Comments from the Government of the People's Republic of China on the Standing Appellate Mechanism

I. Background

At its fiftieth session in July 2017, the United Nations Commission on International Trade Law (UNCITRAL) decided to entrust Working Group III with a mandate to discuss concerns regarding investor-State dispute settlement (ISDS), desirability of the reform, and possible reform solutions. Subsequently, Working Group III held discussions on the establishment of an appellate mechanism, and prepared a number of notes and drafts. On 21 August 2023, an updated draft provisions on an appellate mechanism was presented in *Draft Provisions on an Appellate Mechanism*, in which the overall consideration for the establishment of an appellate mechanism was outlined.

This document aims to further set out the Chinese Government's overall considerations on the establishment of a standing appellate mechanism (unless otherwise specified, the term "appellate mechanism" below refers to the standing appellate mechanism) in the context of the aforementioned reform and its comments on the updated draft provisions on an appellate mechanism presented by the Secretariat.

This document contains preliminary comments of the Chinese Government only, without prejudice to the Chinese Government's position in the future.

II. China's considerations regarding the overall design for establishing an appellate mechanism

Establishing an appellate mechanism is an important part of the reform of the ISDS mechanism, and plays an important role in advancing the rule of law in the field of the ISDS. China is open to proposals for establishing an appellate mechanism. In particular, China supports the establishment of a standing appellate mechanism on the basis of a multilateral treaty which can be widely used by host States and investors, and China supports actively exploring flexible forms of treaty and implementation models to expand the impact and scope of the application of the standing appellate mechanism in the field of the investment dispute settlement.

China is of the view that the institutional design of the appellate mechanism should aim to enhance the consistency and predictability of arbitral awards in investment dispute settlement and stabilize the legal expectations of host States and investors. Moreover, on the basis of an adequate balance between the powers of contracting parties to international investment treaties and those of the appellate tribunal, the appellate mechanism should be designed to provide the disputing parties with an efficient,

complete and affordable mechanism for correcting errors in individual cases, and should enhance the overall legitimacy of ISDS.

With regard to the institutional design, China is of the opinion that the operation of the appellate mechanism should be regulated by multilateral rules, and components of the appellate mechanism should be reasonably defined including the following: the scope of appeal and grounds for appeal under the appellate mechanism, the types of decisions by the appellate tribunal, appellate proceedings and time frame for the decisions made by the appellate tribunal, remand and corresponding proceedings, the qualifications, number, and selection of adjudicators under the appellate mechanism, a control mechanism by contracting States over the operation of the appellate mechanism, the prevention mechanism of abuse of appeal proceedings, etc..

Specifically, as to the scope of appeal and grounds for appeal under the appellate mechanism, China is of the view that the scope of appeal should be limited to decisions on jurisdiction, merits and interim measures, and that the appellate tribunal should be allowed to review the errors of law and certain facts in the original decision made by the first-tier tribunal and, where necessary, to remand the case to the first-tier tribunal. In order to enhance the efficiency of the appellate mechanism and control its operational costs, China supports efforts to explore the use of security for costs to avoid

abuse of the disputing parties' rights and to reduce the overall pressure on the operation of the appellate mechanism, provided that the procedural rights and interests of the disputing parties are guaranteed and sufficient flexibility is reserved for small and medium-sized investors and developing States.

China believes that legitimacy, impartiality and professionalism are the cornerstones for the appellate mechanism to fulfil its institutional functions. In this regard, China believes that the practices of existing international dispute settlement mechanisms with regard to the selection criteria and selection process for the appellate tribunal members can be used as helpful reference, so as to ensure that adjudicators have a high level of expertise and practical experience in public international law and international investment law, and are representative in its composition. At the same time, adequate consideration should also be given to the joint interpretations of international investment treaties made by the contracting parties thereto and the effect of the decisions by the appellate tribunal with a view to preserving the intent and purposes of the contracting parties.

Lastly, China considers it advisable to take reference from and coordinate with the existing recognition and enforcement mechanisms in the investment arbitration, reasonably determine a set of mechanisms that facilitate the recognition and enforcement of the decisions rendered by the appellate tribunal in the territory

of each Contracting Party of the appellate mechanism, and actively explore the possibility of recognizing and enforcing the decisions rendered by the appellate tribunal in non-Contracting Parties.

III. China's considerations on specific rules for establishing the appellate mechanism

(I) Draft provision 1

With respect to paragraph 1 of draft provision 1, China supports that a decision rendered by a first-tier tribunal on its jurisdiction or on the merits may be appealed.

With respect to paragraph 2 of draft provision 1, China supports that an appeal may be raised against an interim measure ordered by a first-tier tribunal. China is open to requiring a disputing party to request for leave to appeal against an interim measure. China is of the opinion that the appellate procedure should not be overly complicated, or unduly increase a disputing party's burden of appeal. Meanwhile, mechanisms to prevent abuse of the right to appeal should also be established to avoid unduly increasing the caseload of the appellate tribunal. Subject to the foregoing, if leave to appeal is required, China considers it necessary to further clarify the conditions for satisfying such requirement. Specifically, China considers that an appeal against an interim measure should be permitted only when the following conditions are met: (1) such measure involves an error of law; and (2) such measure substantially affects the rights of one or more of the disputing

parties. Moreover, China considers that, if leave to appeal is required for an appeal against an interim measure, it should also be clarified that, for such appeal, the aforementioned requirement of leave to appeal shall prevail over draft provision 2, that is, notwithstanding draft provision 2, an appeal against a decision on an interim measure shall be permitted when the conditions are met.

With respect to paragraph 3 of draft provision 1, China supports that procedural orders, decisions on bifurcation, decisions on challenges of arbitrators and other procedural decisions should be explicitly excluded from the scope of appeal, so as to ensure the prompt development of the original arbitration proceedings and speedy settlement of disputes.

(II) Draft provision 2

With respect to subparagraph 1(a) of draft provision 2, China considers that an error in the application or interpretation of the law shall not be restricted to a "manifest" one. In an investment arbitration based on an investment treaty, the application or interpretation of the investment treaty often involves a complex analysis, in which the ordinary meaning, the object and purpose, the context of the treaty, *etc.* are considered. In such circumstance, an error may not be manifest but will have a substantial impact on the result of the case. Thus, if an appeal is only permitted on the ground of a "manifest" error in the application or interpretation of the law, numerous disputing parties in investment arbitration cases

will lose their right to appeal for relief. Considering an essential purpose of establishing an appellate mechanism is to unify legal standards in the investment arbitrations, China believes that disputing parties should be allowed to appeal on all errors in the application or interpretation of the law, regardless of whether such errors are "manifest" or not.

With respect to subparagraph 1(b) of draft provision 2, China supports that certain errors in the appreciation of the facts should be included in the grounds for appeal, but China proposes to define the term "certain errors in the appreciation of the facts" as "errors in the appreciation of the facts that may have a substantial impact on the result of the case". In an investment dispute based on an investment treaty, the interpretation and application of domestic law as well as the assessment of damages are usually factual issues requiring complex analyses, having a substantial impact on the result of the investment arbitration case. If errors in the appreciation of the facts are limited to manifest ones, it may lead to a scenario where errors in the appreciation of the facts that are not manifest but may have a substantial impact on the result of the case cannot be corrected, thus the legal rights of the disputing parties cannot be adequately protected. For example, errors in the assessment of damages are typically not manifest but are relevant to the amount of damages, and have a substantial impact on the disputing parties' rights. It would be detrimental to the interests of the disputing parties if such errors were not recognized as

constituting grounds for appeal. In addition, for some manifest errors in the appreciation of the facts that have no substantial impact on the result of the case, it is not necessary to include them in the grounds for appeal. Therefore, China suggests that the requirement of a "manifest" error in the appreciation of the facts be amended as an error in the appreciation of the facts "that may have a substantial impact on the result of the case". The term "substantial" here means that there is a genuine causal effect between the error in the appreciation of the facts and the result of the case.

With respect to subparagraph 2(g) of draft provision 2, China notes that Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration and Article V2(b) of the New York Convention all take conflict with the public policy of the country where an application for setting aside an arbitral award is made or where recognition or enforcement of an arbitral award is sought as the ground for setting aside or refusal of recognition or enforcement, rather than conflict with "international public policy". Therefore, China suggests clarifying the meaning of the term "international public policy". If it is difficult to reach an effective consensus on the meaning of the term "international public policy", China suggests deleting this subparagraph in order to ensure predictability.

With respect to subparagraph 2(h) of draft provision 2, China considers that new or newly discovered facts may not necessarily have impacts on the result of the case. Allowing a disputing party to appeal solely on the ground of new or newly discovered facts may lead to an abuse of the appellate mechanism and may result in the appellate tribunal fulfilling the role of the "trier of facts" of a first-tier tribunal, deviating from the original purpose of the appellate mechanism. Furthermore, in any dispute settlement proceedings, discovery of facts and production of corresponding evidence are generally subject to time frames. Likewise, the appellate mechanism should also be designed to strike a balance between justice on the merits and efficiency of the overall dispute settlement proceedings. Therefore, China suggests deleting the provisions on new or newly discovered facts in subparagraph 2(h).

With respect to subparagraph 2(i) of draft provision 2, China suggests clarifying the difference between the application scenarios under the terms "unsubstantiated award" and "absence or lack of reasoning" and the application scenarios under the subparagraph 2(f) of this draft provision (i.e. the first-tier tribunal decision failed to state the reasons on which it is based, unless the parties have agreed otherwise). If subparagraph 2(f) could be understood to include the scenarios prescribed under subparagraph 2(i), China suggests deleting the subparagraph 2(i).

With respect to subparagraph 2(j) of draft provision 2, China understands that the term "correction" used therein refers to the correction of clerical, arithmetical or similar errors in a decision, and the term "interpretation" therein refers to the interpretation of the meaning or the scope of a decision. On this basis, China considers that as the first-tier tribunal is more familiar with the case and as the decision against which a correction or interpretation is sought is rendered by the first-tier tribunal itself, it is more appropriate for the first-tier tribunal to be tasked with correcting or interpreting such decision. In addition, if a disputing party is allowed to appeal solely on the ground of correction of clerical, arithmetical or similar errors in a decision rendered or on the ground of interpretation of a decision rendered, and if the appellate tribunal is tasked with correcting and interpreting such decision, the appellate tribunal will need additional time to learn the details of the case as compared to the first-tier tribunal, thus facing significantly increased workload. Therefore, China does not support listing grounds related to requests for correction and interpretation as separate grounds for appeal.

(III) Draft provision 3

China agrees that an appeal should be raised within a specified period of time after the appealable decision is rendered. In the meantime, China considers that the time frame for appeal and the commencing time for the relevant time frame should be

determined reasonably based on the type and nature of the appealed decision. China considers that decisions on interim measures differ significantly from decisions on jurisdiction or decisions on merits in terms of their content and nature. Therefore, different time frames for appeal should be set according to the types of the decisions. In particular, as decisions on interim measures often deal with situations of urgency, the balance between the urgency of the situation and the disputing party's right of appeal should be adequately considered when setting the time frame for appeal against decisions on interim measures. Such time frames should not be too long that the objective of establishing an appellate mechanism for interim measures (i.e. to provide timely relief) is frustrated. In light of the foregoing, China considers that an appeal against a decision on interim measures should be raised within 10 days from the date of the decision by the first-tier tribunal; an appeal against a decision on jurisdiction should be raised within 15 days from the date of the decision by the first-tier tribunal, and an appeal against a decision on merits should be raised within 30 days from the date of the decision by the first-tier tribunal. Where the time frames expire, no appeal, whether in any form or on any ground, should be raised by a disputing party.

(IV) Draft provision 4

China agrees that, when an appeal is raised, the first-tier tribunal may, where appropriate and so requested by a disputing party,

suspend the proceedings until a decision is made by the appellate tribunal. Furthermore, China suggests that a new paragraph be added to provide that the appellate tribunal may, where appropriate and so requested by a disputing party, order the first-tier tribunal to suspend the first-tier proceeding during the appellate proceedings.

(V) Draft provision 5

With respect to paragraph 1 of draft provision 5, China agrees that the paragraph is intended to specify the suspensive effect of an appeal. China, however, suggests taking reference from the wordings in the ICSID Convention and revising the term "any other review proceedings" as referred to in the paragraph into the term "any other remedy, including but without limitation to making supplementary decision to a decision, making rectification of a decision, and interpretation and revision of a decision". The suggested revision is intended to expressly exclude, among others, such similar proceedings as supplementary decision, rectification, interpretation and revision of an award as set forth in the ICSID Convention and the ICSID Arbitration Rules.

Regarding the term "decision" in paragraphs 1 and 2 of draft provision 5, China suggests that this term be consistent with the scope of decision subject to appeal as set forth in draft provision 1. China considers that to this end, this paragraph 1 may be amended as "An appeal shall suspend the effect of the decision of the first-

tier tribunal subject to appeal…", and this paragraph 2 as "Recognition and enforcement proceedings of a decision of the first-tier tribunal subject to appeal…".

(VI) Draft provision 6

With respect to paragraphs 1 and 2 of draft provision 6, China supports that the appellate tribunal shall ensure that the proceedings are conducted in a fair and expeditious manner and in accordance with the rules of procedure to be specified, and members of the appellate tribunal shall comply with the *Code of Conduct for Judges in International Investment Dispute Resolution*.

With respect to paragraph 3 of draft provision 6, China considers that, when interpreting an international treaty, the intent of the contracting parties should be respected, and adjudicatory bodies shall follow the joint interpretations of the contracting parties, regardless of whether this is expressly provided in the applicable treaty. China suggests that the wording "if this is provided in the applicable treaty" be deleted. In addition, as for the term "Contracting Parties", China considers that the capitalized term may easily cause misunderstanding that the term refers to the Contracting Parties to the appellate mechanism. China thus believes that lowercase should be used for the term "contracting parties", and the phrase "Joint interpretation by the Contracting

Parties" should be specified as "Joint interpretation of the applicable treaty by its contracting parties".

With respect to paragraph 4 of draft provision 6, China generally agrees that security for costs should be required so as to prevent the abuse of the appellate proceedings. China, however, believes that the security should be calculated on the basis of the arbitration costs that may arise from the appellate proceedings instead of the amount awarded in the decision by the first-tier tribunal. Meanwhile, in accordance with draft provision 1, a disputing party could simply appeal the first-tier tribunal's decision on its jurisdiction or decision on interim measures. Under such a circumstance, when an appeal is raised by a disputing party, there may be no decision by the first-tier tribunal containing an awarded amount. Therefore, the amount of the security cannot be calculated. To achieve the purpose of preventing the abuse of the appellate proceedings and to avoid the aforesaid impossibility to calculate the amount of the security, China suggests that the security be calculated on the basis of the arbitration costs that may arise from the appellate proceedings. In addition, China considers that reduction, exemption or exceptional arrangements should be made for small and medium-sized enterprises and individual investors.

(VII) Draft provision 7

With respect to paragraph 1 of draft provision 7, China agrees that the appellate tribunal may uphold, modify, or reverse the decision of a first-tier tribunal.

For paragraph 2 of draft provision 7, China suggests that the wording "it **may** remand the dispute to the first-tier tribunal" be amended to state "it **shall** remand the dispute to the first-tier tribunal" where the facts established by the first-tier tribunal are insufficient for the appellate tribunal to render a decision. The suggested revision is to avoid the appellate tribunal's inability to render a decision when the appellate tribunal, at its discretion, fails to remand the dispute in a timely manner. In addition, in order to avoid the appellate tribunal's over-reliance on the first-tier tribunal in establishing material facts, China suggests that exceptions be made to the paragraph by specifying the circumstances in which a dispute shall not be remanded. For example, where an issue of a host State's domestic law is relevant to the legal nature of the host State's act being considered by the appellate tribunal or to the legal interpretation of provisions of the international investment treaty concerned, the appellate tribunal should not remand the dispute on the ground that the first-tier tribunal failed to ascertain the meaning of the host State's law or there is a lack of factual basis.

With regard to paragraph 2 of draft provision 7 that "If the first-tier tribunal is no longer in a position to consider the dispute, or

where it would be inappropriate for the first-tier tribunal to consider the dispute, upon the request of either disputing party, a new tribunal shall be constituted in accordance with the same applicable rules", China considers that the circumstances requiring the constitution of a new tribunal should not be limited to the scenario where a dispute is remanded, but should also include the scenario where the request for correction or interpretation of the decision against which no further appeal is raised after remand is made (and which has final binding effect). China suggests that: (1) a provision on the constitution of a new tribunal be added separately, (ii) the aforesaid provision in paragraph 2 of draft provision 7 be deleted, and (iii) a new provision on the constitution of a new tribunal be added as follows:

[New provision No.] Constitution of a new tribunal

1. Where the appellate tribunal remands a dispute, if the first-tier tribunal or the retrial tribunal is no longer in a position to consider the dispute, or if it would be inappropriate for the first-tier tribunal or the retrial tribunal to consider the dispute, upon the request of either disputing party, a new tribunal shall be constituted in accordance with the same applicable rules.

   It shall be deemed that the first-tier tribunal or the retrial tribunal is no longer in a position to consider the dispute, or that it would be inappropriate for the first-tier tribunal or the retrial tribunal to consider the dispute if, *inter alia*:

(1) Its arbitrator was under some incapacity;
(2) It was not properly constituted;
(3) It manifestly exceeded its powers or ruled beyond claims submitted by a disputing party;
(4) It seriously departed from the fundamental rules of procedure; or
(5) Its arbitrator has engaged in corruption.

2. Paragraph 1 above applies *mutatis mutandis* if a disputing party requests for correction and interpretation of the binding decision of the retrial tribunal.

With regard to paragraph 3 of draft provision 7, China agrees that the decision by the appellate tribunal shall be in writing and state the reasons upon which it is based.

With respect to paragraph 4 of draft provision 7, China suggests that, the wording "it **may** provide, **where appropriate**, detailed instructions" be amended as "it **shall** provide detailed instructions", in order to avoid any error by the first-tier tribunal in the application or interpretation of the law or in the appreciation of the facts after the dispute is remanded.

With respect to paragraph 5 of draft provision 7, China considers that the specific time frame for the appellate proceedings shall be determined taking into account factors such as the type of the appealed decision and the grounds for appeal. China holds that the time frame for rendering a decision by the appellate tribunal may

be set at thirty (30) days if the appeal is raised against a decision on interim measure, sixty (60) days if the appeal is raised against a decision on jurisdiction, and ninety (90) days if the appeal is raised against a decision on the merits. Meanwhile, as the adjudicators under the standing appellate mechanism are relatively fixed, China believes that the time frame may commence from the date on which the appeal is raised.

With regard to paragraph 6 of draft provision 7, China agrees to the current stipulation. The overall time frame actually needed for the appellate tribunal to render a decision may be longer if cases heard under the appellate mechanism gradually accumulate and claims submitted by the disputing parties become increasingly complex. In order to make the time frame for the appellate tribunal to render a decision more practicable, China considers that the appellate tribunal may be allowed to adjust the manner of hearing a dispute as appropriate or to exclude specific claims from the hearing based on the consent of the disputing parties, provided that the rights and interests of the disputing parties are not affected (for instance, limiting the length of documents to be submitted by the disputing parties, the time for preparation, the time and duration of the hearing, etc.). China suggests that a new paragraph be drafted to take into account the above considerations.

With respect to paragraphs 7 and 8 of draft provision 7, China considers that arrangements also need to be made with respect to

the effect of the subsequent decision made by the retrial tribunal in the event of a remand. Such arrangements may need to address different scenarios, taking into account the possibility that the appellate tribunal may remand only certain issues and/or that a disputing party may re-appeal certain issues of the subsequent decision made by the retrial tribunal.

For paragraph 9 of draft provision 7, China considers that the wordings "shall not be subject to any appeal or review" should be amended as "shall not be subject to any appeal or any other remedy as referred to in [draft provision 5], unless otherwise provided in this draft provision", so as to be consistent with draft provision 5.

With regard to paragraphs 10 and 11 of draft provision 7, China considers that adjustments should be made to these provisions, depending on the circumstances of remand. Where neither disputing party appeals the subsequent decision rendered by the retrial tribunal, it should be the retrial tribunal that corrects any error in computation, any clerical or typographical errors or any errors of a similar nature in the decision, or gives an interpretation of its decision at the request of a disputing party. Furthermore, as issues such as errors in computation may affect the substantive content of the final decision, China suggests further provide that the retrial tribunal or the appellate tribunal shall, at the request of a disputing party, stay the enforcement of a decision if it considers that the circumstances so require.

(VIII) Draft provision 8

With respect to paragraph 1 of draft provision 8, China suggests to add a qualifier "unless the retrial tribunal or the appellate tribunal stays enforcement of the decision in accordance with these Rules" to the application of this paragraph, in order to keep consistency with China's suggestion to add to paragraphs 10 and 11 of draft provision 7 with "the retrial tribunal or the appellate tribunal shall, at the request of a disputing party, stay enforcement of the decision if it considers that the circumstances so require". In addition, China considers that relevant adjustments should be made to the paragraph to account for the retrial mechanism. Specifically, where neither disputing party appeals the subsequent decision rendered by the retrial tribunal, similar mechanism should also be available to permit enforcement of such a decision.

China agrees to the arrangements set forth in paragraphs 3 and 4 of draft provision 8.

(IX) Selection mechanism and qualification requirements for adjudicators under the standing appellate mechanism

With respect to the selection and appointment of adjudicators under the standing appellate mechanism, China considers that reference may be made to the selection and appointment requirements of the tribunal members of a standing mechanism adopted by Working Group III. China holds that the adjudicators

under the appellate mechanism should have recognized authority as well as recognized expertise and practical experience in public international law and international investment law. They should understand national public policies, and be proficient in at least one of the working languages of the standing appellate mechanism. In addition, the appellate adjudicators should be representative in terms of the geographic region, level of development, scale of investment and legal systems, among others, of the Contracting Parties to the appellate mechanism.

With respect to the selection process of adjudicators, China considers that the appellate mechanism is an international institution which resolves disputes mainly concerning the responsibility of sovereign States. Therefore, the Contracting Parties to the appellate mechanism should play a leading role in the selection of adjudicators. China is of the view that a selection committee may be established to screen the candidates nominated by the Contracting Parties, and the Contracting Parties to the appellate mechanism will finally determine the adjudicators by a "unanimous majority" or a "two-thirds majority". In addition, China holds that Contracting Parties should retain the authority and flexibility to adjust the number of adjudicators in accordance with changes in the number of cases.