed a new license requirement, effective immediately, for any future export of the company's certain types of ICs to China. Systems that incorporate such certain types of ICs were also covered by the license requirement, and the license requirement also included future ICs that achieve equal or greater performance. See Nvidia Corporation, Current Report Pursuant To Section 13 Or 15(d) Of The Securities Exchange Act Of 1934, at <https://www.sec.gov/ix?doc=/Archives/edgar/data/0001045810/000104581022000146/nvda-20220826.htm>.

III. Legal Basis of the Complaint

35. The measures at issue described above constitute restrictions on trade and are inconsistent with the United States' obligations under various provisions of the covered agreements, including but not limited to:

36. Article I:1 of the GATT 1994 because, through the measures at issue, individually and collectively, the United States fails to accord, with respect to rules and formalities in connection with exportation, immediately and unconditionally the advantage, favor, privilege and immunity granted to products destined for other WTO Members to like products destined for China;

37. Article XI:1 of the GATT 1994 because the measures at issue, individually and collectively, constitute restrictions instituted and maintained by the United States on the exportation or sale for export of the products destined for China;

38. Article 2 of the TRIMs Agreement because the measures at issue, individually collectively, constitute investment measures related to trade in goods, which are inconsistent with Article XI of GATT 1994;

39. Article 28 of the TRIPS Agreement because the measures at issue, individually and collectively, prevent patent owners from (a) assigning, or transferring by succession, the patent and (b) concluding licensing contracts;

40. Article X:1 of the GATT 1994 because the United States has instructed certain semiconductor companies to make applications in relation to the new license requirements set forth in the Interim Final Rule before such requirements were officially published. The United States failed to publish promptly the Interim Final Rule pertaining to trade restrictions in such a manner as to enable governments and traders to become acquainted with them;

41. Article X:3 of the GATT 1994 because the measures at issue constitute laws, regulations, decisions, and/or rulings of general application relating to trade restrictions and the United States fails to administer those measures in a uniform, impartial and reasonable manner.

42. Article VI of the GATS because the United States, through its U.S. Persons' Activities Rules, fails to ensure that its trade-restrictive measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner. Furthermore, the United States fails to maintain or institute objective and impartial procedures which, at the request of an affected entity, provide for the prompt review of and appropriate remedies for administrative decisions affecting trade in services.

43. China emphasizes that the measures at issue have impeded trade in a way that exceeds the permissible limits of security exceptions under such provisions as Article XXI of the GATT 1994. The measures at issues arbitrarily over-stretch the normal scope of export controls by seeking to use security exceptions to preserve the United States' economic and technological "leadership". The measures at issue significantly disrupt normal international trade concerning semiconductor-related products and imperil the multilateral trade order that all Members benefit from.

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44. As a result of the foregoing, the measures at issue appear to nullify or impair benefits accruing to China directly or indirectly under the cited agreements.

45. China reserves the right to raise additional claims and legal matters regarding the above-mentioned measures at issue during the course of the consultations. For avoidance of doubt, China considers the scope of this request for consultations to encompass specific instances of the application of the measures described herein, as well as any ongoing conduct resulting from the continued application of these measures.

46. China looks forward to receiving the reply of the Government of the United States to this request and to setting a mutually convenient date for consultations.
