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People's Republic of China: Preparing a Concession Law for Infrastructure and Public Services— Suggestions on the Draft Interim Regulation on Concessions

Prepared by Fiona Connell, Principal Counsel, ADB; Philip Kelly, Independent Consultant; Michael Schur, Managing Director, Castalia Strategic Advisors; Craig Sugden, Principal Public–Private Partnership Specialist, ADB; and Ellen Zhang, Partner, Pinsent Masons

For the National Development and Reform Commission of the People's Republic of China and the Asian Development Bank

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Asian Development Bank

ABBREVIATIONS

ADB	–	Asian Development Bank
MOF	–	Ministry of Finance
NDRC	–	National Development and Reform Commission
PPP	–	public–private partnership
PRC	–	People’s Republic of China
SOE	–	state-owned enterprise
VfM	–	value for money

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I. INTRODUCTION

导语

1. This report presents to the National Development and Reform Commission (NDRC) of the People's Republic of China (PRC) the main suggestions on the December 2015 draft of the Interim Regulation on Concessions for Infrastructure and Public Utilities. The draft Interim Regulation was discussed at an International Expert Meeting held on 18 May 2016. It is expected to be submitted to the State Council in 2016, possibly in the form of a law on concessions.

该文总结了在 2016 年 5 月 18 日国际专家研讨会上向中华人民共和国国家发展改革委员会（发改委）提供的主要建议。研讨会探讨了 2015 年 12 月颁布的《基础设施和公共事业特许经营暂行条例》（征求意见稿）。该暂行条例有望以法律条文形式于 2016 年递交国务院。

2. The international workshop was supported by the Asian Development Bank (ADB) under Technical Assistance 8717-PRC: Preparing a Concession Law for Infrastructure and Public Services. The event was held at ADB's PRC Resident Mission.

支持此次研讨会的是亚洲开发银行（亚行）技术援助中国 8717 号项目——“为基础设施和公共服务准备一项特许经营法律”。研讨会在亚洲开发银行驻中国办事处召开。

3. Representing the Government of the PRC at the workshop were members of the steering group that prepared the draft Interim Regulation: Deputy Director General Zhang Zhifeng and Director Zhao Chengfeng, Law and Regulation Department, NDRC; Director Gu Tianshu, Regulation and Law Department, Ministry of Finance; and a representative of the Legislative Affairs Office of the State Council. Also present were Jin Yongxiang, General Manager, Dayue Consulting; Li Kaimeng and Yang Kaiyue, China International Engineering Consulting Corporation; and a graduate student from Beijing University.

政府方代表来自负责《暂行条例》筹备工作的领导小组，包括发改委法规司副司长张治峰和处长赵成峰、财政部条法司顾天舒，以及一位来自国务院法制办公室的代表。出席研讨会的还有北京大岳咨询有限责任公司总经理金永祥及其助理人员、中国国际工程咨询公司李开孟和杨凯越，以及一位来自北京大学的研究生。

4. The participating international experts were Bo An, Public Sector Management Specialist, ADB; Matthew Bisley, Partner, Allen & Overy (PRC); James Ballingall, Head, International, Infrastructure and Projects Authority, United Kingdom; Fiona Connell, Principal Counsel, ADB, who chaired the workshop; Philip Kelly, Independent Consultant; Arthur McInnis, Independent Consultant; Michael Schur, Managing Director, Castalia Strategic Advisors; Craig Sugden, Principal Public-Private Partnership Specialist, ADB; and Ellen Zhang, Partner, Pinsent Masons.

国际专家有亚行公共管理专家安铂、来自安理国际律师事务所（中国）的项目伙伴马修·比斯利（Matthew Bisley）、英国基础设施和项目管理局国际部主任詹姆斯·柏霖（James Ballingall）、亚行法律顾问（研讨会主持人）菲奥娜·康奈尔（Fiona Connell）、独立咨询专家菲利普·凯利（Philip Kelly）、独立咨询专家阿瑟·麦金尼斯（Arthur McInnis）、澳大利亚 Castalia 国际战略咨询公司常务董事迈克尔·舒

尔 (Michael Schur)、亚行首席 PPP 专家柯瑞格 (Craig Sugden) 和来自品诚梅森的项目伙伴张晓慧。

5. Section II of this report summarizes the suggestions for the continued refinement of the draft Interim Regulation. ADB had earlier provided detailed comments and suggestions on specific provisions (dated 25 February 2016).

表 1 概括了亚行为完善《暂行条例》提出的各项建议。亚行曾针对《暂行条例》各个具体条款给出评论和建议，并于 2016 年 2 月 25 日将其递交发改委。

6. Also discussed in this report are special topics on lender's step-in rights and lender's direct agreements in PPP projects (section III), and unsolicited proposals (section IV).

附件提供了不同主题的材料，包括非应标建议书、放贷人的介入权和直接协议。

II. SUMMARY OF SUGGESTIONS 建议总结

A. Overview 导语

7. To enlarge the role of public-private partnership (PPP) in delivering public infrastructure and public services, it is essential to have systems and resources that address the wide range of issues encountered by governments, social capital,¹ and financing entities. A comprehensive, robust, and clear policy and legal and institutional framework are essential for identifying and implementing PPP projects that are affordable, bankable, and provide value for money.

为推广以 PPP 形式交付公共基础设施和公共服务，建立机制与基础解决 PPP 发展过程中政府、社会资本方和金融机构面临的各项问题至关重要。全面、稳固、清晰的政策和制度框架，能够使挑选并付诸实施的项目财政承受力好、可融资性强、物有所值 (VfM) 能够实现。

8. The PPP law is an important part of the PPP legal and institutional framework. In general, a PPP law focuses on granting rights, imposing controls, setting regulations, and clarifying basic principles.

虽然 PPP 法律只是 PPP 立法和制度框架的一部分，但它着实重要。通常，PPP 法律会将重心放在权利的授予、管控的实施、监管的设置和总领性原则的澄清上。

9. It may be worthwhile to revisit the draft Interim Regulation with a view to ensuring it answers the following questions:

我们有必要再次审视《暂行条例（草案）》，确保它回答了下述问题：

¹ This includes the private sector and state-owned enterprises.
包括私营部门和国有企业在内的社

- (i) What bodies are empowered to enter into PPPs (e.g., specific central and local state bodies, state-owned enterprises [SOEs], health agencies, etc.)?

哪些机构有权进入 PPP（例如各个中央和地方级别的政府部门、国有企业、卫生部门等）；

- (ii) What forms of contract it applies to (e.g., this will clarify if PPPs are to be covered by one law or several), whether it applies equally to concessions (which are normally user pay PPPs, government pay PPPs, or hybrid PPPs (funded by government and user fees)?)

适用何种形式的法律（例如澄清是设置一个法律还是两个法律，法律是否对于特许经营[通常是使用者付费]、政府付费和政府与使用者混合付费同等适用）；

- (iii) What specific areas of the economy and type of services do the PPPs cover (e.g., is it all areas or sectors or are some excluded, and what happens if the private sector just builds and maintains without providing services directly to the public)?

覆盖哪些领域（例如是覆盖社会和经济的所有领域，还是有些领域需要排除在外；如果私营部门只是建造和维护而没有直接向公众提供服务，这种情形如何处理）；

- (iv) What overall governance/approval processes apply (e.g., how does the budget approvals of the Ministry of Finance fit in)?

整体治理与审批如何进行（例如财政部的预算审批如何加入其中）；

- (v) Have typical policy matters been addressed, such as value for money assessments, areas where PPPs are deemed unsuitable, business case approval processes, appropriate forms of contract, etc.?

传统政策是否存在重要影响？比如在物有所值评估、PPP 适宜领域、项目计划审批程序、合同签订形式等方面是否有影响；如果有，会如何影响。

B. Purpose and Scope of the Law

法律目的与范畴

Suggestion: That the concession law enable sustainable practices, new forms of public-private partnership (PPP) structures, and new modalities of financing.

建议：特许经营法应推动生成可持续性的实践模式、新形式公私合作（PPP）结构和新的融资方式。

10. A PPP law should be enabling and permissive rather than prescriptive. It needs to look to future needs and not be limited only to current conditions and practices. A PPP law needs to be able to stand the test of time to ensure certainty and consistency and minimize the need for future amendments.

PPP 法律应当是授权允许性的，不应当是规定性的，应放眼未来需求，不局限于当今

实践案例。PPP 法律必须要经得起时间的考验，将未来法律修订的必要性降到最低，从而保证法律的确信性和持续性。

11. The PRC can build on its own extensive PPP experience to encourage greater use of PPPs and raise their impact on the quality and efficiency of public services. But the purpose and scope of the PPP law should not be confined to the PRC's PPP experience to date. The law should enable the PRC to readily adapt to emerging issues in PPP implementation and to foster the dynamic, sustainable development of the PPP program.

中华人民共和国（下称“中国”）可以在其自身大量 PPP 实践经验的基础上，鼓励人们更广泛地开展 PPP 项目，提高它们在公共服务质量和效力上的推动作用。中国 PPP 法律的目的和范畴不应当仅局限于中国当前的 PPP 实践经验。该法律应当使中国做好准备，解决 PPP 实施进程中出现的新问题，促进 PPP 动态地、积极地向前发展。

12. The PPP experiences of other countries, both positive and negative, provide an important source of knowledge for project planning and development. The PRC can learn from relevant experiences at home and abroad to design and implement a PPP law that is suited to the needs, trends, and characteristics of its PPP program.

无论是宝贵经验还是失败教训，它国实践对 PPP 未来发展态势和途径都有重要的借鉴意义。因此，在设计、实施 PPP 法律时，中国可借鉴国内外的相关经验，使该法律满足未来需求、适应发展趋势、具备应有特征。

13. A PPP law would often specify how it fits in the overall regulatory framework, cross-referring to other legislation, and specifying how any overlap or potential for conflict is dealt with. For example, it is common to cross refer to procurement regulations, banking and securities laws, dispute resolution, etc.

通常，PPP 法律会明确指出该法律在总体监管框架中的地位——比如它与其它立法的交叉，澄清如何处理它与其它法律间的重合，尤其如果相互之间存在冲突，该如何解决——例如，与采购条例、银行/证券法、争议解决条例的重合或冲突。

14. In the case of the PRC, a variety of official documents relating to PPPs can cause potential confusion unless harmonized. These include the Measures for Concessions in Infrastructure and Public Services, Guidance of the National Development and Reform Commission (NDRC) on PPPs, MOF's Circular on Promotion and Application of PPPs. Such an array of documents, without coordination through the concession law, could make it very hard for a legal firm to give a clean legal opinion to a bank lending credit committee.

在中国，存在许多相关性的文件，例如《基础设施和公共服务特许经营条例》，国家发展改革委员会《关于开展政府和社会资本合作的指导意见》以及财政部《关于推广和应用政府与社会资本合作有关问题的通知》。这些文件需要协调统一，否则容易使人困惑。如果特许经营法不对这一系列文件作出统筹协调，律师事务所便很难在银行信贷上给出明确的法律意见。

15. Detailed or prescriptive legal provisions are best left to the ambit of regulations, policies, procedures, and guidelines that can be more readily adapted to the evolving needs of the PPP program. But a PPP law needs to enable such instruments. It may be worthwhile to review the draft Interim Regulation with a view to removing items that would be better

addressed by specific regulations, PPP agreements, etc.

详细的、规定性的条款最好留给具体条例、政策、程序、和指导性文件去定义，因为这些文件能更好地随 PPP 实践开展和 PPP 模式的演变而做出相应调整。但是 PPP 法律需要推动生成这些工具性文件。我们有必要再次审阅《暂行条例（草案）》，着眼于删除那些能够通过其它具体条例、政策、PPP 协议等文件更好地予以处理的条款。

C. Defining PPP

PPP 的定义

Suggestion: That the concession law consider a definition of PPP similar to that used internationally.

建议：特许经营法应考虑使用与国际相似的 PPP 定义。

16. The PPP is now viewed internationally as a broad and evolving concept that can incorporate a variety of agreements such as concessions.

PPP 而今在国际上被视为一个宽广且不断演进的概念，许多协议安排都可纳入其中，包括特许经营。

17. Early PPP laws usually contained lists of projects covering different combinations of contractual elements, such as build–operate–transfer (BOT), build–operate–own–transfer (BOOT), etc. More recent laws place more emphasis on the substance of PPP than its forms.

早期 PPP 法律往往呈现具体项目列表，涵盖不同的契约要素，比如使用“建设、修复、运营、拥有、租赁、移交、融资、管理”等词（BOT, BOOT 项目）。当代 PPP 法律则更强调 PPP 的实质而非具体形式。

18. There is also greater consensus now that a PPP, as a long-term contract between a public sector party and a private sector party, has the following features:

作为公有方和私营部门之间的一种长期合约，PPP 被越来越多的人认为具有以下共同特征：

- (i) It involves the development and/or management of a public asset or service (bundling these together for risk management);

发展和/或管理一种公共资产或服务（管理这期间产生的风险）；

- (ii) The private sector party bears significant risk and management responsibility throughout the life of the contract (life cycle costs); and

在合同有效期内，私营部门承担巨大风险和管理责任（生命周期成本）；

- (iii) Payments are significantly linked to performance (service standards, demand, use).

付款与绩效密切相关（服务水平/需求/使用）。

19. Private financing is not considered an essential element of the PPP definition but can be desirable for risk transfer and management.

私人融资不是 PPP 定义中的核心元素，但却是风险转移和管理所需要的。

20. The emphasis now is on value for money, affordability, bankability, and competitive procurement and selection processes.

而今，重点关注的是物有所值、可融资性和可负担能力、竞争性采购和竞争性择选程序。

D. Fiscal Risk

财政风险

Suggestion: That the concession law adopt strong mechanisms for assessing, monitoring, managing, and mitigating fiscal risks.

建议：特许经营法应建立强有力机制，评估、监督、管理和减缓财政风险。

21. Concession arrangements can have fiscal impacts when governments (i) commit to direct liabilities (the commitment to make payment for services); (ii) accept contingent liabilities (payments that are contingent on a risk event that may or may not happen, such as force majeure); and (iii) make physical commitments (e.g., to provide right of way and the like), all of which may give rise to penalties and damages and even termination if not delivered.

政府承诺直接债务——即承诺对公共服务直接付款，或接受或有债务——即基于风险事件（有可能发生，也有可能不会发生）给出的可能性付款（如不可抗力情形），抑或是给出现实性的承诺（如提供某种界面、通道等），承诺在公共服务未能交付时，予以罚款甚至终止协议。在上述情形下，特许经营安排便会产生财政性的影响。

22. The fiscal impacts of PPPs need to be managed by the central government, and central agencies need to be vigilant in assessing and monitoring the government's exposure. On the other hand, line agencies often think of concessions as off-budget or an additional source of funds, and do not see the "whole-of-government" perspective. In some countries, line agencies have disguised their liabilities as contingent liabilities (e.g., guaranteed revenue streams or prices) so as to avoid budget constraints.

PPP 的财政影响应由中央层面的政府部门予以管控。这些中央政府部门在评估和监督政府承担的风险上，应时刻保持警惕。然而，中央政府的地方下属机构常会认为特许经营不在财政预算内，或只是一种额外的资金来源，它们不具备“政府全局”的视角。有些国家里，地方政府机构会将它们对特许经营承担的债务掩盖成为或有债务以规避财政限制（如，承诺保证其收益流或价格）。

23. Many countries started to implement PPP on a project-by-project basis, enticed by the temptation of obtaining public services while avoiding or postponing government expenditure, downplaying or ignoring contingent liabilities, or avoiding debt being recorded in the government balance sheet. Without appropriate management and controls, fiscal risk exposure grew with the passage of time and the accumulation of projects. Inevitably, expenditure commitments fell due and some contingent liabilities crystallized.

为了在获得公共服务的同时，回避或减缓政府风险，降低或除去或有风险，或避免在

政府财政收支表上记入债务，许多国家采取以单个具体项目为基础的方式开展 PPP。倘若没有妥善的管控，财政风险会随着时间的推移和项目的不断累积而逐渐增大。如此以来，支出上的承诺不可避免地要到期兑现，一些或有债务则被坐实。

24. Fiscal risks probably pose the greatest threat to the success of a PPP program. In too many countries, PPPs have led to fiscal stress and disillusionment that have halted the program. Most of these problems have a predictable source—failure to install adequate processes and systems to manage and mitigate fiscal risk exposure.

财政风险或许是影响 PPP 项目成败的最大威胁。在许多国家，由于 PPP 造成了财政压力，人们不再对 PPP 抱有美好期望，PPP 规划最终处于停滞。诸多问题的产生都有一个共同原因：没有设置合理的程序和体系，管理和降低财政风险。

25. Fiscal agencies have a role to play in examining and approving the fiscal risks and the direct and indirect, and contingent and implied liabilities that are inherent in PPP projects. Fiscal agencies thus need to be involved at the various stages of the PPP project cycle, such as in preparing the business case, issuing the request for proposal, and evaluating agreements and related documents prior to signing the PPP.

相关财政部门应当对 PPP 项目自身带有的财政风险以及直接、间接、或有或是潜在的债务进行审批。相关财政部门需要介入 PPP 生命周期中的许多环节，包括项目开发、征询项目计划书、PPP 合同和相关协议签订之前等阶段。

26. Article 13 of the draft Interim Regulation provides a starting point for fiscal affordability evaluation. But more could be done by drawing from the instructive experiences of other countries.

《暂行条例（草案）》第 13 条指出的财政可承受能力评估是个良好开端，可以更多地借鉴其它国家相关经验。

E. Competition

竞争

Suggestion: That the concession law place tighter restrictions on the (i) selection of the social capital partner without competitive bidding, (ii) the participation of the state-owned enterprise as the social capital partner, and (iii) the ownership share of the public partner.

建议：特许经营法应严格限定以下情况：不经过竞争性招标选择社会资本合作伙伴；公营合作方国有企业以社会资本合作方身份参与 PPP；公营合作方股权份额。

27. Competition is fundamental to the PPP concept. However, PPPs permit long-term exclusive rights that are open to abuse. Robust preparation of competitive bidding of PPP projects to ensure they are tendered through “competition for the field” is essential to preventing such abuse.

竞争是 PPP 基础理念之一。PPP 包含许多长期性的独享权利。这些权利容易被滥用。完善 PPP 项目开发，使其采用竞争性招投标，让投标者基于竞争而获得提供公共服务的权利，这一点对于防止上述专享权利被滥用具有重要作用。

28. Shortcuts such as hastily prepared, incomplete PPP agreements leave the government partner with little protection and vulnerable to being exploited by the other partner. Choosing a partner in a non-transparent manner without full regard to their capacity will expose the government party to high-cost, low-quality public services.

项目开发急促、PPP 协议不全等仓促行为都会减弱政府受保护的力度，容易使政府被合作者压榨。择选合作伙伴时不透明、不全面考虑合作方的能力，都有可能导致政府方最终获得的公共服务高成本低质量。

29. Competition between social capital partners for PPP projects in public infrastructure and public services drives efficiency, sound risk allocations, and delivery of value for money. Competition can be between social capital partners from within the PRC and can also include competition from social capital partners from other countries. Competition will help ensure the best PPP outcomes for the PRC, and will help PRC firms prepare to effectively compete for PPP projects in other countries.

公共基础设施和公共服务 PPP 项目的社会资本合作方之间展开竞争，能够提升效率，合理分配风险，实现物有所值。相互竞争的社会资本方可以是中国国内的，也可以是国际的。竞争有利于确保中国获得最佳的 PPP 产出，同时帮助中国公司具备在国际上竞争 PPP 项目的能力。

30. Article 16 of the draft Interim Regulation places restrictions on non-competitive bidding. However, it may be too flexible in allowing alternatives to open bidding if feasibility analysis concludes there will be too few eligible entities. A stricter requirement, such as failure of prequalification process, would be preferable.

《暂行条例（草案）》第 16 条指出了约束非竞争性招标的重要性。但它指出如果可行性研究证实符合条件的实体数量过少时允许使用其它招标手段。这一点规定地太过灵活，不妨对何时可以使用其它招标手段规定的更严格一些——比如资格预审程序失败。

31. It will be a challenge to ensure that there is effective competition for a PPP project where only locally-owned SOEs show interest. If only related parties bid, it will create an impression of unfair competition and deter potential bidders, thereby weakening the bidding process.

如果一个 PPP 项目只有地方国有企业有意愿参与，那么保证这个 PPP 项目有效展开竞争就会比较困难，会给人不公平竞争的印象，吓跑潜在投标人，最终减弱招投标程序的效力。

32. If the public partner owns more than 50% or controls a special purpose vehicle or project company, it is no longer a PPP but a conventional government project without effective competition. The draft Interim Regulation could state that the social capital partner can be neither majority-owned nor controlled by the public partner, and that the share of a special purpose vehicle or project company owned by the government is limited to 49% or, preferably, a lower share.

如果公有方控制了 SPV 或项目公司 50%以上的股份，那么这个项目就不再是 PPP 了，而是一个无有效竞争的传统政府项目。《暂行条例（草案）》应指出社会资本方不能

被公有方控股，也不能是处于公有方管控之下。政府拥有的 SPV 或项目公司的股份不得超过 49%，或者最好是一个更低的数字。

F. Bankability 可融资性

Suggestion: That the concession law be permissive of different forms of lender security and ways of giving assurance to lenders, such as lender's step-in rights.

建议：特许经营法律应当允许以不同的形式确保放贷人权益，比如允许放贷人拥有介入权。

33. Social capital partners and their lenders will want clear risk allocation and a high level of certainty. This is especially so for lenders. PPPs use various forms of lender security to address lending concerns. PPP laws have an important enabling role to play in clarifying risk allocation and reducing uncertainty, while project details are best left to PPP and related agreements.

社会资本方及其放贷人希望项目风险分配明细、不确定因素少。对于债权人而言，更是如此。PPP 项目使用不同形式的贷款担保，采取不同的方法解决放贷人的担忧。PPP 法律应在明确风险分配、降低不确定性这一点上发挥重要作用，具体细节可以留给 PPP 协议及相关合约处理。

34. However, Article 37 of the draft Interim Regulation restricts collateral security to cash flows, which severely limits the availability of funding and the development of innovative financing models. This is presumably a reaction to the government's concern that vital services may be interrupted. But this concern can be addressed by ensuring that the facility in question cannot be used for other purposes, so that its value to lenders is only to perform the function it has under the concession contract. It is important that the draft Interim Regulation allow the concession agreement and direct agreement to address these matters.

《暂行条例（草案）》第 37 条将抵押担保限定在现金流上。这有可能会严重约束资金供应和创新性融资模式的发展。或许，其目的是回应政府恐怕重要公共服务供应被中断的担忧。但其实这种担忧可以通过其它方式予以解决，如让资金不得用作其它用途，仅能用在实现特许经营协议规定的用途上。暂行条例（草案）应当允许特许经营协议和直接协议解决这些问题，这一点很重要。

35. Corporate finance is the main source of funding for PPP projects in the PRC today. International trends, however, indicate that project financing is becoming more established as a means of PPP financing and that lending to SOEs to finance PPP projects is likely to be less attractive as the PPP program progresses. The concession law should leave scope for various innovative forms of financing even if these are not yet evident in PRC PPP projects.

企业融资是当今中国 PPP 项目融资的主要形式。从国际经验来看，项目融资将逐渐成为 PPP 融资的固定模式，而目前通过向国有企业放贷而为 PPP 项目融资的形式会随着 PPP 的发展逐渐减少。特许经营法律应为不同的、创新性的融资留有余地，即便这些融资形式在中国尚未存在。

36. Direct agreements between the public partner and lenders are important to project finance. They allow the lenders to “step in” and to cure non-performance by the concessionaire, or appoint a qualified person, to prevent a project from defaulting on its debt and becoming bankrupt. It is generally in the interest of the public sector partner to allow lenders to cure violations by the concessionaire. This enhances project bankability and facilitates financing. Replacement of the original, non-performing concessionaire by a competent new party is generally subject to the approval of the public partner, which is sometimes limited to the question of the new party’s capacity to deliver the concession agreement.

公有合作方与特许经营者放贷人之间的直接协议对项目融资非常重要。它允许放贷人“介入”项目，并通过特许经营者（或是获得授权的其它人）“治愈”特许经营项目的不良表现，以防止出现债务违约或破产。总体而言，让放贷人通过特许经营者去解决违约行为是符合公有合作方的利益的。这种行为能够增强项目的可融资性，加快融资进程。替换原有的、表现不良的特许经营者，取而代之以新的有能力的其它经营者的做法，必须得到公有方的批准，有时还要取决于加入这一经营者履行特许经营协议的能力如何。

37. Allowing lenders to step in helps protect the project’s cash flow and the continued operation of the concession, in the event of poor performance. Direct agreements are common in other countries, and are a key tool in enabling debt financing of infrastructure. Providing for lender’s step-in rights and for direct agreements is generally a better way to handle the need to get lender consent than requiring it in all circumstances as in Article 34 of the draft Interim Regulation.

允许放贷人介入能够保护项目的现金流，即使在项目进展不佳时，特许经营仍能持续运行，不至于中断。直接协议在其它国家很常见，也是营造基础设施建设项目债务融资有利环境的重要工具之一。总之，给予放贷人介入权，允许其签订直接协议，能更好地让放贷人在《暂行条例（草案）》第 34 条描述的各种情形下各项要求得到满足。

G. Dual PPP Streams

特许经营和 PPP 处于不同的两个系统中

Suggestion: That only a single, unified stream for all concessions and PPPs be established through a broad definition of concession under the concession law.

建议：特许经营法律应当宽广地定义特许经营和 PPP，以便使建特许经营和 PPP 纳入统一的唯一一套管理体系之下。

38. Some stakeholders in the PRC distinguish a concession from a PPP based on the source of project revenue. A project that earns its revenue from users is described by some as a concession while a project that relies on a local government for project revenue is considered a PPP.

在中国，有些利益攸关方会基于项目收入来源将特许经营和 PPP 区别开来。有些人认为如果项目收益来自使用者，则该项目就属于特许经营性质。同理，项目收益源自地方政府付款的则属于 PPP。

39. Learning from the experience of other countries, only a minority of the PRC’s future

public investment projects are likely to be reliant on user revenue. Most public investments are likely to support at least some community members that are either unable or unwilling to pay. A local government will need to make payments or other financial contributions on their behalf for the project to be bankable. Most projects are likely to rely on a mix of user revenue and government contributions, or solely on government contributions.

基于国际经验，中国未来公共投资项目仅会有一小部分是依赖使用者付费的。中国大多数公共投资项目服务的社区人群是没有能力或意愿为之付费的。地方政府将代表那些社区人群为项目付费或是提供有关金融上的支撑，以便使项目具备可融资性。大多数项目的收益既有政府付费也有用户付费，或是仅有政府付费。

40. One issue being discussed in the PRC is whether there should be two streams of laws and regulations for PPPs—one for projects dependent on user revenue, and another for other types of projects. This is considered an inefficient approach that is best avoided.

当下中国正在探讨的一个问题是：中国是否应该有两套法律、法规、程序等法律文件，其中一套专门针对使用者付费，而另一套则专门针对使用者付费之外的情形。我们认为这样的做法是低效的，最好避免。

41. There is very little difference between preparing a project reliant on user revenue and one that is not. But if there are two streams, differences will inevitably emerge in the process of project preparation and approval.

无论项目是否属于使用者付费，项目准备过程几乎并没有差别。但是如果设立了两套法律体系，项目准备和审批过程将不可避免地出现差异。

42. The downside of dual streams is already evident in the PRC. Separate streams of concessions and PPP projects have emerged since 2013 without a clear distinction between the two. The general practice appears to be that a project with government contribution is treated as a PPP that is procured via the Government Procurement Law and follows guidance from the MOF, while other projects use the Tendering and Bidding Law and follow guidance from the NDRC. However, market participants still report uncertainty in knowing which stream is most relevant to their project, how to seek government concurrence on the correct stream for a project, and how to reconcile differences between the two streams.

两套法律体系会产生负面影响，这在中国已经很明显。特许经营和 PPP 相互独立的法律体系最早出现在 2013 年，但当时两者之间并没有清晰的界限。常规做法是政府付费项目被视为 PPP，采用《政府采购法》，由财政部指导。不是政府付费的项目则采用《招标投标法》，由发改委指导。但是市场参与者们依然不确定其项目究竟应当遵从哪一条体系，接受哪一系列政府部门的审批，也不清楚当两条体系出现冲突时如何解决分歧。

43. Switching streams during project preparation is likely to add to project development time and cost. Efforts can be wasted and the true nature of a project can be misrepresented in order to avoid switching streams. Project quality will be compromised if a project is designed just to remain within a stream, even when it is poorly suited to that stream. Implementing agencies may be required to follow one stream, depending on their institutional relationship and project history, even if it is not the best fit for the project. If projects do switch streams, the status of completed assessments may become unclear.

项目准备时期，在上述两种体系间切换很可能增加项目开发成本和时间。努力回避两种体系间的切换会浪费人们的精力，阻碍项目实质的呈现。倘若项目设计仅仅是为了能够使项目符合上述两条体系中的其中某一条，或者只是能够让项目牵强地符合其中一条，那么这样做会对项目质量构成损害。实施机构有可能只是鉴于其与上述两条体系中某一条体系中的政府管理部门拥有良好关系，而让其项目采用该政府管理部门所在的那一条法律体系，即便那条法律体系并不是项目最佳的法律适用体系。倘若项目的确在两个不同的体系间切换，已完成的项目各项评估的状态就会变得不清晰。

44. Dual streams compel all stakeholders involved in PPPs—government, the social capital sector, financiers, etc.—to paddle in two streams when one stream should be the optimum.

两种不同的体系需要项目所有相关方面，包括政府、民间资本合作方、投资人等掌握这两种不同的体系。然而事实上，一种体系就足够了。

45. Most importantly, it is undesirable to decide on the design of a PPP until it is identified prior to project development.²

最主要的是，在项目遴选和开发之前，并不需要确定项目具体设计。

46. The draft Interim Regulation proposes a broad definition of concession that, among other features, includes projects reliant on user revenue, government payments, or a mix of the two. Such a broad definition is supported as it helps clarify that concession and PPP are one and the same meaning. The inclusion of additional provisions that help unify the existing concession and PPP streams is also encouraged.

《暂行条例（草案）》对特许经营给出了一个宽泛的定义，包含了使用者付费、政府付费以及使用者与政府共同付费的项目。我们支持这种广泛的定义设置，因为它有助于澄清 PPP 和特许经营属于同一个概念。我们鼓励增加补充条款，整合目前特许经营和 PPP 两条法律和管理体系。

H. Value for Money

² Project analysis and the preparation of a business case are necessary to make a well-informed decision on the best mode of project delivery, financing, and structuring. Preliminary analysis will establish if the project is sustainable to justify further development as a PPP. During project development, it will become clear if a project will deliver value for money through a PPP and if it is affordable. Market research on potential social capital partners and financiers will indicate whether the project is bankable. The availability of sources of finance (user payments, government payments, or a mix of both) will determine whether delivery as a PPP is the best option. Should detailed analysis and market consultation determine that a PPP is the preferred option, decisions can be made on the project framework, the allocation of risks, the extent of government support, and other matters.

项目分析和商业计划对于在项目交付方式、项目融资及实施构架方面做出合理决策十分必要。这种初步分析将确定项目的 PPP 模式是否可持续，以确定在未来是否可以继续使用 PPP 模式推进项目。在项目开发阶段，我们将清楚地辨明项目能否通过 PPP 模式实现物有所值以及项目是否负担得起。对潜在的社会资本方和出资人进行市场调查，能够告诉我们项目是否具有可融资性。融资渠道和付款形式（使用者付费、政府付费或使用者与政府混合付费）可行性分析有助于指明 PPP 模式是否是项目的最佳选择。如果详细的项目分析和市场调查证明 PPP 模式是更好的项目实施方式，那么随后便可以确定项目实施框架、需求和风险分配、政府支持程度等其它方面的事宜。

物有所值

Suggestion: That the concession law require concessions to achieve value for money and that assessments be undertaken of whether they do.

建议：特许经营法应当要求特许经营项目实现物有所值，并要求对项目的物有所值实现情况进行评估。

47. Value for money (VfM) is the optimum combination of whole-of-life costs and quality (or fitness for purpose) of the good or service to meet the user's requirements. It is not the choice of goods and services based on the lowest cost bid. It is instead a comparative process and should be tested across every stage of a project's development to compare options and inform decisions.

物有所值指的是在 PPP 项目生命周期内的所有成本和项目产出的商品或服务之间取得最佳平衡，以最大程度满足使用者需求。它不是选择那些要价最低的商品或服务。相反，它是一个比较的过程，需要在项目发展的每一个阶段进行测验，比较不同的选择方案，以便最终作出合理决策。

48. VfM assessments, however, are not a perfect science, and they can be abused.

但物有所值并不是一个完美的科学，有时会被滥用。

49. Many countries have followed the United Kingdom's approach to VfM of testing project proposals in two primary ways. The first test looks at whether it is a good project, employing a cost-benefit analysis of the different options for taking the project forward. The second test applies a qualitative analysis to see if the project is of a type likely to be suitable for private financing and a quantitative assessment to measure if private financing will offer better value than public financing.

许多国家采用英国的物有所值评估方式，对拟开展的项目采用两种主要方法来检验。一个是看项目是否是一个好的项目，这包括不同实施方法的成本收益分析。另一个是看项目是否适合社会资本融资，这一般涉及两个方面：一是定性分析——分析项目是否适合民间资本融资；二是定量分析——分析民间资本融资是否能比政府财政出资产生更好的价值。

50. However, under this approach, projects have fallen short of considering a full range of options, and have simply compared the PPP through delivery in the conventional manner. There has been too much reliance on the pass/fail outcome of the quantitative assessment, which relied on poor quality data and generated figures capable of manipulation. The result is the PPP could be done for the wrong reasons as the tests were tilted in favor of the PPP. The United Kingdom is now revising its approach to VfM.

但并没有完全覆盖所有的实施方式，只是对比了 PPP 模式和传统模式。这种对比过分依赖定量分析结果是否得以通过，而定量分析所依据的基础数据并不全面，生成的最终数字也可以被人为地修改。所以，有可能最终会不正当地使用 PPP 模式。同时，英国政府向 PPP 方面倾斜。其实，英国目前正在修订它的物有所值评估方法。

51. The best VfM model for the PRC still needs to be determined, and is likely to evolve

over time.

究竟哪一种方式最适合中国，尚需进一步讨论。最佳方式的选择也会随着时间的推移不断发生演变。

52. While a concession law should leave flexibility in the way of assessing VfM, it is important that the law set the achievement of VfM as a goal of PPPs and also require assessments of whether VfM is achieved.

特许经营法应当在物有所值评估上留有一定的灵活空间。该法应将物有所值的实现定位为 PPP 的目标之一，并要求对项目的物有所值实现情况进行评估。

I. PPP Approvals

PPP 审批

Suggestion: That provision be made for specialized PPP approvals and that these be integrated with existing requirements.

建议：应当有针对 PPP 审批的专门条款，并将这些条款与现有的其它法律要求进行整合。

53. PPPs require two different types of approvals from government agencies: (i) standard approvals regardless of the delivery mode of the project (e.g., whether as a PPP or a conventional project), which include environmental approvals, construction permits, approvals for use of land or water resources, and approvals for government appropriations; and (ii) special approvals that are unique to and arise because of the nature of a PPP, such as concessions which give rise to different fiscal commitments and whose VfM should be compared to alternative modes of delivery.

PPP 需要两种不同类型的政府部门审批：一种是不考虑项目交付形式的标准型审批——不论项目是 PPP 形式还是传统形式，这种审批包括环境审批、建筑审批、土地和水资源审批、政府财政适宜性审批等；另一种是针对 PPP 性质的特殊型评估和审批，比如，特许经营项目需要不同形式的财政性支持，并且特许经营项目的物有所值情况应当同其它类型的交付形式进行对比。

54. These approval requirements need clear institutional structures and processes to ensure they are well managed. PPP projects have many unique features that central agencies will typically be more involved with them than with projects delivered in the conventional way. PPPs do not usually fit normal budget and liability management processes and framework, and need a different monitoring and control process. Notably, the unique characteristics of PPPs mean that monitoring, control, and approvals are needed at all stages of the project life cycle: project initiation, development, evaluation, approval, procurement, operation, and handback.

为了良好地管理这些特殊形式的审批，需要设立清晰的体制性结构和程序。相比以传统形式展开的项目，PPP 项目需要中央政府部门更多地参与。PPP 项目往往不在常规财政预算和债务管理程序及框架内，所以需要不同的管控流程。显然，PPP 项目具有许多不同于以往项目的独特之处，监督、管理和审批需要贯穿整个项目生命周期内的各个阶段，包括：项目发起、开发、评估、审批、采购、运营、归还等不同阶段。

55. The draft Interim Regulation, specifically Articles 9, 10, 13, and 14, appear to reinforce standard approvals by relating duties and functions without addressing how these will be adapted to PPPs. Some new concession-specific requirements are included, notably an implementation plan and fiscal affordability evaluation. But the purpose and content of these are not set out, creating uncertainty. For example, it is unclear whether contingent liabilities require an approval or even need to be declared. Article 40 prohibits new approvals or procedures for implementation.

暂行条例（草案）》第9、10、13和14条指出各部门要承担不同职责与智能，意在加强标准型审批，但是并没有解决各部门不同的职责和职能如何专门针对 PPP 项目展开。虽然新的针对特许经营的具体要求提了出来，也就是实施计划和财政可承受能力评估，但是它们的具体目标和内容并没有指出来，所以不确定性仍然存在。比如，或有债务是否需要审批或是正式予以声明，并没有清楚地规定。第40条则禁止了以实施特许经营为名增设行政审批项目或审批环节。

56. The concession law could be expanded to address the unique approval requirements of concessions, such as through an elaboration of the implementation plan and fiscal affordability evaluation. The consolidation of new and existing requirements (e.g., integration of a PPP's implementation plan and a project feasibility study) would be highly beneficial to streamline approvals and project preparation.

为满足特许经营的特殊审批要求，特许经营法应进一步扩展，比如对实施计划和财政可承受能力评估予以详细说明。对现有的审批要求和新增审批要求进行整合——例如整合项目可行性研究和 PPP 实施计划，以简化审批环节和项目准备时间，这对 PPP 发展是大有裨益的。

J. Institutional Arrangements

机构性安排

Suggestion: That provision be made for specialized PPP entities.

建议：应当规定成立 PPP 专属机构。

57. Specialized entities are normally set up to support the PPP. Dedicated PPP units that serve as centers of excellence and establish a bank of institutional memory on PPP are necessary when implementing an ambitious PPP program. PPPs require a development and procurement approach that is significantly different from conventional public procurement of public infrastructure and public services. PPP projects have more complex financing arrangements; require a higher level of risk management, identification, and allocation; define project requirements in terms that are output-based and performance-based rather than input-based; and involve a long-term assessment of projects.

通常会设有专属机构负责 PPP 事宜，比如 PPP 中心。PPP 中心集结了 PPP 方面的专业力量和知识储备，它对于推动 PPP 的蓬勃发展是十分必要的。PPP 开发和采购方式与传统的公共设施和服务的政府采购大不相同。PPP 项目的融资安排更加复杂，需要更高级别的风险管理、甄别和分配。PPP 项目是基于项目产出和绩效的，而非基于项目投入，它需要时间跨度很长的评估。

58. Special skill sets and experience are required of PPPs that are not readily available in government. As a result, governments set up PPP units with access to experts and professional advisers. PPP units generally have the responsibility for fostering the PPP agenda, which entails advising on policy, procedures, and necessary changes to the legal and institutional framework; preparing a pipeline of projects; structuring and procuring projects; and assisting in managing contract relationships.

对于此，政府并没有现成的技能和经验，所以政府成立 PPP 中心，集合 PPP 专业人员并联络和管理 PPP 职业顾问。通常，PPP 中心有责任规划 PPP 的进程，包括提供政策、程序，以及法律和机构框架调整上的建议；不断开发可用于 PPP 的项目；构建和采购项目；在合约管理上提供支持等。

59. Establishing a PPP unit does not mean centralization of responsibility for PPPs or vesting it with approval authority. Checks and balances need be ensured through proper processes that involve different parts of government. Some parts of government are responsible for proposing projects, other parts help select and prioritize projects for PPP and prepare and develop projects, while other parts will be involved in reviewing projects and proposals from social capital partners.

成立 PPP 中心并非将 PPP 项目责任集中起来，PPP 中心也不具备审批权。审查与权衡事宜是需要不同的政府部门依照合理安排的程序展开的。有些政府部门负责项目提议，各部门协助挑选 PPP 项目，并为项目优先层次排序，完成项目的开发，另一些部门负责项目审批和民间自提项目建议书。

60. While Article 10 of the draft Interim Regulation provides for a coordination mechanism, its role is too broadly defined and it appears it can only operate within existing duties and functions. It is unclear if a whole-of-government PPP unit with new duties and functions, such as used in many other countries, is possible. Local governments have explained to us they only have the authority to establish PPP units or center within an existing agency and within existing duties and functions.

尽管第 10 条指出建立协调机制，但定义过于广泛，且看上去只能在现有的政府职能范围内运行，并没有指出是否能够像其它一些国家一样成立一个完全由政府所有的 PPP 中心，承担独有的职责与任务。地方政府曾告诉我们，他们只有权力在现有的职能范围内，并在现有的某机构的基础上成立 PPP 中心。

K. PPP Funds

PPP 基金

Suggestion: That the concession law enable a wide range of PPP funds.

建议：特许经营法律应当促进生成各种 PPP 基金。

61. Many countries have used PPP funds to foster market development and to address specific market needs and improve project bankability. Examples include viability gap funding, credit enhancement schemes, and investment funds.

许多国家都使用 PPP 基金促进市场发展，解决市场上的特殊需求，改善项目的可融资性。此类基金包括可行性缺口补助基金、增信计划和投资基金等等。

62. Article 38 of the draft Interim Regulation provides for the establishment of guidance funds between governments and financial institutions, and stipulates that the government can provide investment grants, fiscal subsidies, or subsidized loans. The scope of this provision, however, may be too narrow and rule out types and structures of funds that may be needed in the future.

《暂行条例（草案）》第 38 条指出在政府和金融机构之间成立引导基金，政府可提供投资补助、财政补贴、贷款贴息等。这一规定可能太过狭窄，一些未来可能会需要的其它类型和结构的基金被排除在外。

63. For example, would Article 28 rule out the viability gap fund, which is fully financed by the government for providing investment grants? Such funds are intended to overcome the difficulties of providing this type of grants through the normal budget process.

比如，该条规定是不是把可行性缺口补助——政府完全出资的一种投资补贴——排除在外了？可行性缺口补助基金能够克服以常规财政预算程序提供政府资助时面临的困难。

64. And would Article 28 rule out credit enhancement schemes for government contributions to PPPs? Social capital partners and banks as well are likely to find it difficult to assess the creditworthiness of local governments and whether they will meet their financial commitments to a PPP over its term. A credit enhancement facility can provide an efficient way of reducing the risk that local governments will not meet obligations on time, and lowering the cost of financing a PPP. Some credit enhancement facilities in other countries are entirely owned and operated by the government.

该条规定是否会将政府对 PPP 的另一种支持——增信计划排除在外了呢？社会资本合作方以及银行有可能难以评估政府的信用度，不能确定政府是否能够在 PPP 整个过程中兑现其金融性承诺。增信便利能够有效地减少政府不按时履约的风险，降低 PPP 融资成本。在有些国家，增信便利基金完全由政府提供。

L. Terminology

术语

Suggestion: That the concession law employ commonly used terminology and definitions.

建议：特许经营法应当使用普遍采用的术语和定义。

65. While there is considerable diversity across countries in PPP laws, there is considerable common ground in terminology. This is helpful as common understanding facilitates the movement of service providers and financiers between countries, which benefits host countries through competitive pressures and the transfer of ideas and technology. It also assists in the sharing of knowledge.

尽管各国 PPP 法律大不相同，但在术语使用上有许多相同之处。这种相同的、广泛使用的术语推动国家之间服务供应商和投资人的互动，他们相互之间的竞争压力以及知识、理念的转移会使所在国受益良多。相同的术语使用同样有助于知识的共享。

66. Adopting commonly accepted terminology will be most useful in PPP implementation.

For example, providing a list of definitions in the concession law similar to that seen in other countries would help those new to the PRC to quickly understand the law and the PPP environment. Also, setting out the required contents of a PPP agreement similar to that seen in other countries would likewise benefit all stakeholders.

特许经营法使用普遍被采用的术语非常有助于其实施很。比如，法律中提供一个与其它国家相似的术语定义目录，这能够帮助那些不了解中国 PPP 的人快速理解中国的相关法律和 PPP 发展环境。同样，在 PPP 协议中设置与其它国家相似的内容也会大有裨益。

III. LENDER'S STEP-IN RIGHTS AND LENDER'S DIRECT AGREEMENTS IN PPP PROJECTS

PPP 项目中的债权人介入权与债权人直接协议

A. Why Lender's Step-in Rights in PPP Projects Are Needed

何谓 PPP 项目中的债权人介入权以及为何需要介入权

1. Project-Financed PPPs

仅限于项目融资项目

67. Not all PPP projects give step-in rights to lenders. The lender's step-in rights should only be required for project-financed PPPs and should not be needed for corporate-financed projects (where the sponsors finance the project on its own balance sheet).

并非所有 PPP 项目都能赋予项目债权人以介入权。只有项目融资 PPP 项目才需要债权人介入权，企业融资项目（在此类项目中，项目发起人依据其自身的资产负债表为项目提供资金）不需要债权人介入权。

68. "Project finance" means that the debt financing (provided by banks or the bond market) is raised on a project-specific basis and relies primarily on the PPP project agreement and the various subcontracts for security, and on the specific project cash flows for repayment.

“项目融资”是指按照特定项目筹集的债务融资（由银行或债券市场提供），主要依靠 PPP 项目协议和各种分包合同作为担保，依赖特定项目的现金流偿还债务。

69. As a comparison, "corporate finance" means where the funding is raised based on the credit strength of the general (non project-specific) business and balance sheet of the sponsor or its parent company.

相比之下，“企业融资”是指根据项目发起人或其母公司的一般（非特定项目）业务和资产负债表的信贷能力来筹集资金。

2. What Is a Step-in Right

何谓介入权

70. If the source of financing for a PPP project is project finance, as noted above, the

lenders rely on the PPP project agreement and the various subcontracts and on the specific project cash flows for repayment. Therefore, the lenders will wish to ensure that, where there is a default under any of the key contracts for the project (most importantly, the PPP project agreement under which these cash flows are paid), if the default would otherwise entitle the counterparty to terminate the contract, the lenders have a right to “step in” to the project company's rights and obligations under the relevant agreement and cure the default.

如果 PPP 项目的资金来源是项目融资，则如上文所述，债权人依靠 PPP 项目协议和各种分包合同作为担保，依赖特定项目的现金流来偿还债务。因此，债权人希望确保，当项目的任何关键合同（最重要的是其项下现金流已支付的 PPP 项目协议）出现违约时，如果违约本可以使对方有权解除合同，债权人有权“介入”项目公司在有关协议项下的权利和义务，并纠正违约行为。

71. The lenders will not, typically, have security over the hard assets of the project company, as would be the case in many types of secured financing such as real estate financing or aircraft financing. As a result, they will not be able to sell the physical project to recover the amount owed to them. Rather, the project finance lenders are repaid through the performance of the project as contemplated by the PPP project agreement and payment by the government counterparty for the services provided through the successful operation of the project.

通常情况下，债权人不会以项目公司的硬资产为担保，这和许多担保融资（如房地产融资或航空器融资）的情况有所不同。因此，债权人不能出售实体项目以收回应收欠款。相反，项目融资债权人是通过 PPP 项目协议所预期的项目绩效以及政府合约方为通过项目成功运作所提供的服务而支付的款项来获取回报。

72. As such, it is critical to project finance lenders that they will have rights to take action to remedy problems before matters deteriorate to a point where the government can terminate the PPP project agreement.

因此，对于项目融资债权人而言，至关重要的一点是他们有权在问题恶化到政府可以终止 PPP 项目协议的地步之前，采取行动纠正问题。

73. In addition, where there is an event of default under the loan agreement, the lenders will nevertheless require a step-in right to the PPP project agreement as a way to protect their interest, even where the loan default does not constitute a termination event under the PPP project agreement.

此外，在贷款协议出现违约的情况下，即使贷款违约不构成 PPP 项目协议项下的终止事由，作为保护其利益的一种方式，债权人仍会要求对 PPP 项目协议行使介入权。

3. Government vs. Lenders **政府与债权人**

74. Under a PPP agreement, the government usually has the right to step in to projects where the project company is in breach or in certain emergency situations. The government also has the right to ultimately terminate the PPP project agreement because of the project company's breach.

根据 PPP 协议，政府[通常?]有权介入到项目公司出现违约或某些紧急状况的项目

中。政府也拥有因项目公司违约而最终终止 PPP 协议的权利。

75. On the other hand, as described above, lenders will also demand rights to step in to projects (including rights to take managerial control of the project company), declare default, and “accelerate” loans (demand repayment and exercise their security rights) in case of project difficulties.

另一方面，如上所述，债权人也会要求拥有介入项目的权利（包括项目公司的管理控制权），在项目处于困境时宣布违约或者贷款“提前到期”（要求偿还并行使其担保权）。

76. These rights are set out and regulated in a direct agreement. The direct agreement is a contractual tool to regulate the relationship and rights between the government, the project company, and project finance lenders in the event of defaults, step-ins, and terminations. Figure 1 shows a typical example of a lender’s direct agreement in PPPs.

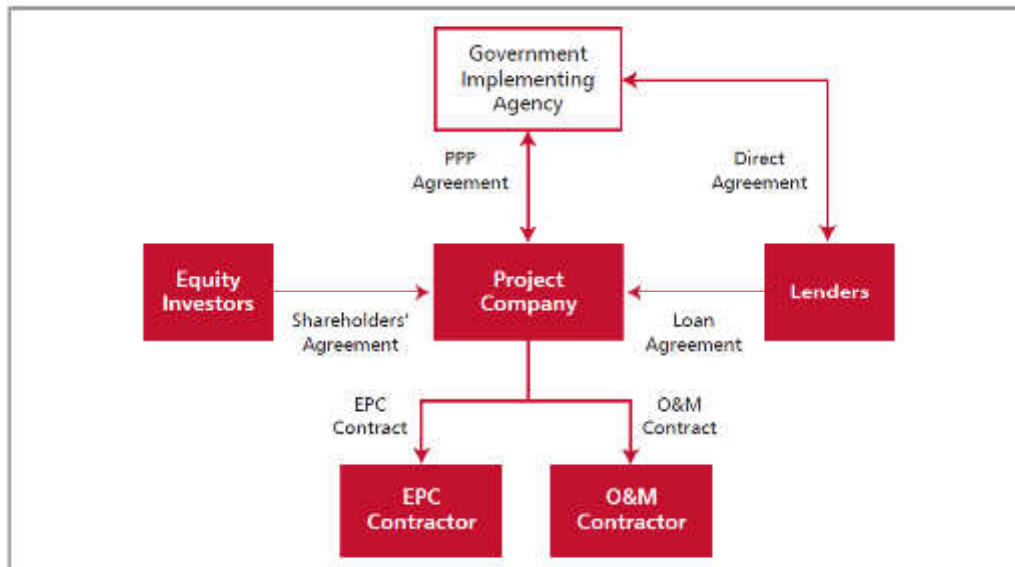
此类权利都在“直接协议”中列载并加以规范。直接协议是一项合约工具，用以在违约、介入和终止的情况下监管政府、项目公司与项目融资债权人之间的关系和权利。债权人直接协议如图 1 所示。

77. Assuming the project proceeds smoothly, most project finance loans for PPP projects feature a “tail” period between the final repayment of the project finance debt and the scheduled expiry of the project term. Once the loan is fully repaid, to the extent the lenders have security over the project assets, that security is released and the project assets can be dealt with on expiry of the project in the manner contemplated under the project agreement (i.e., the assets can revert to the government free of the lenders’ security interests).

假设项目进展顺利，PPP 项目的大多数项目融资贷款在项目融资债务的最后还款期和项目期限的预定届满期之间都有一个非常重要的“尾”期。贷款还清之后，在某种程度上，债权人可以以项目资产为担保，而担保解除之后，项目资产可以在项目届满时按照项目协议预期的方式进行处理（即资产可以复归政府所有，解除债权人的担保利益）。

Figure 1: Typical PPP Structure with a Lender's Direct Agreement

图 1： 签订债权人直接协议的典型 PPP 结构



Source: International Bank for Reconstruction and Development / The World Bank, Asian Development Bank, and Inter-American Development Bank. 2014. Reference Guide Public-Private Partnerships Version 2.0.

资料来源：国际复兴开发银行/世界银行、亚洲开发银行以及泛美开发银行。2014年。《PPP参考指南（2.0版）》。

78. Although the direct agreement is a contractual tool aimed at regulating the relationship between the government and the project finance lenders, it is important to bear in mind that the interest of the government and project finance lenders in PPP projects is to a large extent aligned.

虽然直接协议是一种旨在监管政府与项目融资债权人之间关系的合约工具，必须牢记的是，政府和项目融资债权人在 PPP 项目中的利益在很大程度上是相一致的。

79. First, it is important to distinguish the motives for the respective step-in. Government is likely to have a *practical* concern to correct a defect (or to take control of the project during a national emergency). The lenders' concern is *protective*—they wish to protect themselves from the (possibly devastating) consequences of termination of the PPP contract. This different motivation is likely to make actual conflict between the government and lenders' rights unlikely because they both want the project to keep operating and to keep producing revenues.

首先，务必对各自介入的动机加以区分。政府可能会对纠正缺陷（或在出现国家紧急状态期间对项目实施控制）有着现实的关切；债权人的关切则具有防护性——他们希望保护自己免受 PPP 合同终止带来的（可能是毁灭性的）后果。不同的动机很可能会引发政府和债权人的权利之间的实际冲突，这不可能是因为他们都希望项目继续运行，并继续创造收益。

80. In addition, the project finance lenders, and their technical advisers, will closely monitor project works to ensure they are built on time and to specification, and will also monitor the delivery of services to ensure that service charges to be paid by government to

the project company under the PPP agreement are paid without deductions. In this way, the interest of the project finance lenders to ensure that the project company performs its obligations is broadly aligned with those of the government.

此外，项目融资债权人及其技术顾问将对工程进行密切监督，确保工程按时按规范修建，并将对服务的交付进行监督，确保政府按照 PPP 协议规定需向项目公司支付的服务费全额支付。如此，为了确保项目公司履行义务，项目融资债权人的利益基本上与政府的利益相一致。

81. Direct agreements can be advantageous to the government, in that they give project finance lenders an opportunity to “revive” a PPP project where the project company is having difficulty performing its obligations. If the PPP project can be restored with minimal disruption to public services, then both the government and the project finance lenders benefit.

直接协议可能有利于政府，因为此类协议让项目融资债权人有机会在项目公司难以履行其义务的情况下“恢复”PPP项目。如果PPP项目能够在尽量不影响公共服务的情况下得以恢复，则政府和项目融资债权人双方都能获益。

82. In some projects, the government regards the asset as so “strategic” (for example, an urban transportation system) that it is not prepared to allow the potential loss of control that a lender’s step-in right entails. However, the invariable trade-off for this is that in such circumstances, the government will be *obliged* in the PPP agreement to take over and purchase the project on default, and the purchase price will in nearly all circumstances be sufficient to discharge the project finance debt.

在某些项目中，政府认为资产具有非常重大的“战略意义”（如城市交通系统），不愿意因债权人介入权而导致可能丢失控制权。但这种情况亘古不变的权衡方式是，在这种情形下，政府有义务按照 PPP 协议规定接管和购买违约的项目，而几乎在所有情况下，购买价格将足以清偿项目融资债务。

4. Why Provide Lender’s Step-in Rights 为何提供债权人介入权

83. Step-in rights protect the interest of lenders, lowering risk and, therefore, the cost of financing a PPP that is project-financed. This, in turn, improves the affordability to government and/or users and the value for money generated by the PPP.

介入权能够保护债权人的利益，减少风险，并因此降低项目融资 PPP 项目的融资成本。而这又提高了政府和/或使用者的财政负担能力以及 PPP 创造的物有所值量值。

84. Step-in rights protect government counterparties by helping ensure continuation of project operations and avoiding termination of PPP agreements. The value of a PPP agreement to a project company and its lenders largely rests in the cash flow it provides. If a PPP agreement is terminated, this cash flow is lost, and in most cases, lenders will need to recover their loans from termination agreements. Doing so is messy and costly, and full recovery of the loan may not be possible. Lender’s step-in rights allow the PPP to operate as intended so it can generate the cash flow needed to meet debt obligations. Step-in rights are rarely actually exercised. But their presence reassures lenders and acts as an incentive

for all parties to a PPP to work efficiently and cooperatively to prevent problems.

介入权有助于确保项目运作的持续实施，避免 PPP 协议的终止，进而保护政府合约方。PPP 协议对于项目公司和债权人的价值主要取决于它提供的现金流。PPP 协议一旦终止，该现金流就会丢失，而且在大多数情况下，债权人将需要通过终止协议收回其贷款。这种做法不仅混乱复杂、成本高昂，而且可能难以全额收回贷款。债权人介入权使得 PPP 项目能够按预期运营，从而能够创造偿还债务所需的现金流。介入权极少实际行使。但其存在能够使债权人感到安心，并激励 PPP 项目所有各方提高工作效率和合作能力，防止出现问题。

85. Providing for lender's step-in rights will help allow a transition toward project financing. Most PPP projects in the PRC use corporate finance. In some countries such as Australia, project finance is the main method of financing PPPs. Making a transition toward more project finance will offer the PRC a number of benefits as in the following examples:

提供债权人介入权有助于向项目融资的模式过渡。中国的大多数 PPP 项目都采用企业融资的模式。在有些国家，如澳大利亚，项目融资是 PPP 融资的主要方法。向更多采用项目融资的模式过渡将为中国带来诸多好处。例如，它将有助于：

- tighten the market scrutiny of the investment decision, which will incentivize improvements to project quality;
加强投资决策的市场监督，从而促进项目工程质量的改进；
- facilitate new ways of financing, such as the issuance of project bonds, that can better allocate risk to the party best able to bear it;
推动新融资方式的发展，如发行项目债券，从而更合理地向最能承担风险的一方分配风险；
- open up access to new sources of finance, such as institutional investors that are restricted in their ability to lend to corporations;
开拓新的融资渠道，如向企业提供贷款能力受到限制的机构投资者；
- lessen barriers to new entrants as PPP operators, who can secure good projects but may lack the financial resources or track record required by corporate finance; and
减少对新加入机构的壁垒，如能够确保优质项目、但可能缺乏企业融资所需财力资源或业绩记录的 PPP 运营商；
- good operators take on more or larger projects based on the quality of a project and their proposal, rather than just their balance sheet.
以项目工程质量和建议书——而不仅是资产负债表——为依据，由优质运营商承担更多或更大的项目。

86. Even if lender's step-in rights would not be used immediately by operators and financiers that are satisfied with business-as-usual, facilitating project financing can help start a healthy evolution in the PPP program. Providing for lender's step-in rights can help avoid an over-reliance on bank financing that may, learning from the experience of other

countries, ultimately stifle the PRC's PPP program.

纵然满足于业务正常运营的运营商和融资人不会立即行使债权人介入权，促进项目融资的发展也能有助于推动 PPP 计划的健康发展。提供债权人介入权能有助于避免对银行融资的过度依赖，从其他国家的经验教训可知，这种过度依赖最终可能会遏制中国 PPP 计划的发展。

B. How Lender's Step-in Rights Are Exercised

如何行使债权人介入权

87. Step-in rights are contractual rights agreed under a direct agreement (see detailed explanation in sections C–E below). A direct agreement may provide different ways for lenders to exercise control over a project that is in difficulties.

介入权是“直接协议”（参见下文[3-5]节的详细说明）框架下约定的合约权利。直接协议可以为债权人提供各种不同的方法去控制陷入困境的项目。

88. The direct agreement may allow a lender, or (more commonly) its appointed agent with expertise in the relevant field, to step into the relevant project agreements and assume the rights and obligations of the project company under the PPP project agreement on a temporary (“step-in”) basis.

直接协议可以让债权人或（更常见）其指定的具有相关领域专业知识的代理人介入相关项目协议，并临时（“介入式”）承担项目公司在 PPP 项目协议项下的权利和义务。

89. In addition to enabling the lender or its agent to step into the relevant project agreements, the direct agreement allows the PPP project agreement to be novated to a new operating party where lenders have security over the project company's rights under the PPP project agreement. This is often referred to as “substitution” of a new PPP agreement party and it may occur at once or after a period during which the lenders have exercised their step-in rights, depending on the direct agreement terms and the circumstances of the breach. Substitution can be made subject to the government party's reasonable satisfaction that the substituted party is competent and qualified. The government and the lenders are likely to be aligned in their desire to find a reliable and competent operator.

除了能够让债权人或其代理人介入相关项目协议外，直接协议允许将 PPP 项目协议让渡给新的运营方，而在这种情况下，债权人可以以项目公司在 PPP 项目协议项下的权利作为担保。这通常被称为新 PPP 协议方的“替代”，它可以在债权人已经行使介入权之后马上发生，也可以在此后的一段时期之后再发生，这主要取决于直接协议的条款规定和违约的具体情况。替代应以政府合约方的合理满意为准，替代方应具有相关的能力和资格：在希望找到可靠而有能力的运营商方面，政府和债权人可能趋于一致。

90. Where lenders have security over a project company's shares, as is often the case, they may enforce the share security. In some jurisdictions, enforcement will enable the lenders to transfer the shares of the project company to a party chosen by the lender. But in some jurisdictions, transfer of shares and management rights to a lender's selected buyer is

not possible: local law may provide that the only remedy for a secured party is to sell the shares in a public process.

凡是债权人以项目公司的股权为担保的——这是常有的情况——他们可以行使股权担保权。在有些司法管辖区，股权担保权的行使将使债权人能够将项目公司的股权转让给债权人选定的一方；但在有些司法管辖区，将股权和经营权转让给债权人选定的买方是不可能的：当地法律可能规定，被担保方的唯一补救措施是通过公开程序出售股权。

C. Parties to Lender's Direct Agreement

债权人直接协议的有关方

91. Direct agreements are entered into between (i) the project company, (ii) the project finance lenders (often by way of an “agent bank” acting on their behalf), and (iii) the counterparty, under the relevant key underlying contracts (in the case of the PPP project agreement, the government). Thus, direct agreements are usually tripartite agreements.

直接协议由以下各方订立：（1）项目公司；（2）项目融资债权人通常由“代理银行”代表债权人订立）；（3）相关关键基础合同的合约方（在 PPP 项目协议的情况下，为政府）。因此，直接协议通常是三方协议。

92. In addition, lenders also enter into direct agreements with the construction contractor and crucial suppliers or service providers to the project company. In each of these agreements, the lenders seek a right, but not an obligation, to perform obligations on behalf of the project company if the project company fails to perform so that the lenders can ensure that the project is constructed and operated so that it earns money to repay the lenders.

除了与政府 PPP 协议方签订直接协议外，债权人还与建筑承包商和项目公司的关键供应商或服务提供商签订直接协议。在上述各协议中，债权人谋求的是，如果项目公司未能履行义务，其将代表项目公司履行义务——这是债权人的一种权利而非义务——从而使债权人能够确保项目顺利施工和运营，获取收益以偿还债权人。

D. Objective of Lender's Direct Agreement with Government

债权人与政府之间直接协议的目的

93. The objective of a direct agreement is basically to enable the project finance lenders to “step into the shoes” of the project company if the project company defaults in performance of the following:

从根本上说，直接协议的目的是，如果项目公司在履行以下义务时违约，项目融资债权人能够“接替”项目公司的工作：

- its loan obligations, and
贷款义务；
- its contractual obligations to the contract counterparty in circumstances which enable the counterparty to terminate the relevant key contract.

在合同对方能够终止相关关键合同的情况下，其对合同对方的合同义务。

94. The above two types of default are usually interlinked and a default under one category may also constitute a default under the other (most well-drafted project finance agreements will make a serious breach of any key project contract an “event of default” under the financing agreements).

以上两种违约通常是相互联系的，一种类别的违约也可能构成另一类别的违约（大部分精心起草的项目融资协议都将任何关键项目合同的严重违约行为视为融资协议项下的违约事由）。

95. Direct agreements are an integral part of security package in a project financing:

直接协议是项目融资中担保计划的重要组成部分。

- (i) First, a direct agreement perfects the grant of security over the relevant contract by providing the necessary counterparty consent and acknowledgment.

首先，直接协议通过提供必要的合同对方同意和确认，完善相关合同的担保设定。

- (ii) Second, a direct agreement details the procedures of enforcement of some types of security and regulates the relationship between the security holder (the project finance lender) and the relevant contracting party.

其次，直接协议详细阐明了某些类型的担保的实施程序，并规定了担保权人（项目融资债权人）和相关缔约方之间的关系。

- (iii) Third (and where a direct agreement goes beyond the rest of the security), through direct agreements, the project finance lenders obtain a wider scope of rights and powers than that under a security mechanism only. These wider rights and powers are important in a project financing because, even where there is security over hard project assets, the assets of the project company are likely to be worth less than the outstanding debt if they are sold separately on the enforcement of the security (partly because there is no ready market for some project assets and because there may be restrictions on the ability to sell some of the assets). The direct agreement is part of an arrangement that allows all the assets and rights of the project company to be transferred as a whole package, so that the project can be transferred as a going concern. In this regard, it is important to note that the key assets of a project vehicle are not so much the physical assets as the revenue contracts under which it operates. If these are terminated, the other assets are generally worth very little. It is thus a key principle that there must be a mechanism to keep these in place for sufficient time to permit a transfer to a purchaser of the project.

第三（及直接协议超出担保计划其余部分的情况下），通过直接协议，项目融资债权人获得的权利和权力要比只有担保机制时更为广泛。在项目融资中，更广泛的权利和权力具有重要的意义，因为即使是在以项目硬资产为担保的情况下，项目公司的资产如果在执行担保权时单独出售，也可能资不抵债（一方面是因为某些项目资产没有适合的现成市场，而且出售某

些资产的能力也可能存在各种限制因素)。直接协议是项目协议的组成部分,它允许项目公司的所有资产和权利一揽子转让,从而使项目可以作为一个经营主体进行转让。在这方面,值得注意的是,项目公司的关键资产并不是实物资产,而是其赖以运营的收入合同。如果这些协议被终止,其他资产通常会一文不值。因此,必须要有相应的机制来保持这些协议在一定时间内稳定不变,以使对项目购买者的转让成为可能,这是一项重要的原则。

E. Contents of Lender's Direct Agreement with Government

债权人与政府之间直接协议的内容

96. Lenders would usually expect a lender's direct agreement with government about the PPP agreement to contain the following main provisions:

债权人通常会希望债权人与政府之间就 PPP 协议订立的直接协议包含以下主要条款:

- (i) Consent to the security—consent from the government to charging or assigning by way of security the project company's rights under the PPP agreement (to the extent such consent is required by law or by the project agreement which will almost always be the case). Usually, this is reinforced by a requirement to pay amounts due to the project company under the PPP agreement into accounts secured in favor of the lenders.

同意担保——政府同意以担保的方式掌管或转让项目公司在 PPP 协议项下的权利(如果此类同意是法律或项目协议所要求的话,情况几乎总是如此);通常而言,同意担保的强化措施是要求必须将 PPP 协议项下应付项目公司的款项支付到以债权人为受益人的受保护账户里。

- (ii) Not to terminate without notice to the lenders and restriction on exercise of rights—an undertaking from the government that it will not exercise any right to terminate the contract without first giving the lenders a specific period of prior written notice (“suspension period”). It is also often provided that the government undertakes not to sue the project company, petition for its winding-up, exercise rights of set-off, or take any of the other related actions without first affording the lenders the right to go through the step-in procedure and cure the defaults under the PPP agreement.

不在未经通知债权人和对权利行使施加限制的情况下终止协议——政府作出的承诺,它不会在未以事先书面通知的形式给予债权人一定时间(“暂停期”)的情况下行使终止合同的权利。它也经常规定,政府承诺,不会在未事先授权债权人办理介入程序和纠正 PPP 协议项下违约行为的情况下起诉项目公司、申请其清盘、行使抵销权或采取任何其他相关措施。

- (iii) Not to terminate the PPP agreement when lenders enforce the security—if the government has the right to terminate the relevant contract upon the enforcement of any security granted by the project company or the security over the shares in the project company, the government agrees it would not do so in case the lenders enforce their security, so long as such enforcement is in accordance with the terms of the direct agreement. Frequently, this will require

government consent to ensure that any assignee of the project agreements is a proper person, but the government may be required to be reasonable in deciding whether to give or withhold its consent.

不在债权人执行担保权的时候终止 PPP 协议——如果政府有权在执行项目公司授予的担保权或项目公司的股权担保权时终止相关合同，则在债权人执行其担保权的情况下，只要此类执行符合直接协议的条款，政府承诺不会在此时终止 PPP 协议。通常情况下，这需要政府的同意，以确保项目协议的受让人为合适人选，但在决定是否给予同意时，政府可能必须拥有合理的理由。

- (iv) Undertaking to continue—during the suspension period, the government agrees to continue to comply with all its obligations under the PPP agreement. This provision tends to be the most controversial since it can operate to increase the government's exposure to the project company. Hence, the length of the suspension period is always one of the most heavily negotiated provisions. The suspension period operates to allow the lenders to make up their mind whether to exercise their rights (there is no obligation for them to do so).

承诺继续——在暂停期间，政府同意继续履行其在 PPP 协议项下的所有义务。这一规定往往是最具争议性的，因为它可能会增加政府对项目公司的影响；因此，暂停期的长度始终是谈判最艰难的条款之一。暂停期使债权人能够最终决定是否行使其权利（它们没有这样做的义务）。

- (v) Obligation to provide details of default/liabilities—the government is obliged to provide details of the default and to quantify the liabilities so that the lenders know exactly what liabilities they are going to assume after step-in. The lenders will normally insist such details provided by the government are conclusive for the benefit of the lenders.

提供违约/责任详情的义务——政府有义务提供违约的详情，并对责任进行量化，使债权人明确知道他们在介入之后要承担哪些责任。债权人通常会坚持认为，此类由政府提供的详情对债权人的利益具有决定性的意义。

- (vi) Agreement to temporary step-in—the government will allow the lenders or their nominated transferee to assume the project company's rights and obligations under the PPP agreement for a period of time:

同意临时介入——政府允许债权人或其指定的受让方在一定时期内承接项目公司在 PPP 协议项下的权利和义务：

- (a) **Step-in**—An agreement from the government that after the occurrence of a default under the loan agreement, the lenders (or a receiver or agent appointed by them) may elect to assume (jointly with the project company) its rights and obligations under the PPP project agreement for a specific period of time. By agreeing to step-in, the lenders, or their nominee, undertake to cure the breaches that gave rise to the government's termination right and to discharge accrued liabilities, and to become jointly and severally liable with the project company for performance of the relevant contract during the step-in period.

介入——政府同意，在发生贷款协议列明的违约行为之后，债权人（或其指定的接收人或代理人）可以选择在一定时期内（与项目公司共同）承接其在 PPP 项目协议项下的权利和义务。如果同意介入，即代表债权人或其指定人员承诺纠正那些导致政府行使终止权的违约行为，偿还应计负债，并在介入期间为相关合同的履行与项目公司一起承担连带和单独责任。

- (b) **Step-out**—The lenders may at any time after the step-in, by a further notice to the government, “step out” of the PPP project agreement. This means that the lenders’ nominee ceases to be treated as a party to the PPP agreement and is released from all future obligations under the PPP agreement (but will continue to be liable for any unperformed obligations that accrued during the step-in period). Lenders will exercise this right (i) when they consider that the breach has been cured and the project company is able to perform the PPP agreement going forward; (ii) when they have agreed to transfer the project to someone else on a permanent basis and when the substitution process is to be implemented; or (iii) when they consider that the project is not viable and want to exercise rights under the loan documentation such that the project is effectively terminated. This is an important right to lenders as they will wish to make sure their nominee is not forced to retain its liability for the project company’s obligations under the relevant contract.

脱离——债权人可以在介入之后的任何时候，通过再次通知政府的方式，“脱离”PPP 项目协议。这意味着，债权人指定的人员不再被视为 PPP 协议方，其在 PPP 协议项下未来的所有义务也被解除（但将继续为介入期间发生的未履行义务承担责任）。债权人将在以下情形下行使这一权利：（i）债权人认为违约行为已经纠正，且项目公司今后能够履行 PPP 协议；（ii）债权人已经同意将项目永久性地转让给其他人，且即将实施替代程序；（iii）债权人认为有关项目不具有可行性，并希望行使贷款文件规定的权利，以有效终止该项目。对于债权人而言，这是一项重要的权利，因为他们希望确保其指定人员不会被迫继续对项目公司在相关合同项下的义务承担责任。

- (vii) **Substitution**—the procedures for exercising the “permanent” right of substitution are very similar to step-in. The lenders are granted the benefit of the suspension period in order to decide whether they want to (i) step in on a temporary basis, (ii) substitute on a permanent basis, or (iii) do nothing. During the suspension period or a step-in period, the lenders can exercise the substitution right by procuring that the project company, the counterparty, and the substitute (which might be a special purpose entity established by the lenders or might be a third party purchaser of the project) execute a novation agreement that typically requires the substitute to cure the outstanding identified breaches and then assume all responsibility for the PPP project agreement going forward.

替代——“永久性”替代权的行使程序与介入权非常类似。债权人获得了

暂停期的好处，能够决定自己是希望（a）临时介入，（b）永久替代，还是（c）什么也不做。在暂停期间或介入期间，债权人可以通过采购的方式行使替代权，项目公司、合约方和替代方（可能是债权人设立的特殊目的实体，也可能是项目的第三方购买者）将执行约务更替协议——一般而言，约务更替协议要求替代方纠正尚未解决的已确定违约行为，然后承担 PPP 项目协议今后的全部责任。

97. From the perspective of the project company (as the borrower), a direct agreement is another form of security. The project company would want to ensure it still has the equivalent of an equity of redemption. In other words, the fact that the lenders may have taken control of a project through direct agreement should not mean that a borrower loses his/her contractual rights forever. If the loans are repaid, the project contracts should be returned to the original borrower. While it may be legal to provide a simple transfer, to make it practically easier, the usual way is to provide for the bank's work-out vehicle to become a co-obligor with the project company (borrower), for the government only to deal with and look to that vehicle during the period of step-in and for the vehicle to simply retire from the PPP project agreement once the loan has been paid.

从项目公司（作为债务人）的角度看，直接协议是另一种形式的担保。因此，项目公司会希望确保它仍然拥有与赎回股权相当的权利。换言之，债权人也许已经通过直接协议控制项目的事实不应当意味着，债务人永远丧失其合约权利。如果贷款还清，项目合同应返还给原始债务人。虽然进行简单的转让可能也是合法的，但为了让实际操作更简便，通常的方式是规定银行的债务重组公司必须成为项目公司（债务人）的共同债务人，政府在介入期间只能与该公司交涉，而该公司在贷款还清后直接退出 PPP 项目协议。

98. From the perspective of the government, it may consider the following points:

从政府的角度来看，它可能会考虑以下几点：

- (i) The government will want to consider its right to suspend during the period of notice and will want to ensure that any defaults are remedied promptly (and, for payment defaults, this means immediately) upon an entity stepping in or the contract being novated.

政府将希望在通知期内暂时搁置其权利，并希望确保所有违约行为能够在某一实体介入或合同被更替之时得到及时纠正（对于还款违约而言，这意味着马上纠正）。

- (ii) The government will want to insist that anyone who becomes a party under the PPP agreement in question as a result of step-in or novation must be approved by the government or, at a minimum, satisfy a set of criteria to ensure that the new party will have the technical and financial capability to undertake the project.

政府将希望坚持要求，任何一个因介入或更替而成为有关 PPP 协议合约方的人员必须经由政府批准，或者至少要满足一系列标准，以确保新合约方具备承办有关项目的生产能力以及技术和财务能力。

- (iii) The government may want to impose a limit on the period during which the

lender can control the project. This is usually expressed as a limit on the duration of the “step-in period.” The period should be such as to give the lenders’ nominee a reasonable opportunity to cure the relevant default. The lenders may argue that there should not be such a limit and they should be able to run the project until their loans are repaid and any time limit will only serve to encourage acceleration of the loans. However, the government may not want lenders running the project.

政府可能要对债权人可以对项目施加控制的期限加以限制。这通常被表达成对“介入期”期限的限制。这一期限应足以为债权人的指定人员提供合理机会去纠正相关违约行为。债权人可能会认为，不应该设置这样的限制，他们应当能够一直运营该项目，直至其贷款全部收回，任何时间限制只会鼓励贷款提前到期。然而，政府可能不希望由债权人运营项目。

F. Suggestions on the PRC Legal Framework

对中国法律框架的建议

99. As explained above, in most countries with a developed PPP projects practice, step-in rights are in nature contractual rights negotiated and agreed between the relevant parties under a direct agreement, rather than statutory rights provided under legislation. Both in Australia and the United Kingdom, these arrangements are a standard part of a PPP project. These rights are not based on regulatory regimes specific to PPP projects but depend on the reliable enforcement of contractual rights, thus giving comfort to lenders. Governments typically spend considerable time negotiating direct agreements to ensure they both protect their own rights under the PPP project agreements and maintain control over which vehicle is carrying out the PPP project. The government will also require lenders to provide notice of defaults under loan documentation.

如上所述，在大多数具有成熟的 PPP 项目实践的国家，介入权事实上是由直接协议的有关各方谈判和协商达成的合约权利，并不是法律规定的法定权利。在英国和澳大利亚两国，这些协议都是 PPP 项目的标准组成部分。这些权利并不是以针对 PPP 项目的法规制定为依据，而是取决于合约权利的可靠执行，从而使债权人安心。政府通常会花费大量时间来开展直接协议谈判，以确保既能保护其自身在 PPP 项目协议项下的权利，又能维持其对实施 PPP 项目的公司的控制。政府还将要求债权人提供贷款文件所规定的违约通知书。

100. This paper suggests that the concession law of the PRC provide for a general rule to recognize and support the authorities to negotiate direct agreements with lenders to structure and document the step-in rights mechanism. This will enable the development of project finance in the PPP market. This paper also suggests that the concession law does not provide any substantive rights and/or obligations to either lenders or authorities as each project has specific situations where negotiation of the positions should be allowed to provide tailor-made solutions. Article 34 of the draft Interim Regulation can be amended to state that the exercise of any termination right under the PPP project agreement can be made subject to lenders’ contractual rights under any direct agreements for the project.

我们建议，中国的特许经营法草案应当制定一般性规则，承认并支持当局与债权人开展直接协议谈判，以制定介入权机制并形成文件。这将促进项目融资在 PPP 市场的发展

展。我们建议，特许经营法草案不对债权人或当局的任何实质性权利和/或义务加以规定，因为每个项目都有其特殊性，立场谈判应当可以提供量身定制的解决方案。特许经营法草案第 34 条可以修改为规定，PPP 项目协议项下的任何终止权利可以根据债权人在该项目直接协议项下的合约权利来确定。

101. To help with the capacity building of the local authorities that wish to carry out PPP projects, this paper suggests that the NDRC can take the lead in preparing a sample direct agreement with guidance notes to show the usual positions of direct agreement of international practice. Such direct agreements can be provided for relatively easily. For example, following are the key provisions on direct agreements in the 2014 Model Law on Public-Private Partnership adopted by the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States. Similar material could potentially be included in the concession law and its supporting regulations.

为了帮助那些希望实施 PPP 项目的地方当局开展能力建设，我们建议，国家发改委可以牵头制定包含实务指引的直接协议范本，展示国际惯例中直接协议的一般立场。此类直接协议可以制定得相对简易。例如，独立国家联合体成员国议会大会通过的《公共采购示范法（2014）》有关直接协议的关键条款可见下文。而类似材料也可能纳入特许经营法及其配套法规：

Direct agreement means an agreement by and between a public partner, a private partner and one or more financing organisations and/or other parties retained by the private partner with a view to implementing a public-private partnership project which sets forth the terms and conditions of their cooperation in connection with the implementation of such project.

直接协议是指公共部门合作伙伴、私营部门合作伙伴与该私营部门合作伙伴持有的一个或多个融资机构和/或其他方之间为实施公私合作项目而订立的协议；该协议规定了协议各方就项目实施开展合作的条款和条件。

(2)(16) A public-private partnership agreement may also contain other terms and conditions, including: ...the right of the public partner or, if so provided by a direct agreement entered into with a financing organisation, the right of such financing organisation, to dismiss, on a temporary basis, the private partner or other parties from implementation of the public-private partnership project, in particular, from its operation and to set forth a procedure for temporary replacement of the private partner or another party in the event that the private partner has materially violated any terms and conditions of the agreement, including through the fault of third parties, or in the event that any terms and conditions of implementation of the public-private partnership project have been violated by third parties and such violation has not been remedied within a reasonable time allowed for this purpose by the public partner as may be provided under the public-private partnership agreement or other agreement between the public and private partners, as well as upon the occurrence of other circumstances specified in the agreement, in particular, in order to prevent, mitigate, or eliminate risks or effects of emergencies, protect human health or ensure security or safety of any property or other rights and legitimate interests of individuals and legal entities, as well as to protect the environment;

(2) (16) 公私合作协议也可以包含其他条款和条件，包括：...如果私营部门合作伙伴严重违反协议的任何条款和条件，包括由于第三方过错导致的违反，或者如果第三方违反了有关公私合作项目实施的任何条款和条件，且此类违反未在公共部门合作伙伴为此目的而根据公私合作协议或公共部门和私营部门合作伙伴订立的其他协议提出的合理时间内进行纠正，以及如果发生协议规定的其他情形，尤其是为了防止、减轻或消除紧急状况的风险或影响，保护人类健康或保障任何财产的安全或个人和法人实体的其他权利和合法权益，以及保护环境的情形，公共部门合作伙伴有权或者融资机构（如果是与融资机构订立直接协议的）有权临时让私营部门合作伙伴或其他方退出公私合作项目的实施——尤其是项目的运营，并制定临时替代私营部门合作伙伴的程序；

(23) (5) A public partner, a private partner and a financing organisation may enter into a direct agreement on cooperation throughout the term of implementation of a public-private partnership project (direct agreement with the financing organisation) which may include the following terms and conditions:

(23) (5) 公共部门合作伙伴、私营部门合作伙伴与融资机构可以就整个公私合作项目实施期间的合作订立直接协议（与融资机构之间的直接协议），协议可以包括以下条款和条件：

1) a procedure for approval of a proposed new private partner and criteria that such partner should meet, in case of assignment by a private partner of its rights and transfer of its obligations under the public-private partnership agreement and/or if a private partner becomes unable to perform its obligations under the public-private partnership agreement, as well as in the event of other substitution of the private partner under the said agreement, as well as the consequences of such substitution;

1) 拟议新私营部门合作伙伴的审批程序及该合作伙伴应达到的标准，以备出现以下情形：私营部门合作伙伴转让其在公私合作协议项下的权利和义务，和/或私营部门合作伙伴无法履行其在公私合作协议项下的义务，以及该协议中的私营部门合作伙伴被替代，且出现相关后果；

2) a procedure for giving a consent to the private partner's granting a pledge or other encumbrance over a public-private partnership object in order to secure performance of its obligations under the public-private partnership agreement and/or agreements with financing organisations;

2) 准许私营部门合作伙伴将公私合作标的作为质押或其他债权的程序，以确保私营部门合作伙伴履行其在公私合作协议和/或与融资机构订立的其他协议项下的义务；

3) exceptional instances when it shall be allowed to unilaterally change terms and conditions of the direct agreement and/or unilaterally repudiate it, as well as a procedure for determining the amount of compensation to the

private partner and financing organisation due and payable by the public partner in the event of early termination of the direct agreement;

3) 允许单方修改和/或单方否认直接协议项下条款和条件的特殊情况, 以及确定公共部门合作伙伴在提前终止直接协议的情况下到期及应付给私营部门合作伙伴和融资机构的赔偿金额的程序;

4) instances of, a procedure for and consequences of modification and/or termination of the public-private partnership agreement upon the agreement between the parties or unilaterally;

4) 协议各方或单方按照协议修改和/或终止公私合作协议的实例、程序和后果;

5) instances of, a procedure for and consequences of dismissal, upon the initiative of the financing organisation, of the private partner or other parties from operation of a public-private partnership object; and

5) 按照融资机构的倡议让私营部门合作伙伴或其他方退出公私合作标的运营的实例、程序和后果;

6) other terms and conditions consistent with the existing national legislation.

6) 符合现行国家立法的其他条款和条件。

IV. UNSOLICITED PROPOSALS

非应标建议书

A. Observations

观察意见

102. An unsolicited proposal is a proposal to undertake a PPP project that is put forward to the government by a private sector entity when the government has not issued a request for a proposal. The unsolicited proposal should not be a mere suggestion for a project or a project concept. It should include detailed construction, operation, maintenance, and financing plans to permit an evaluation to be made as to whether the project and proposal are worthy of further consideration by government. Unsolicited proposals can arise as special cases in the provision of different types of infrastructure facilities and services that have limited competition.

非应标建议书是指私营部门企业在政府尚未发布建议邀请书时, 向政府提出承接 PPP 项目的建议书。非应标建议书不应仅是一个项目建议或项目概念。它应当包含详细的施工、运营、维护和融资方案, 使政府能够评估该项目及建议书是否值得进一步考虑。在竞争有限的各种不同类型的基础设施和服务的供应中, 非应标建议书可以作为特殊个案出现。

103. Private sector entities often propose projects with the specific objective of avoiding a competitive process. If the private sector entity is granted exclusivity for the project, it will usually seek to negotiate the details of the project on a sole-source basis with the government. Entering an agreement with a sole source supplier without inviting competing proposals has led to criticism and suspicion in many countries, because of a lack of competition and transparency. International experience shows that entering an agreement with a sole source supplier, without inviting competing proposals, causes reputation problems for the overall PPP process and undermines credibility for future projects.

私营部门企业提出项目建议时，往往带着规避某种竞争流程的目标。如果私营部门企业获得该项目的独家授权，它在与政府磋商项目细节时，往往基于唯一的供应渠道。签订协议时不进行建议书竞争性遴选而仅依靠唯一的供应渠道，这种做法已在许多国家引发批评和质疑，因为这种方式缺乏竞争性和透明度。国际经验表明，这种行为往往会影响整个 PPP 模式的声誉，并损害未来项目的可信度。

104. Different approaches have been taken by governments on unsolicited proposals, including

各国政府用于应对非应标建议书的方法各不相同，如：

- refusing to receive unsolicited proposals on the grounds that the government has identified project priorities in its public investment plans and does not need to be deflected from those choices by proposals for projects that are not in the plans. Where the unsolicited proposal is made for a project that is in the infrastructure plan, then it is viewed purely as a matter of timing as to when the government should seek proposals for the project;

拒绝接受非应标建议书，理由是政府已确定其公共投资计划中的优先发展项目，没有必要因为不在计划内的项目建议书偏离这些项目选项。如果非应标建议书是针对基础设施建设计划内项目编制的，那么这将纯粹是一个时间问题，取决于政府何时征询该项目的建议书。

- submitting the proposal to the same process as a proposal from a government source, with no preference being given to the proposer of the unsolicited proposal;

将其视为源于政府方面的建议书，使用同一程序提交建议书，绝不偏袒该非应标建议书的建议人；

- providing an opportunity to competitors to submit counter-proposals but give the proposer of the unsolicited proposal an advantage such as a bonus in the evaluation ratings or, under a Swiss Challenge process, permit the proposer of the unsolicited proposal to match the best counter-proposal that is better than the unsolicited proposal; and

为竞争对手提供提交反建议的机会，但给予该非应标建议书的建议人一定优势，如评估评级方面的奖励，或者采用“瑞士式竞标程序”，允许非应标建议书的建议人与优于该非应标建议书的最佳反建议相竞争。

- offering compensation for project proposal development costs to the proposer of

an unsolicited proposal.³

向非应标建议书的建议人提供项目建议书开发成本补偿。

105. Where unsolicited proposals are permitted, the process for handling unsolicited proposals for private sector participation in public infrastructure is designed to ensure that imaginative proposals receive a fair hearing. To limit unsolicited proposals to genuine cases, strict criteria should be applied to determine if a proposal is an unsolicited proposal of a type that can be considered for admission to the PPP process for assessment, in the same way as if the proposal had been submitted by a government entity. Where a country decides that it will permit unsolicited proposals, it should restrict these to the following cases:

凡允许非应标建议书的，应为私营部门参与公共基础设施建设制定非应标建议书处理程序，以确保创造性建议书得到公平处理。为将非应标建议书限制到真实案例中，应将该建议书视为由政府机构提交的建议书一样，采用严格标准评估其是否是可纳入 PPP 程序。如果一国决定允许非应标建议书，则该国应将非应标建议书限制在设有以下条件的项目中：

- the proposal does not relate to a project under preparation by the government;
建议书不涉及政府正在筹备 的项目；
- the proposal is independently originated and developed by the proposer;
建议书是由建议人独立创建和撰写；
- the proposal is prepared without supervision or involvement of a government entity; and
政府机构未监督或参与建议书的编制；
- the proposal includes detailed information to permit evaluation of the proposal in an objective and timely manner.
建议书包含详细信息，能够对其进行客观、及时的评价。

106. If the proposal is found to be a priority project and is suited and feasible for procurement as a PPP arrangement, and there is no special reason (e.g., intellectual property) why the proposer should be given priority, then the proposal should as far as practicable be subjected to competitive tendering.

如果建议书提出的项目确为优先发展项目，并适合采用 PPP 安排进行采购，且没有任何特殊理由（如知识产权）表明该建议者应被优先考虑，则该建议书应当在可行的范围内进行竞标。

107. Where a country decides that it will permit unsolicited proposals, provisions should be included in the PPP law to ensure that the government manages and controls the

³ Additional information on the different approaches are available in (i) Public-Private Infrastructure Advisory Facility (PPIAF). 2014. *Unsolicited Proposals—An Exception to Public Initiation of Infrastructure PPPs, An Analysis of Global Trends and Lessons Learned and International Bank for Reconstruction and Development*; and (ii) The World Bank, Asian Development Bank, and Inter-American Development Bank. 2014. *ADB Public-Private Partnerships Reference Guide*. Version 2.0. pp.195–203.

process by which these proposals may be submitted, evaluated, and procured so as to ensure the best VfM for government. The provisions in the law should aim to encourage genuine proposals of high quality, discourage poor quality proposals, ensure competitive tension for the project, and provide transparency.

凡决定允许非应标建议书的国家，应将相关条款规定写入 PPP 法律，保证政府有效管理和控制非应标建议书的提交、评估和采购过程，确保政府获得最大经济效益。法律条款的规定应当力求鼓励高质量的原创建议书，遏制低质量的建议书，确保项目的竞争性氛围和透明度。

B. Suggestions

建议

108. To make a well-informed decision on unsolicited proposals, it would be helpful for the PRC to consider the likelihood of receiving unsolicited PPP proposals for priority infrastructure or public services that are not already included in a government's investment plan, and to estimate the likely number of these proposals, the sources from which they will emerge, and the resources that will be required to consider the unsolicited proposals. There is a need to guard against unsolicited proposals derailing the government's priority infrastructure projects and public services by using up valuable resources and expertise in considering unsolicited proposals.

一国政府需要考虑接受政府投资计划尚未包含的、就基础设施或公共服务优先发展项目提出的非应标 PPP 建议书，并考虑此类建议书的预计数量、来源和审议它们所需的资源。审议非应标建议书时，有必要利用宝贵资源和专业知识，防止非应标建议书使政府偏离基础设施建设和公共服务优先发展项目。

109. If unsolicited proposals are to be permitted, provisions should be included in the concession law directed toward managing and controlling the process, and encouraging fair competition. If unsolicited proposals are permitted, the criteria for admitting to consideration must be clear and certain. The proposal should be a priority project in the relevant development plan.

如果允许非应标建议书，相关法律规定应以管理和控制这个过程并鼓励公平竞争为方向。如果允许非应标建议书，则允许标准必须清楚明确且限于罕见例外的情况。建议书项目应为有关发展规划中的优选项目。

110. An unsolicited proposal must be more than an expression of interest in providing a facility or service or a project concept. It should contain sufficient detail to be screened for admission to the PPP program and evaluated for VfM.

非应标建议书不应仅仅表述提供设施、服务或项目带来的利益。还应包含充足详细的信息以供 PPP 计划筛选和经济效益评估。较高的经济效益主要得益于通过合作伙伴获得的比传统公共采购更高的效率。

111. The main source of better value for money is higher efficiency from a partner than is obtained from delivery of a public investment in the conventional manner. The main catalyst to higher efficiency is competition between potential partners. Unless treated with caution, and in a disciplined manner, there is a risk that unsolicited proposals may undermine these

elements.

提高效率的主要推动力是潜在合作伙伴之间的竞争。但必须采取审慎规范的方式对待非应标建议书，否则将有可能破坏这一切。

112. Examples of how unsolicited proposals can be treated in a PPP law are provided in the Appendix.

针对特许经营法如何处理非应标建议书，附件提供了一些示例。

C. Key Points

概要

- It is important to adopt a clear position on unsolicited proposals.
明确界定非应标建议书。
- While generally not a preferred approach for concessions, unsolicited proposals can be helpful in fostering innovation and overcoming inexperience with concessions.
尽管非应标建议书并不是特许经营倾向于使用的方式，但是非应标建议书有利于催生创新，克服特许经营上的经验不足问题。
- Unsolicited proposals need extra attention to ensure they are in line with public expenditure priorities (as unsolicited proposals are not generated by public investment planning) and address governance challenges.
非应标建议书需要额外投入精力，确保其与公共开支的优先项保持一致（因为非应标建议书不是源自公共投资规划），并且保证它能够应对治理上的挑战。
- The experience of other countries indicates that a reasonably restrictive approach is preferable. Ideally, projects that commence as unsolicited proposals should be awarded through a competitive process (potentially with some small advantage and/or reimbursement of expenses to the private sector initiator). Alternatively, unsolicited proposals should be subject to a higher degree of scrutiny by higher-level government agencies.
它国经验表明，最好对非应标模式采取合理的限制性措施。理想情况下，源自非应标模式的项目应当通过竞争程序授予（潜在地给予私营部门自提者一定的益处和 / 或花费上的报销），或者让高层次政府机构对非应标建议书采取更加严苛的审核。
- Unsolicited proposals should be well-developed proposals that enable government to decide if the project is a priority and will provide value for money if delivered as a PPP.
非应标建议书必须构架完善，以使政府能够判定其是否应当优先发展，且判定其若通过 PPP 形式展开能否实现 VFM。
- A suggestion of a project from a potential concessionaire with an indication of willingness to implement through a concession should not be given the status of

an unsolicited proposal.

若潜在特许经营者提出的项目建议，只是表示有意愿通过特许经营的方式开展项目，那么这种建议并不能被视为是非应标建议。

EXAMPLES OF HOW PPP LAWS TREAT UNSOLICITED PROPOSALS

附件：PPP 法律处理非应标建议书的示例

Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States, Model Public-Private Partnership Law 2014

独立国家联合体成员国会间大会 2014 公私伙伴关系示范法

Article 8. Unsolicited proposals

第八条 非应标建议书

1. A proposal on implementation of a project in the form of a public-private partnership project may be developed and submitted to a body authorised to pass a resolution on implementation of such project by a potential private partner. When developing a proposal on implementation of a public-private partnership project, a potential private partner may negotiate with a proposed public partner. The body authorised to pass a resolution on implementation of the public-private partnership project shall be obliged to consider such proposal and pass the resolution thereon pursuant to a procedure and within time limits provided for by national legislation. A resolution against implementing a public-private partnership project (resolution against entering into a public-private partnership agreement) may only be passed by the body authorised to pass the resolution thereon in a limited number of instances, a list of which shall be provided for by national legal acts.

1. PPP 项目实施建议书可由某潜在私营部门合作方提出，并将其递交于获授权可对该项目的实施做出决议的机构。潜在私营部门合作方提出 PPP 项目实施建议书时，应与被提议的公共部门合作方进行沟通。获授权可对该项目的实施做出决议的机构有义务依照国家法律规定的程序和时间限定内，对该项目建议书进行审议并做出决议。否决某 PPP 项目的实施（即反对订立 PPP 协议），仅能由获授权可对该项目实施给予决议的机构做出，且必须符合国家法案规定的一系列特定限制条件。

2. If a tender commission resolves that a public-private partnership agreement should be entered into with a different private partner, the potential private partner that has developed and submitted to the authorised body the above-mentioned proposal on implementation of the project in the form of a public-private partnership project shall be entitled to be fully compensated by the public partner or, if provided so by respective tender documents, by the winner of the tender for the right to enter into the public-private partnership agreement for its reasonable and justified costs incurred by such potential private partner in connection with the development thereby of the said proposal.

2. 若招标委员会决定 PPP 协议由其它潜在私营部门合作方订立，则提出 PPP 项目实施建议书，并将其递交于获授权可对该项目的实施做出决议的机构的该潜在私营部门合作方有权从公营部门合作方，或具体招标文件规定的 PPP 协议缔约方中标者那里获得与该项目建议书提出相关的各项合理费用的补偿。

United Nations Commission on International Trade Law, Model Legislative Provisions on Privately Financed Infrastructure Projects 2003

联合国国际贸易法委员会 2003 年私人融资基础设施项目示范立法条款

I. General provisions

总则

(g) “Unsolicited proposal” means any proposal relating to the implementation of an infrastructure project that is not submitted in response to a request or solicitation issued by the contracting authority within the context of a selection procedure;

(g) “非应标建议书”指所有非回应政府签约部门按照择选程序提出的要求或恳请，而递交的有关基础设施项目实施的提议。

II (iv) Unsolicited proposals

非应标建议书

20. Admissibility of unsolicited proposals

非应标建议书的准入性

As an exception to model provisions 6 to 17, the contracting authority is authorized to consider unsolicited proposals pursuant to the procedures set forth in model provisions 21 to 23, provided that such proposals do not relate to a project for which selection procedures have been initiated or announced.

作为第 6 条款和第 17 条款的例外情形，若非应标建议书所涉及项目尚未启动或发布择选程序，则政府签约部门有义务按照示范条款第 21 和 23 条规定审议非应标建议书。

21. Procedures for determining the admissibility of unsolicited proposals

判定非应标建议书准入性的程序

1. Following receipt and preliminary examination of an unsolicited proposal, the contracting authority shall promptly inform the proponent whether or not the project is considered to be potentially in the public interest.

1. 收到非应标建议书并初步审查之后，政府签约部门应迅速告知自提者其提议项目是否在公共利益考虑范围内。

2. If the project is considered to be potentially in the public interest under paragraph 1, the contracting authority shall invite the proponent to submit as much information on the proposed project as is feasible at this stage to allow the contracting authority to make a proper evaluation of the proponent's qualifications and the technical and economic feasibility of the project and to determine whether the project is likely to be successfully implemented in the manner proposed in terms acceptable to the contracting authority. For this purpose, the proponent shall submit a technical and economic feasibility study, an environmental impact study and satisfactory information regarding the

concept or technology contemplated in the proposal.

2. 若该项目确在第 1 段所指公共利益考虑范围内，政府签约部门应邀请自提者在当时可行条件下，尽可能多地提供与提议项目相关的信息，以便政府签约部门合理评估自提者资质，以及该项目在经济和技术上的可行性，确定该项目是否能够依照政府签约部门的要求，成功地将项目付诸实施。出于上述目的，自提者应递交一份技术和经济可行性研究报告，一份环境影响研究报告，以及其它与计划书预期采用的概念和技术相关信息。

3. In considering an unsolicited proposal, the contracting authority shall respect the intellectual property, trade secrets or other exclusive rights contained in, arising from or referred to in the proposal. Therefore, the contracting authority shall not make use of information provided by or on behalf of the proponent in connection with its unsolicited proposal other than for the evaluation of that proposal, except with the consent of the proponent. Except as otherwise agreed by the parties, the contracting authority shall, if the proposal is rejected, return to the proponent the original and any copies of documents that the proponent submitted and prepared throughout the procedure.

3. 考虑非应标建议书时，政府缔约部门应尊重知识产权、商业机密以及项目包含、引发、援引的其它独有权利。因此，除非出于评估项目建议书的目的，或征得自提者的同意，政府缔约部门不得使用由自提者或以自提者名义提供的与计划书有关的各项信息。

22. Unsolicited proposals that do not involve intellectual property, trade secrets or other exclusive rights

22. 不涉及知识产权、商业机密或其它独有权利的非应标建议书

1. Except in the circumstances set forth in model provision 18, the contracting authority shall, if it decides to implement the project, initiate a selection procedure in accordance with model provisions 6 to 17 if the contracting authority considers that:

1. 示范法条款第 18 条规定的情形除外，若政府签约部门决定开展所提议项目时认为：

(a) The envisaged output of the project can be achieved without the use of intellectual property, trade secrets or other exclusive rights owned or possessed by the proponent; and

(a) 项目预期产出可以在不使用自提者拥有的知识产权、商业机密或其它独有权利的情况下实现；并且

(b) The proposed concept or technology is not truly unique or new.

(b) 所提议的概念或技术并非全新或独一无二，则政府签约部门应当依照条款第 6 条和 17 条发起择选程序。

2. The proponent shall be invited to participate in the selection proceedings initiated by the contracting authority pursuant to paragraph 1 and may be given an incentive or a similar benefit in a manner described by the contracting authority in the request for proposals in consideration for the development and submission of the proposal.

2. 自提者应受邀参与政府签约部门依照第 1 段发起的择选程序。自提者还有可能因符合政府签约部门出于建议书审议目的而指定的建议书构建和递交方式，被给予奖励或是类似益处。

23. Unsolicited proposals involving intellectual property, trade secrets or other exclusive rights

23. 涉及知识产权、商业秘密或其它独有权利的非应标建议书

1. If the contracting authority determines that the conditions of model provision 22, paragraph 1 (a) and (b), are not met, it shall not be required to carry out a selection procedure pursuant to model provisions 6 to 17. However, the contracting authority may still seek to obtain elements of comparison for the unsolicited proposal in accordance with the provisions set out in paragraphs 2 to 4 of this model provision.

1. 若政府签约方认为不符合示范条款第 22 条第 1 段第 1 和 2 节规定情形，则不应当依照第 6 和 17 条款发起择选程序。然而，政府签约部门依然可以依据该示范条款第 2 和 4 段针对该非应标建议书而获取有关对比要素信息。

2. Where the contracting authority intends to obtain elements of comparison for the unsolicited proposal, the contracting authority shall publish a description of the essential output elements of the proposal with an invitation for other interested parties to submit proposals within [a reasonable period] [the enacting State indicates a certain amount of time].

2. 当政府签约部门计划针对该非应标建议书获取对比要素信息时，政府签约部门应公布该计划书主要产出组成，并邀请其它有意愿的有关方在 [合理时间内] [法律颁布国指定的一段时间期限] 递交建议书。

3. If no proposals in response to an invitation issued pursuant to paragraph 2 of this model provision are received within [a reasonable period] [the amount of time specified in paragraph 2 above], the contracting authority may engage in negotiations with the original proponent.

3. 若在 [合理时间内] [上文第 2 段规定的时间期限] 无建议书回应依据示范条款第 2 段发出的邀请，则政府签约部门可与最初的自提者展开磋商。

4. If the contracting authority receives proposals in response to an invitation issued pursuant to paragraph 2, the contracting authority shall invite the proponents to negotiations in accordance with the provisions set forth in model provision 19. In the event that the contracting authority receives a sufficiently large number of proposals, which appear prima facie to meet its infrastructure needs, the contracting authority shall request the submission of proposals

pursuant to model provisions 10 to 17, subject to any incentive or other benefit that may be given to the person who submitted the unsolicited proposal in accordance with model provision 22, paragraph 2.

4. 若政府签约部门依据第 2 段发出邀请后收到了建议书，则政府签约部门应依照示范条款第 19 条邀请这些建议书的提出者参与磋商。若政府签约方收到了足够多数量的初步看上去可满足基础设施需求的建议书，则政府签约部门应当要求建议书的递交须遵照示范条款第 10 至 17 条的要求，且对于依照示范条款第 22 条第 2 节递交非应标建议书的自提者予以奖励或其它益处。