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RETHINKING PUBLIC–PRIVATE PARTNERSHIPS

DISPUTE RESOLUTION MECHANISMS OF PPP AGREEMENTS IN CHINA:
A RESEARCH BASED ON JUDICIAL DECISIONS

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Abstract Based on research on a number of judicial decisions regarding concession and Public–Private Partnership (PPP) agreements, this paper demonstrates the problems and dilemmas of China’s current PPP dispute resolution mechanism and clarifies three fundamental issues: concession ≠ PPP; concession agreement ≠ administrative agreement; and disputes related to administrative agreements ≠ administrative disputes. On the grounds of these conclusions, the paper argues that the logical chain of China’s existing PPP and concession dispute resolution mechanism is untenable. The logic of the current mechanism starts from the definition of an administrative agreement; it then classifies concession agreement as administrative agreement; and finally subjects the disputes over concession agreements to administrative litigation. Yet, this starting point is problematic because the definition of administrative agreement and the distinction between public and private law attributes are difficult to determine precisely, as they lack the necessary theoretical clarity and uniqueness. Overall, the current legal situation of PPP in China is far from being satisfactory because a statutory law on PPP is absent, the existing laws and regulations on administrative agreements are primitive, and the judicial practice has not yet established unified and clear criteria. Against this backdrop, this paper proposes a possible way out. First, we should critically reflect on the current administrative agreement and PPP agreement theory. Then, we should apply the method of legal fact research, adopt doctrinal tools of the legal relationship theory and contract construction theory, and eventually establish a multiple dispute resolution mechanism to resolve disputes effectively.

Keywords public–private partnerships, PPPs, concession agreements, administrative agreement, dispute resolution mechanism, legal relationship theory

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This work was supported by the funding research project of Renmin University of China (Project No.: 17XNA001).
INTRODUCTION

Public–Private Partnership (PPP), a new innovative form of public administration and public goods supply after privatization, deregulation, and reregulation, has been spreading around the world since the 1990s. Starting from the 1984 Shajiao B Power Station BOT Project in Shenzhen, PPP has been operational in China for more than 30 years, during which it has experienced several up and downs. Since 2014, due to the supportive policy from the central government, especially from the National Development and Reform Commission and the Ministry of Finance, PPP has once again drawn great attention,
including being elevated to the level of “quasi-national strategy.”¹ In merely a couple of years, China has become the world’s largest PPP market, with the planned investment exceeding RMB10 trillion.²

However, the dramatic development of PPP has at the same time given rise to various problems. PPP has been overused and abused, sometimes as a financing tool by local governments, which resulted in an overdraft of governmental credit and a radical increase in financial risk. In order to prevent and control these risks, the Ministry of Finance issued the Notice on Improving the Management of PPP Information Platform Project Database (关于规范政府和社会资本合作(PPP)综合信息平台项目库管理的通知, Notice No. 92) in November 2017. The aim was to strictly review and remove illegal projects in the database to regulate PPP practice more effectively. This marked the turn from the unconstrained development period to the strict supervision stage of PPP regulation in China. As a result, PPP suddenly cooled down. Many PPP projects that have been implemented or urgently suspended also resulted in legal disputes. According to the database (China Judgements Online) of the Supreme People’s Court (SPC), lawsuits involving PPP have been increasing explosively since 2017.³ It is foreseeable that, as an aftermath of this round of PPP boom, the challenge will be how to settle these PPP disputes.

Unfortunately, China’s current dispute resolution mechanism cannot provide sufficient, unified, and complete remedies to the growing number of PPP disputes and lawsuits. On the contrary, there have been heated debates regarding a number of issues. First, although the Administrative Litigation Law (行政诉讼法) has included concession agreements in the scope of accepting administrative cases (hereinafter referred to as “litigation scope”) in its 2014 revision, the question of whether disputes over concession agreements should be settled through administrative litigation or civil litigation remains unsettled; especially the administrative and civil divisions of the SPC hold different

² According to the Report on National PPP Information Platform Project Database (Feb. 2019) released by the China Public Private Partnerships Center at the Ministry of Finance on Mar. 28, 2019, by the end of Feb. 2019, the database had collected 8,780 projects, and the total amount of investment had reached RMB13.3 trillion.
³ The number of judgments under the keyword of PPP in China Judgements Online (http://wenshu. court.gov.cn) increased radically from 1 (2015) and 2 (2016) to 16 (2017) and 58 (2018).
opinions on this issue. Second, although the Administrative Litigation Law includes concession agreements in its litigation scope as a specific type of administrative agreement, the SPC has been trying to extend its scope of administrative litigation to all disputes involving PPP agreements in its judicial interpretations. This attempt has been opposed rather strongly by practitioners. Considering the distrust of the administrative litigation system and the convenience of civil compensation claims, the private partners taking part in PPP prefer to resolve their disputes through civil litigation. Finally, a critical controversial issue during the drafting process of the future PPP regulation is whether disputes over PPP agreements can be arbitrated. Despite the fact that it is common practice in many countries to stipulate the arbitration clause in PPP agreements, the SPC clearly excluded this possibility in the draft of its Judicial Interpretation on Administrative Agreements.

Against this background, and based on the analysis of relevant judicial decisions and reflections of PPP theories, this paper provides suggestions to build reasonable and suitable PPP dispute resolution mechanisms for China.

I. CURRENT STATUS OF AND DEBATES ON DISPUTE RESOLUTION MECHANISMS OF CONCESSION AND PPP IN EXISTING LAWS AND REGULATIONS

First, it is necessary to clarify the relationship between concession and PPP. Some
regulators and scholars in China either equate concession with PPP or, as the National Development and Reform Commission does, understand concession as a broader term than PPP. However, according to the prevailing international view in both practice and academia, PPP is the umbrella term covering concession and other forms of partnerships between the public sector and private companies. For example, in its 2014 directive on the award of concession agreements, the European Union made it clear that concessions are a particular form of PPP, and, based on estimations by the European Commission services, over 60% of all PPP agreements would qualify as concessions. Therefore, although concession is the most common form of PPP, these two are not synonymous. Furthermore, concession can also be divided into many concrete forms such as BOT (Build-Operate-Transfer), TOT (Transfer-Operate-Transfer), and BOO (Build-Own-Operate). Thus far, we can draw the first preliminary conclusion: concession ≠ PPP.

Second, it is necessary to clarify whether concession agreements belong to administrative agreements. This is a highly controversial question, the answer to which will directly determine judicial remedies for concession agreements. In the following sections, this issue will be discussed from the perspectives of existing laws and regulations, judicial decisions, and legal theory, respectively.

The stance of the Administrative Litigation Law on the legal nature of concession agreements is rather strong and explicit. It understands a concession agreement as a subcategory of administrative agreements, and therefore includes it in the scope of administrative litigation. After its revision in 2014, Article 12, Paragraph 1, Item (11) of the Administrative Litigation Law clearly provides that the people’s courts shall accept the complaint when “a complaint claiming that an administrative agency has failed to perform according to the law or as agreed upon, or illegally modified or rescinded, an agreement, such as a government concession agreement or a land and building expropriation compensation agreement.”

In Article 11 of the Judicial Interpretation of the SPC on Several Issues concerning the Application of the Administrative Litigation Law (最高人民法院关于适用《中华人民共和国行政诉讼法》若干问题的解释) issued in April 2015, the SPC defines administrative agreement as having five aspects: subject, objective, the exercise of administrative power, bilateral negotiation, and contents of the legal relationship. Accordingly, an administrative agreement is an agreement “which is concluded by an administrative agency within the extent of its statutory duties and responsibilities with a citizen, a legal person, or any other organization through negotiation to achieve public interests or government

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8 See YU, fn. 5.
administration objectives and provides the rights and obligations in administrative laws as its contents.” Article 11 further lists the government concession agreement and the land and building expropriation compensation agreement as two specific forms of administrative agreements and emphasizes that these agreements are subject to administrative litigation. Although this judicial interpretation has been replaced by a new one issued in February 2018, its impact on judicial practice is significant.

However, the Measures for the Administration of Concession for Infrastructure and Public Utilities (基础设施和公用事业特许经营管理办法, hereinafter referred to as “PPP Measures”), which were co-issued by the National Development and Reform Commission and five other ministries and came into force on June 1, 2015, only stipulates under Article 49 that, in the event of a dispute over the performance of concession agreement, the dispute shall be settled through negotiation. However, the article remains silent about the legal remedies in case of a failed negotiation. Article 51 of the PPP Measures also provides that any concessionaire who considers that a specific administrative action of an administrative organ infringes upon his or her rights and interests is entitled to file administrative reconsideration or administrative litigation. However, this provision is merely a restatement of the rights to legal remedies of the concessionaires as persons subjected to administrative action, while at the same time stressing the distinctions in the legal remedies of administrative agreement and administrative action as two different forms of administrative activities. This regulatory act has been widely seen as the basic law of PPP among practitioners. However, in view of the fact that the Administrative Litigation Law has classified a concession agreement as an administrative agreement and included it in the litigation scope, the PPP Measures, as lower-level law, pragmatically adopts an evasive attitude, remaining vague on the thorny issue of legal remedy for disputes over concession agreements.

Even more obviously different is the Legislative Proposal for PPP Law (政府和社会资本合作法征求意见稿) released by the Ministry of Finance in January 2016. According to this proposal, if disputes over PPP agreements cannot be settled through negotiation, they should be decided on through civil litigation or arbitration. This proposal came to a premature end after the regulation and policy-making power was unified by the then Legislative Affairs Office of the State Council (国务院法制办). Nevertheless, it reflects the widely different positions among important PPP regulators on the dispute resolution mechanisms.

One-and-a-half year later, on July 21, 2017, the then Legislative Affairs Office of the
State Council released their proposal for the PPP Regulation on Infrastructure and Public Services (基础设施和公共服务领域政府和社会资本合作条例(征求意见稿), hereinafter referred to as “PPP Regulation”). Notwithstanding the objections and pressures from many angles, the proposal stipulates the arbitration clause for the performance of the PPP agreement without excluding the possibility of civil litigation in Article 40. In Article 41, the proposal further provides administrative reconsideration or administrative litigation for a specific administrative action of an administrative organ in implanting and supervising a PPP project that infringes upon the rights and interests of social capital parties. The PPP Regulation is still in the legislative process, but it appears that the dual dispute resolution mechanism for all PPP agreements, including concession agreements, as can be seen in the proposal, will be eventually adopted. This dual system distinguishes disputes over the performance of PPP agreements and disputes regarding administrative action on PPP implementation. While the former can be settled by civil litigation, the latter should be resolved through administrative litigation. Whether this dual mechanism is sound and practical will be explored later.

From the discussion above, it is hard to neglect the divergence of opinions between the judicial and the administrative branches and between the general statutory law and specific PPP regulations. On the one hand, the Administrative Litigation Law and its judicial interpretations by the SPC have always been insisting that a concession agreement is administrative and, as such, its dispute should be settled through administrative litigation. It even tries to extend the scope of administrative litigation to all disputes over PPP agreements. On the other hand, the ministries and offices of the State Council did not adhere to this approach in drafting and making specific PPP regulations. It can be anticipated that the debates over proper PPP dispute resolution mechanisms will not end with the promulgation of the PPP Regulation.

II. CONTROVERSIES OVER DISPUTE RESOLUTION MECHANISMS OF CONCESSION AND PPP IN JUDICIAL PRACTICE

A closer look at the judicial practice indicates the regrettable fact that the amendment of the Administrative Litigation Law and its judicial interpretation have not played a decisive role in the debates on the dispute resolution mechanisms of the concession agreement. Rather, there still exist a number of ongoing different and even conflicting opinions on this issue. Based on my analysis of the representative cases involving a concession agreement, the lack of consensus is most significant in three aspects. The first is the legal nature of the concession agreement and hence its proper jurisdiction. There are opposing views on this point among different levels of courts, between the administrative and civil divisions of the SPC, and even within the civil division of the SPC. The second is the criteria to identify the exercise of administrative power by the public sector party in concession and PPP agreement. Here, we still lack clear judicial
criteria and guidance. The third is the nature of disputes over concession and hence the applicable law. So far, no majority opinion has been reached on this issue either. In this part, I will discuss these three questions consecutively within the context of concrete cases.

A. The Legal Nature of and the Jurisdiction over Concession Agreements

Because the new Administrative Litigation Law and its judicial interpretation explicitly include concession agreements in their litigation scope since they took effect on May 1, 2015, the administrative division of the SPC has basically classified all concession agreements in dispute as administrative ones when deciding cases in which administrative agencies fail to perform or illegally rescind concession agreements.\textsuperscript{11} However, if the parties involved have doubts about the legal nature of the concession agreement, the court’s judgment might reach three different kinds of conclusions.

The first kind of judicial opinion is to classify concession agreements as civil contracts. A landmark case of this kind is the contractual dispute involving Henan Xinling Expressway Company (河南新陵高速公路公司合同纠纷管辖权异议案) in 2015, in which the objection to jurisdiction became the focal point. The civil division of the SPC examined the BOT concession agreement in dispute based on five aspects — subject, objective, exercise of administrative power, bilateral negotiation, and contents of the legal relationship — as defined in Article 11 of the 2015 Judicial Interpretation on the Administrative Litigation Law. The court then decided that this BOT agreement, by its nature, regulates a civil and commercial legal relationship, and should, therefore, be classified as a civil and commercial contract, instead of an administrative agreement. The Court’s core reasoning can be summarized in three points: (1) The objective of the agreement, to build an expressway and to set up a toll station, is more profitable than to providing public service that is accessible and free to the public. (2) Although one party to the agreement is the local government, the counterparty, Xinling Expressway Company, still enjoys full autonomy in entering into a contract and determining the content of the contract and is not subject to unilateral administrative actions. The content of the contract includes specific rights and obligations as well as liability for breach of contract, which proves that the contract was signed by two equal parties based on negotiation. (3) The content of the contract goes beyond agreement on administrative permission and administrative license, and even this part should be seen as the performance of the contract, which constitutes only part of the contract and as such cannot determine the nature of the contract.\textsuperscript{12}

\textsuperscript{11} As at Apr. 8, 2019, the China Judgements Online database had collected 18 cases regarding concession agreements from 2015 to 2019. In all the 18 cases, the courts confirmed the administrative nature of the concession agreement.

\textsuperscript{12} See 最高法(2015)民一终字第244号裁定书, fn. 4.
The reasoning and conclusion of this judgment directly influenced subsequent cases. For example, in City Government of Bazhong v. Sichuan Bawan Expressway Co., Ltd. in 2017, the Beijing Second Intermediate People’s Court also examined the BOT concession agreement based on the above-mentioned aspects and eventually determined that the agreement was a civil contract and therefore confirmed the validity of the arbitration clause within it.13

The second kind of judicial judgment is to classify concession agreements as administrative ones. A textbook example of this kind is Hainan Zhongdong Group Co., Ltd., etc. v. County Government of Suixi, in which the Zhanjiang Intermediate People’s Court found that the agreement in dispute contains the essential elements of an administrative agreement. The elements are as follows: The objective is to achieve public interest; the subject is acting under the authorization of the local government and the government bears all the responsibility; the content of the agreement is the awarding of concession. This concession must be permitted by public authorities, and therefore not a civil obligation that can be performed by the private partner alone.14

Finally, there is the third kind of judgment on the legal nature of a concession agreement, namely, acknowledging its nature as an administrative agreement, while at the same time identifying its specific clauses as civil ones, which shall be decided by the civil division of the court according to civil and commercial laws. An example is the shareholder investment dispute involving China Energy Conservation Asset Management Co., Ltd. and Jingmen Jinghuan Environmental Protection Technology Co., Ltd. In this dispute, the civil division of the SPC held that, albeit the administrative agreement nature of the concession agreement in general, the concrete clause in dispute touches upon the issue of the ownership of certain investments, which by its nature is an agreement on civil rights and obligations between the two parties. As pointed out by the appellate court, the concession agreement might very well be an administrative agreement in general; however, this does not necessarily exclude the possibility that certain parts of its content might also be an agreement on civil interests and hence should be decided upon according to the rule of civil rights and obligations.15

The above-mentioned different judicial decisions correspond to the three representative scholarly views on the nature of a concession agreement: the civil contract

It is worth noting that this divergence in both judicial practice and academic discussions did not disappear after the revision of the Administrative Litigation Law. Even when the judicial interpretation explicitly classifies a concession agreement as an administrative agreement, the conflicting opinions remain.

The divergence in judicial decisions can be explained from many angles. First, it might be a consequence of the path-dependence of judicial practice. Before the revision of the Administrative Litigation Law in 2014, most concession agreements, especially BOT agreements, which were introduced into China in 1995 as a way to attract foreign investment, have been classified as civil contracts, and the disputes over these agreements were usually settled through civil litigation or arbitration.17 To some extent, civil judges still practice this tradition and tend to treat concession agreements as civil ones.

A second reason is the above-mentioned 2015 Judicial Interpretation on Administrative Litigation Law itself. One might even say that because the courts applied the five-element criteria defined in it, they reached different conclusions. This is because the criteria are rather abstract, leaving significant interpretative space for judges. For example, the elements of “exercise of administrative power” and “public interest objective” are indeterminate legal concepts on which consensus can hardly be reached. Moreover, the criteria consist of five elements; however, the weight of each element in deliberation is not clear. Some judges focus on the element of “exercise of administrative power,” while others pay more attention to the element of “contents of the legal relationship.” Therefore, even using the same analytical framework, judges often reach different decisions.18 More fundamentally, it is impossible to define anything by simply listing some of its features. Logically, it is not exhaustive. Therefore, the 2015 Judicial Interpretation cannot completely define an administrative agreement with its five-element criteria, either. Consequentially, from these vague criteria, we will not be able to draw the conclusion that all concession agreements are administrative agreements.

It would seem a more logical and accurate conclusion to assume that concession agreements that have the features or elements of administrative agreements are administrative, but certainly not all of them. This has been corroborated by the ununified judicial decisions and diverse PPP practice. So far, we can draw the second preliminary

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17 See YU, fn. 5 at 11.

18 CHEN Tianhao, 行政契约的识别与边界 (The Identification and Boundary of Administrative Agreement), 1 中国法学 (China Legal Science), 143 (2019).
conclusion: concession agreement ≠ administrative agreement. Disputes over concession agreements should therefore not necessarily be settled through administrative litigation.

B. Difficulties in Identifying the Element of “Exercise of Administrative Power” in Concession Agreements and Predicament of the Dual Dispute Resolution Mechanism

Looking through judicial decisions, we can see that the courts apply the five-element criteria and examine the subject, objective, content, and other elements comprehensively when deciding the legal nature of concession agreements. The core of the criteria, or the most important element, however, is the element of “exercise of administrative power.” In addition, the dual dispute resolution mechanism for PPP agreements, as recommended in the PPP Regulation proposal, also uses “the exercise of administrative power” as the basis of their dichotomy. Accordingly, PPP disputes involving the exercise of administrative power are administrative law disputes and subject to administrative reconsideration or administrative litigation, whereas PPP disputes over the performance of the agreement, which do not involve specific administrative action of an administrative organ, can be settled by civil litigation or arbitration.

As the SPC expressed in the case of *Beijing North Union Power Engineering Co., Ltd. v. Urumqi City Transportation Bureau* (北京北方电联电力工程有限责任公司与乌鲁木齐市交通运输局其他合同纠纷案), “two legal relationships with different natures intertwine in BOT agreements,…the actual nature of the legal relationship in dispute cannot solely be determined by the fact that one side of the agreement is public authority, rather, the critical point here is whether the dispute is related to the exercise of administrative power by an administrative organ.”19 Some scholars in this field suggest that “the exercise of public power” should be the core criterion in distinguishing administrative and civil agreements. Whether the disputes are a result of the exercise of public power should be the decisive factor in choosing the appropriate dispute resolution mechanism.20

However, with regard to this point, on deciding whether the specific concession or PPP agreement in dispute qualifies as the exercise of administrative power, the judicial practice has not been clear or consistent. The debates are most heated in three situations: when the government does not perform its contractual obligation such as land expropriation and house demolition, providing financial subsidies, or assisting in the approval of licenses; when the government temporarily takes over the concession project; and when the government unilaterally terminates the agreement. In the following sections, I will discuss these three issues in turn within the context of concrete cases.

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1. Disputes over Non-Performance of Contractual Obligations by the Government under Government Investment Promotion Agreements. — The common obligations of the government under government investment promotion agreements include land expropriation and house demolition, providing financial subsidies and preferential policy, and assisting in the approval of licenses (state-owned land use permission, construction project permission, business license, tax registration, etc.). Courts are divided in their opinions regarding the legal nature of these contractual obligations of administrative agencies. Some courts emphasize that the performance of such obligations relies upon the exercise of administrative power. They also understand the function and objective of these agreements as part of the government’s responsibility in developing the local economy, meaning that they are public by nature. Based on these arguments, they tend to classify investment promotion agreements as administrative, which are subject to administrative litigation.\(^{21}\) In stark contrast to this opinion, other courts believe that investment promotion agreements are contracts reached by two parties through equal negotiation. As a reflection of their autonomy of will, the rights and obligations as agreed in the contract are equal. As to the administrative permission and license involved, they are only part of the agreement and should be seen as the performance of the contract, which does not determine its nature. Therefore, these courts tend to think that investment promotion agreements are in general civil contracts.\(^{22}\)

The case of a contractual dispute involving Chongqing Red Star Macalline Enterprise Development Co., Ltd. (重庆红星美凯龙企业发展有限公司合同纠纷案) in 2017 is a classic example of the second opinion. In this case, the government of Yulin City was sued in the civil court. The claimant demanded the termination of the contract for building a square, because the city government did not complete its work of land expropriation and house demolition, and the land that it provided was defective. The court of first instance dismissed the claim as it was of the opinion that the non-performed contractual obligations actually relied upon the exercise of administrative power by an administrative agency. Since these are not disputes over rights and obligations between equal civil parties, the civil court should not accept such cases.

The judgment was later revoked by the SPC. Contrary to the court of the first instance, the SPC did not understand the contractual obligations of the government as an exercise


\(^{22}\) See for example 自贡大象电子科技有限公司与自贡市大安区人民政府合同纠纷再审案 (Zigong Elephant Electronic Technology Co., Ltd. v. Da’an District Government of Zigong City), 最高法(2014)民申字第799号裁定书 (No. 799, Petition Civil Judgment of the Supreme People’s Court), May 30, 2014.
of administrative power. Rather, their functions are to help the other party to perform their obligations under the contract, and as such, the agreement is essentially a civil contract and should, therefore, be accepted by the civil court. The reason for such a different conclusion is that although administrative power is involved in the agreement, it is not the main content of the contract. Rather, the administrative power is merely of an ancillary nature for the achievement of a civil and commercial objective and, as such, it would not affect the nature of the agreement as a civil contract.

As shown in the above discussion, although the exercise of public power can be the core criterion in identifying an administrative agreement, it will not be able to guarantee a unanimous conclusion if other elements such as the objective and the main content of the agreement are taken into consideration. Therefore, there is still no definitive answer to the question of the nature of governmental obligations under PPP agreements. Whether the obligations of government are the exercise of power in administrative law or merely performance of the contract in civil law still depends on the concrete agreement.

2. The Legal Nature of the Government's Temporary Takeover of Concession Projects. — Infrastructure and public utilities involve public interest and public safety. Therefore, the government can adopt temporary measures to take over the concession projects under certain circumstances. However, under China’s current legal system, the exercise of this kind of temporary takeover lacks unified and clear regulations. According to Article 18, Paragraph 3, Item (12) of the PPP Measures, the concession agreement should include “emergency plans and temporary takeover plans.” However, this act does not specifically stipulate the preconditions, the procedural requirements, or the nature of the temporary takeover. It is generally believed that there are two preconditions for the government to temporarily take over a concession or PPP projects: (1) to protect the public interest in case of an emergency; and (2) the concessionaires violate the law or the concession agreement.

As for the nature of the temporary takeover, namely, whether it is an administrative action of the government to exercise its authority or an action to exercise its civil rights under the contract, there is no consensus yet. This has become the core issue of dispute in the case of Zhangpu Zhonghuantianchuan Environmental Protection Water Co., Ltd. v. Environmental Protection Bureau of Zhangpu County, etc. (漳浦中环天川环保水务有限公司 v. 漳浦县环境保护局等).
司与漳浦县环境保护局等侵权责任纠纷案)。In this case, both the government and the concessionaire argued that it was an action to exercise civil contractual rights rather than a specific administrative action of the government temporarily taking over the concession enterprise that might cause a pollution accident. However, the court of the second instance and the SPC as the retrial court insisted that the clause in the concession agreement, which provided that the government could “take measures for public safety and health in emergencies,” had the nature of an administrative agreement. Therefore, the takeover of the temporary operation committee in this case did not violate the contractual agreement since it should be recognized as an administrative action of performing duties instead of a civil tort action. In particular, it was asserted, “the takeover is the legal duty of the administrative organ to stop the illegal act, to avoid the hazard, and to prevent further expansion of the hazard in the administrative management process.”26 It is clear here that the court characterized the temporary takeover action as an administrative compulsory measure.

Accordingly, three questions should be further considered. First, the administrative compulsive measures are administrative actions taken by the administrative organs according to the law, for which there is no need for any contractual basis. It is then questionable why the court emphasized the nature of the agreement stipulating the takeover measures as an administrative agreement. Second, in the case, both legal provisions and contractual agreements are at hand; therefore, it is debatable whether the government’s temporary takeover should be recognized as an administrative compulsory measure to perform administrative duties or an exercise of its civil rights under the contract. Third, the attribute of the takeover action directly determines the type of litigation. This means that, if it is recognized as an administrative compulsory measure, the private partner could only refer to administrative reconsideration or administrative litigation to claim for damage compensation. Comparatively, if it is classified as an action of exercising contractual civil rights, the private partner would be able to bring a civil lawsuit. The controversy over the nature of the temporary takeover also reflects the difficulty of resolving PPP disputes by the dual mechanism, for some actions in disputes are inherently difficult to define as the government’s performance of a contract or its exercise of administrative power.

3. Disputes over the Nature of the Government’s Unilateral Termination of the Agreement. — Similar to the temporary takeover, the nature of the government’s unilateral termination of a concession or agreement also causes significant controversy in judicial practice, which varies from the exercise of the administrative power to that of the contractual civil rights according to different opinions. The lack of consensus among

courts is fully reflected in the case of City Government of Hotan v. Hotan Tianrui Gas Co., Ltd. (和田市人民政府与和田市天瑞燃气有限责任公司合同纠纷案), which lasted seven years.

In this case, the City Government of Hotan and Xingyuan Gas Co., Ltd. (hereinafter referred to as “Xingyuan”) signed a concession agreement for the investment and construction of a natural gas utilization project. Afterward, the government thought that Xingyuan and its established project company, Tianrui Gas Co., Ltd. (hereinafter referred to as “Tianrui”), violated the relevant laws and regulations during the fulfillment of the contract. According to the agreement as well as the Contract Law (合同法), the government decided to terminate the contract, withdraw the concession, and take over the project, and thus sent Tianrui a “Notice to Terminate the Agreement” and a “Notice of Takeover.” The government also filed a civil lawsuit in December 2008 with the Intermediate People’s Court in Hotan Prefecture to terminate the contract. Meanwhile, the private partners of the concession, Xingyuan and Tianrui filed another lawsuit with the Xinjiang High People’s Court, the appellate court of the Intermediate People’s Court in Hotan Prefecture, to propose that the government’s termination of the contract was invalid and asked it to continue with the contract. The Xinjiang High People’s Court heard these two cases jointly. After deciding that the concession agreement was a civil contract, the court held the opinion that the City Government of Hotan terminated the contract according to the Contract Law, and there was no administrative decision to revoke the concession. Since the reason for the cancellation of the contract by the government did not meet the relevant statutory requirements as stipulated in the Contract Law, the court supported the claim of the private party.27

However, in July 2014, the SPC as the court of the second instance held that the agreement was signed by the City Government of Hotan as an administrative organ, and it was an action of granting concession and exercising public power according to the city public utility management regulations. Many aspects of the agreement, including the granting of the concession, the determination of the price standard, the ownership and disposal of the facilities, as well as the supervision of the government on the project reflect the special status of the government. Therefore, the agreement was an administrative one, and the government’s termination of a contract and takeover of a business should be recognized as administrative action. On that account, this was not within the jurisdiction of civil litigations. Hence, the SPC revoked the judgment of the first instance and rejected the claim and the counterclaim from both sides; however, it asserted that the parties could file an administrative lawsuit separately.28

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28 See 最高法(2014)民二终字第 12 号裁定书 (No. 12, Final Civil Judgment of the Supreme People’s Court), Jul. 7, 2014; see WEI, fn. 25 at 69–70.
Xingyuan and Tianrui subsequently filed an administrative lawsuit to the Intermediate People’s Court in Hotan Prefecture. In the following final administrative judgment made by the Xinjiang High People’s Court in 2015, the government’s action of dissolving the agreement and withdrawing the concession was recognized as an administrative penalty that had a significant impact on the rights of the counterparty. However, the penalty was deemed illegal for procedural reasons, since the government did not inform the opposing party before issuing the “Notice to Terminate the Agreement,” thus depriving them of their right to defend, make statements and hold a hearing. Although the government’s termination of the contract and takeover of the project was confirmed to be illegal, the court did not revoke it in order to protect public interest, nor did the court support the private party’s request to continue using the contract. 29 Whether the private party had filed a further lawsuit for compensation was unknown.

Hence, after seven years of litigation, the private party has not received a substantive remedy. It is worth noting that during the tortuous litigation process of the case, the judgments on the nature of the government’s unilateral withdrawal of the concession have changed time and again, from a civil action to an administrative action, and then to an action of administrative penalty. Regardless of whether the arguments and the results of the various judgments are debatable and whether the remedies for the involved parties are sufficient, the divergent judgments themselves indicate the difficulty in recognizing the nature of the government’s unilateral termination of the agreement, which leads to the disputes over the jurisdiction of the litigation and eventually the different substantive judgments.

In other lawsuits involving disputes arising from the government’s unilateral termination of concession agreements, the judgments on the nature of the termination are also inconsistent. Under certain circumstances, the government’s actions are recognized as civil ones, for example, the case of Shuyang Hengtong Water Co., Ltd. v. County Government of Shuyang (沭阳恒通水务有限公司与沭阳县人民政府合同纠纷案). 30 In contrast, other courts hold that the government’s decision to terminate the agreement has both civil and administrative characteristics. Therefore, both the relevant provisions of the Contract Law and the theory of administrative superiority in administrative law have been adopted by the courts to judge the validity of the “Notice of Termination of Agreement” issued by the administrative agency. This approach can be found in the case of Hainan Zhongdong Group Co., Ltd., etc. v. County Government of Suixi (海南中东集团有限公司等与遂溪县人民政府行政协议纠纷案). 31

To summarize, as is proved in the above cases, the element of “exercise of administrative power” is not qualified to serve as the key criterion to identify and define administrative agreements. At least in the three situations discussed above, it is extremely difficult to tell whether the actions in dispute are merely the exercise of contractual rights, or the exercise of administrative power, or a mixed action with both civil and administrative attributes. This problem also brings doubts about the feasibility of the dual dispute resolution mechanism, which uses “the exercise of administrative power” as the basis of its dichotomy. Built on shaky ground, it can be hardly expected that this dual mechanism would provide a better solution. What, then, is the right way to solve the existing problems and how should we build suitable PPP dispute resolution mechanisms in China? Perhaps we should look at external theories and experience for inspiration.

C. Nonidentity between Disputes Related to Administrative Agreement and Administrative Disputes

A thorough analysis of the judicial decisions shows that there are mainly two kinds of disputes regarding concession or PPP. The first kind arises during the process of choosing the private partners, for example, the disputes related to the process of bidding or granting a concession. This kind of disputes may involve the exercise of the administrative power, for example, the withdrawal or revocation of a concession. Disputes arising at this stage are generally recognized as administrative ones in the areas where the two-stage theory is implemented, such as the Taiwan region of China. 32 Although the two-stage theory has not been adopted in China’s mainland and there are different opinions on the remedies for such disputes, in fact, most of them are also resolved through administrative litigations. Typical examples include disputes arising from the grant of concessions without competitive procurement procedures, 33 lawsuit brought by competitors regarding the grant of the concession, 34 and disputes arising from the government’s re-grant of a concession to other private partners. 35

The second kind of disputes arises from PPP agreements. Actually, the so-called PPP agreement is a contract bundle or a contract system, which includes the framework agreement, the concession agreement, the financing agreement, the guarantee agreement, the construction agreement, the insurance agreement, etc. Although the concession agreement is the core one, it is not equivalent to the PPP agreement as a whole. Even disputes regarding the concession agreement itself are also quite complex; some are related to public law, while others are related to private law. Furthermore, if we look at the entire process of the concession, we will see that a concession agreement actually comprises a series of actions, including the offer, the signing, the performance, the dissolution, the invalidation, the liability for breaching the agreement, the compensation, as well as the renegotiation of the agreement. At any stage of this process, litigation may occur, but the nature of the disputes arising at different stages is not the same. The specific type of dispute varies in different cases and may involve the validity of the contract, the effectiveness of the notice to terminate the agreement, the government’s repurchase prices, the government’s non-performance of contractual obligations, the geographical scope of the concession, the legality of subcontracting the PPP project, etc.

This shows that disputes involving concession agreements or PPP agreements are extremely complicated and diverse. Even if an agreement is deemed an administrative one, the given dispute may only relate to the repurchase price of the project or the ownership of specific funds in the agreement, which should not be identified as an administrative dispute or referred to as administrative litigation.

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Therefore, we cannot rigidly classify a dispute as an administrative one simply because a certain administrative agency is involved, nor can we generally refer a dispute to administrative litigation simply because it bears the name of an administrative agreement. Instead, we should determine the nature of a given dispute according to the concrete content of the agreement, and then choose the proper type of judicial remedy.

In short, a third preliminary conclusion can be drawn here: disputes related to administrative agreements ≠ administrative disputes. It can be further inferred that disputes related to administrative agreements do not necessarily exclude arbitration. This is because, according to Article 3, Item 2 of the Arbitration Law, matters that cannot be arbitrated are “administrative disputes that should be handled by the administrative organs according to the law.” Therefore, if a given dispute is not an administrative one, it should not be excluded from arbitration.

III. RECONSTRUCTION OF PPP AND CONCESSION AGREEMENT THEORIES

The current legal situation of PPP in China is far from being satisfactory. For example, a statutory law on PPP is absent, the existing laws and regulations regarding administrative agreement are primitive, and the judicial practice has not yet established unified and clear criteria. Against this backdrop, it is necessary to pay more attention to practice, while at the same time reflecting on the existing theory. The historical mission of PPP research is to explore the best possible institutional design, to indicate the direction for future development, and to respond to the call for theoretical guidance in judicial practice.

A. Exploring the Real Problems and Empirical Rules in the Practice of PPP and Administrative Agreements in China Using the Legal Fact Research Method

Research on administrative agreement in China has made some progress in the previous years, yet it still suffers from some kind of oversimplified and unreflected version of legal transplant and lacks sufficient attention on the concrete practice and local experience of PPP in China. Against this background, investigation on PPP practice and empirical research on relevant judicial decisions as well as existing laws, regulations, and policies appear to be useful. Through this research, we should be able to see the true panorama of China’s PPP practice and to identify the real problems within it, and then try to give a theoretical explanation and response to these complicated issues with particular Chinese characteristics. This method of empirical research is called legal fact research (Rechtstatsachenforschung) in Germany, which complements the doctrinal study of law (Rechtsdogmatik), and could promote research on new administrative laws, including

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43 See YU, fn. 20 at 52.
The legal fact research method was adopted by Hartmut Maurer, Germany’s leading scholar in administrative law. Using a questionnaire survey, Maurer collected first-hand data to examine the motivation, quantity, and content of administrative agreements, and to investigate the legal issues and problems involved. Moreover, through the empirical research on judicial decisions, especially the analysis of the legal issues in disputes, the results of the decisions, and the judicial criteria applied, he greatly advanced the theory of administrative agreements and charted the direction for future studies. In his seminal textbook, Maurer writes: “the main topic of today is not the admissibility of the administrative agreement in principle, but the refinement of the administrative agreement theory, especially the explication of the legal elements, forms and consequences of administrative agreement. This is the prerequisite for the effective application of administrative agreement in practice.”

The legal fact research method is of significant importance for China to solve the current problems regarding PPP dispute resolution mechanisms. This is because we first need to understand the practice. The questions we should ask include at least the following: In which specific areas are PPPs being used? What are the concrete forms of PPP? Which kinds of PPP agreements can be classified as administrative agreements? What are the concrete contents of PPP agreements? What are the most common forms and causes of PPP disputes? How many disputes are caused by major risks such as problems in government credit or financing, changes in regulations and policies, inaccurate market prediction, uniqueness of the project, and incomplete agreements? Which kinds of dispute resolution mechanisms are favored by the social capital parties? Can the current mechanism resolve the disputes effectively and substantively? Finally, what are the established judicial criteria? Only with a thorough and comprehensive understanding of the real world of PPP, and only when we figure out the true and typical legal issues in PPP practice, can we find the target of our theoretical analysis and come up with a proper and specific legal solution.

Starting from judicial decisions, we can review and summarize the courts’ attitude toward PPP, find out the problems around PPP, identify the need for a system design, and

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46 Hartmut Maurer, 行政法学总论 (General Theory of Administrative Law), translated by GAO Jiawei, Law Press (Beijing), at 361 (2000).
observe the development of PPP in judicial practice, discern its call for theoretical
guidance, and eventually promote the function of the judiciary in interpreting and further
developing the laws and regulations on PPP.\textsuperscript{47} In this paper, I chose rather controversial
judgments to show the problems in the current PPP dispute resolution mechanism, but
actually, the judiciary, most prominently the administrative division of the SPC, has
already made significant progress in establishing judicial criteria for PPP disputes. For
example, in the judgment in the case of \textit{Hubei Caobengongfang Co., Ltd. v. Jingzhou
Development Zone Management Committee \& City Government of Jingzhou} (湖北草本工
房有限公司与荆州开发区管委会、荆州市政府行政协议纠纷案), Judge LI Guangyu
proposes four clear and strict requirements for the administrative agency to terminate,
unilaterally, the administrative agreement through the exercise of administrative
superiority. The proposed requirements are that it should be carried out for public interest;
the specific circumstances of public interest should be explained; it must conform to the
principle of proportionality; and the damage and loss must be compensated. At the same
time, Judge LI also emphasizes that if the purpose of the agreement could not be achieved
due to the violation of the contract by the private party, the administrative organ could
certainly adopt corresponding measures in accordance with the rules of the Contract Law
or the provisions in the agreement, without exercising their administrative superiority.\textsuperscript{48}
With their value in the further development of the law, judicial decisions like this are the
perfect material for the legal fact study. They are worthy of being seriously analyzed,
summarized, and incorporated into the theoretical construction of administrative
agreements in China.

\textbf{B. Giving up the Logical Obsession of Referring to the Remedy of Administrative
Litigation Based on the Definition and Attributes of the Agreement}

The logic of the current theory and practice of PPP, especially the concession dispute
resolution mechanism in China, starts from the definition of an administrative agreement.
Based on this definition, the theory classifies concession agreement as administrative
agreement, which finally leads to the conclusion that the relevant disputes, as disputes
over an administrative agreement, should be settled through administrative litigation. The
main reason the current dispute resolution mechanism has brought so many controversies
and difficulties in judicial practice can be found here. The starting point of this logical
chain is problematic as the definition of administrative agreement and the distinction
between public and private law attributes are difficult to determine precisely. Therefore,
this approach will hardly provide us with the necessary theoretical clarity and uniqueness.

\textsuperscript{47} YE Bifeng, \textit{行政合同的司法探索及其态度} (Judicial Exploration of and Attitude towards Administrative

\textsuperscript{48} See \textit{最高法(2017)行申 3564号裁定书} (No. 3564, Petition Administrative Judgment of the Supreme
People’s Court), Jan. 30, 2018.
First, the definition cannot fully cover the various contracts and agreements that have been used in the real world of the administration, nor can it correspond to the diversity of administrative agreements, which makes it unconstructive for further development of the administrative practice. Moreover, since there is no clear-cut way to distinguish between public and private law, it would be impractical to attribute certain models to either of them. This thorny issue is usually decided on in a problematic manner, that is, as long as the legal rules regarding administrative agreements do not fit well, the model will be excluded from the scope of administrative agreements, or directly be classified as a private contract and referred to the private law. Starting from the definition will inevitably result in controversial issues such as distinguishing between civil and administrative agreements, identifying the mixed agreements and the cross ones, etc. These problems have been fully noted by Germany, which has rich experience in administrative agreement practice. In its legislation, Germany has decided not to stipulate a precise definition of administrative agreement. Actually, the characterization and categorization of agreements have never been a core issue in the German administrative agreement law. On the contrary, the academics and practitioners have developed a relatively abstract theory of administrative agreement and tend to solve specific problems in practice individually and specifically.49

Second, the boundaries between public and private law are already broken when the government cooperates with the private sector to undertake public tasks. Against this backdrop, it seems anachronistic to raise the question of whether concession agreements should be governed by public or private law. It is rather obvious that a concession agreement has dual attributes, which is the outcome of an effective mixture of the two legal fields. Accordingly, instead of lingering over the disappearing boundaries between public and private law, the theoretical work should explore and construct the new academic frontiers. This will help to find regulatory tools and ways of promoting the cooperation between the state and the private sector, on the one hand, and providing the best choice for all participants including the administrative organs, the private parties, and other interested parties, on the other hand.50

Third, the core reason for defining PPP agreements as public law contracts and thus subject to administrative litigation is that this approach could protect public interest better.51 However, whether this is really the case is rather dubious. In fact, the crux of

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51 See YU, fn. 5 at 12.
public interest protection in PPP projects is whether the administrative agencies have the appropriate regulatory authority and tools to safeguard public interest throughout the process of the performance of the agreement and the implementation of the project. This does not necessarily mean that we have to classify PPP agreements as public law contracts and resolve the disputes through administrative litigation. On the one hand, the regulatory power of an administrative agency could be expressly stipulated in the law. For example, the German legislation on PPP places great emphasis on the government’s regulatory powers and responsibilities and clearly stipulates that if the corresponding clauses are missing in an agreement, it would be invalid. This provision has proved very effective in overcoming the problems of weak contract supervision and in safeguarding public interest. On the other hand, the administrative organs could totally protect public interest through contractual arrangements and other tools and means in private law. For example, clauses that guarantee the influence of an administrative agency can easily be stipulated in the agreement, such as the rights of the government to read certain documents, to enter, check, temporarily take over, and eventually repurchase the project. Generally, compared with the ex-post remedy through litigation, this kind of supervision and remedy before and during the process is actually more timely and effective in safeguarding public interest.

Finally, the participants of PPP practice rarely care about whether the agreement is a public or a private one. Therefore, it is suggested to get rid of the self-circulating argument regarding the distinction between public and private law as well as between public and private contract. Instead, we should return to the original and essential problem in both kinds of contracts: to examine PPP agreements and the related controversies through the lens of legal relationships. As Professor Hartmut Bauer points out, the two tools of doctrinal research, the legal relationship theory (Rechtsverhältnislehre) and the contract construction theory (Vertragsgestaltungslehre) could serve as important fulcra of the PPP theory.

52 Art. 9, Sec. 1 of the 2007 PPP Law of the Federal State Schleswig-Holstein of Germany stipulates the following: A partnership contract is invalid if the administrative authority is not given the contractual rights to influence and supervise in order to guarantee that the private partner will fulfil its obligation at any time, and no negotiation or change of contract regarding the absence of these rights has taken place between the two contractual parties.

53 YU Wenguang, Praktische Erfahrungen und rechtliche Probleme mit Public Private Partnership in der Verkehrsinfrastruktur in Deutschland und China (Practical Experience and Legal Issues with Public Private Partnership in Transport Infrastructure in Germany and China), Peter Lang (Frankfurt am Main), at 271 ff. (2010).

54 See Bauer, fn. 49, at Ch. 36 Para. 42, 103 ff.

C. Reconstructing the Administrative Agreement and PPP Agreement Theory with the Legal Relationship Theory and the Contract Construction Theory

Administrative agreements raised at least two challenges to the theory of the administrative law, namely, how to cover all forms of administrative agreements in practice and how to correctly direct them. However, neither the new administrative law theory nor the regulation theory provides systematic and persuasive interpretation for the doctrinal research in this field. The challenges could instead be solved, as suggested by Professor Hartmut Bauer, by the administrative legal relationship theory.56 Because of its inclusiveness, this theory can cover contractual relationships involving two or more legal subjects, and thus avoid restricting administrative agreements to the so-called unequal ones between the government and private parties. This kind of broad inclusiveness also supports the freedom of contract and the equal status between the two parties. More importantly, the legal relationship theory does not treat the contract as an isolated and static legal action. Rather, it places the agreement in an evolving legal relationship and examines all the relevant legal relationships between the two parties prior to and after the specific legal action. This means that it adopts a theory of contract that focuses on the process.57 In this way, the rights and obligations of all contractual parties at every stage during the development process of the contract, including the offer, the negotiation, the conclusion, the performance, the renegotiation, etc., will be put under review. This is very conducive to the examination of all legal relationships during the whole life cycle of PPP.

Furthermore, when it comes to the analysis of the rights and obligations of the contractual parties, focusing more on contract construction (Vertragsgestaltung) would help us to get rid of the dilemma of disputing over the nature of the agreement. Instead, with its emphasis on the process, this approach will allow us to analyze the specific rights and obligations in the given contractual legal relationship, and eventually to integrate this contractual relationship with both public and private law characteristics.58 These are most illuminating for the construction of China’s PPP dispute resolution mechanism. With these two theories, we could now focus on the legal relationships behind the disputes, identify various legal relationships mixed in the case, then choose proper applicable laws and legal remedies accordingly, and finally resolve the disputes substantively.

56 See Bauer, fn. 49 at Ch. 36 Para. 133.
58 See Bauer, Id. at Para. 125 ff.
D. Establishing a Multiple PPP Dispute Resolution Mechanism for the Purpose of Resolving Disputes Effectively

Regardless of whether disputes over a concession or PPP agreement should be settled through administrative or civil litigation, the purpose should be to resolve the disputes effectively, which means guaranteeing effective judicial remedies, and at the same time improving the stability and predictability of the legal order. This is of great significance in creating a favorable business environment, enhancing the confidence of a private economy, and promoting the stable development of PPP in China. This is the point of adding “settle administrative disputes” as one of the legislative objectives in Article 1 of the Administrative Litigation Law during its 2014 revision. This is also the motivation of including administrative agreements in the scope of administrative litigation: “Disputes over administrative agreements are often accompanied by the ones over administrative actions, and including them into the scope of administrative litigation would be conducive to settling the disputes altogether.”

However, the current dispute resolution mechanism is first entangled in recognizing the nature of the concession agreement, which leads to the controversy over, and hence delays in providing proper remedies. For example, in the above-mentioned case regarding the gas concession in Hotan City, the court of the first instance recognized the agreement as a civil one, while the SPC, as the appellate court, classified it as an administrative agreement and thus asked the private party to bring another administrative lawsuit separately, without making any judgment on the substantive dispute. This seems debatable, as it would impose a heavier burden of a lawsuit on the contractual parties. In this regard, the experiences of the United States and Germany are worth learning from. The basic principles of dispute resolution in the U.S. PPP laws are informal, predictable, fast, and inexpensive, and Article 19, Paragraph 4, of the German Basic Law emphasizes the effectiveness and completeness of judicial remedies. Therefore, the core purpose and original intention of our PPP dispute resolution mechanism should also be to resolve disputes effectively.

The purpose of resolving disputes effectively and completely urges us to build a multiple dispute resolution mechanism, rather than to stick to administrative litigation as the only remedy. To achieve this goal, we should look at the mechanisms adopted by the United States and Germany, which include the multiple ways of administration settlement, litigation, mediation, and arbitration, etc. For example, in the US, in order to promote a multiple and fast dispute resolution mechanism, the parties are allowed to submit their

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60 FU Hongyu, 《美国PPP法律问题研究——赴美投资的影响以及我国的立法借鉴》 (Study on Legal Issues of PPP in the US: Influence on Investment to the US and Inspiration for Chinese Legislation), 《财政研究》 (Public Finance Research), 94 (2015).
PPP agreements to arbitration and other alternative dispute resolution (ADR) institutes.

In Germany, concession agreements are generally recognized as private contracts, with their disputes being settled by arbitration or mediation. In addition, the multiple dispute resolution mechanism is also proposed in the PPP legislation guidelines issued by the Organisation for Economic Co-operation and Development and the Asian Development Bank. As an innovative way to provide public goods and services, PPP has been adopted worldwide, and there is no compelling reason for China to reject the multiple dispute resolution mechanisms for PPP, which are commonly accepted by other countries. As discussed above, the matters excluded by the Arbitration Law are administrative disputes that should be resolved by administrative agencies. If it could be proved that a PPP agreement dispute does not involve the exercise of administrative power, meaning that it is not an administrative dispute, then it could certainly be appealed to the arbitration procedure. Therefore, it is not justifiable that the judicial interpretation of an administrative agreement being drafted completely excludes the possibility of arbitration for all concession and PPP agreements. In addition, it should be taken into consideration that there have already been precedents in judicial practice to recognize the legality of resolving PPP disputes by arbitration.

Therefore, it is argued in this paper that, due to the complexity of the PPP agreement system, the multiplicity of the PPP legal relationships, the dual attributes of PPP agreement disputes, and the ambiguity of the legal nature of PPP agreements, a multiple dispute resolution mechanism, which includes arbitration, should be developed in China. Only in this way can we resolve PPP disputes effectively and thoroughly, and eventually achieve the administrative goal. Moreover, since the issues in disputes and their degree of severity are multi-tiered, it is suggested to add expert mediation and ruling before litigation and arbitration, which might be helpful to resolve the disputes before they get aggravated.

**CONCLUSION**

By analyzing a number of judicial decisions regarding concession and PPP agreements, the problems and dilemmas of China’s current PPP dispute resolution mechanism have been demonstrated. Meanwhile, three fundamental issues have also been clarified, namely, that concession ≠ PPP, concession agreement ≠ administrative agreement, and disputes related to administrative agreements ≠ administrative disputes. From this, we can draw the conclusion that the logical chain of China’s existing PPP and concession dispute resolution mechanism is untenable. The logic of the current
mechanism starts from the definition of an administrative agreement. It then classifies concession agreement as administrative agreement. Finally, it subjects the disputes over concession agreement to administrative litigation. Yet this starting point is problematic because the definition of an administrative agreement and the distinction between public and private law attributes are difficult to determine precisely, as they lack the necessary theoretical clarity and uniqueness.

The current legal situation of PPP in China is far from being satisfactory because a statutory law on PPP is absent, the existing laws and regulations regarding administrative agreement are primitive, and the judicial practice has not yet established unified and clear criteria. This paper proposes possible ways to address these issues. We should first critically reflect on the current administrative agreement and PPP agreement theory, then apply the legal fact research method, adopt doctrinal tools of the legal relationship theory and the contract construction theory, and eventually establish a multiple dispute resolution mechanism to resolve disputes effectively and completely.