

中美清洁能源研究中心技术管理
计划与项目合同

*The CERC TMP and Project
Contracts*

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中美清洁能源论坛
US-CHINA Clean Energy Forum

管理文件的先后顺序

The Order of Precedence of the Controlling Documents

- CERC议定书是所有CERC项目的主导文件
- The CERC Protocol is the controlling document for all CERC Projects.
- CERC议定书之IP附件，且在各项工作开展前应有相应的技术管理计划
- IP Annex to the CERC Protocol Requires a TMP before works commences:
 - 当事人或其参与方应共同建立关于知识产权利用的科技管理 计划规定
 - II.B.2.(d) The Parties or their participants shall jointly develop provisions of a Technology Management Plan regarding the exploitation of intellectual property rights ...
 - 如果双方不能达成在特定的研究项目协议上商定一个联合技术管理计划，此项工作不得布署。
 - (e) If the Parties cannot reach an agreement on a joint Technology Management Plan in the particular research project agreement, work on the particular research project shall not commence.
- 三个联盟中的任一联盟的技术管理计划，该计划将制定合作框架以及知识产权的管理细则
- Technology Management Plan for each of the three consortia creates the framework for collaboration and the management of Intellectual Property
- 具体的项目以及IP合同将详细描述项目参与者的权利和义务
- Project- and IP-specific contracts will describe in detail the rights and responsibilities of a project's Participants

技术管理计划 (TMP) 框架

Technical Management Plan (TMP) Framework

- 区分背景知识产权和项目知识产权并清楚地界定各范围内的相关权利
- Distinguish 'Background' IP from 'Project' IP and be clear about the rights associated with each category.
- 确保CERC参与者无限制、无障碍地使用所许可的背景知识产权
- Ensure there are no restrictions or encumbrances impairing licenses of Background IP to CERC Participants.
- 确保背景知识产权和项目知识产权能在商业条款中被许可
- Ensure Background and Project IP can be licensed on commercial terms.
- 确保合同中有项目知识产权分配条款及其他相关条款
- Ensure flexibility to put Project IP allocations, terms and conditions *in contracts*
- 描述项目知识产权所需许可的限定范围
- Describe the limited scope of required licenses for Project IP.
- 确保知识产权的常规保护
- Ensure *traditional IP protections* for IP.

背景知识产权的保护

Background IP is Protected

- **III.1**

- 背景知识产权所有者保留对其拥有的背景知识产权所享有的所有权利、所有权及利益
- **Owners of Background IP retain all right, title, and interest in their Background IP**
- 本文中的任何事项均不得解释为要求该权利所有者许可、转让或以其他方式转移其所享有的背景知识产权
- **nothing herein shall be construed as requiring such an owner to license, assign or otherwise transfer its Background IP**
- 背景知识产权的任何使用都需要获得适当的许可证
- **any use of Background IP may require an appropriate license**

- **IV.1.** 参与者和背景知识产权的提供方—

- Participants and providers of Background IP may—**

- 列出其宣称为背景知识产权的所有知识产权，以便对背景知识产权和项目知识产权加以区分
 - **list all relevant IP that they assert as Background IP for the purpose of seeking to distinguish Background Intellectual Property from Project Intellectual Property.**
 - 书面约定背景知识产权的范围和性质
 - **agree in writing to the scope and nature of the Background IP.**

除项目保密信息外的 技术管理计划所需的披露、汇报和共享

TMP Requires Disclosures, Reports and Sharing but Protects Confidential Information

- **IV.2.** 进行公开汇报，但“依照各自国家法律法规及其他有关保密条例，以及为保护专利申请新颖性的需要不得公开的除外”
- **IV.2.** Public reports are required, but may not disclose “that which cannot be disclosed to the public in accordance with applicable national or other laws and regulations regarding secrecy, confidentiality or the need to preserve the novelty of an invention for purposes of patenting.
- **IV.3.** 中方ACTC及美方ACTC，每一方应尽力使对方能够在公众获知之前，尽早获得在上述合作活动中产生的、非属商业机密的技术报告
- **IV.3.** Each, the China ACTC and U.S. ACTC, shall ...make available to the other ... technical reports resulting from such cooperative activities that are not “business-confidential”...

除项目保密信息外的 技术管理计划所需的披露、汇报和共享

TMP Requires Public Disclosures and Reports but Protects Confidential Information

- **IV.5.** 参与者可视情况签署一份双方同意的，以对知识产权、其他商业机密信息或对研究数据保密的保密协议
- **IV.5.** As appropriate, a Participant may execute a mutually agreeable confidentiality agreement, to protect the confidentiality of Intellectual Property, other business-confidential information, or protected research data.
- **IV.6.CERC** 议定书缔约双方（或其指定机构）及其参与者可就各自的商业机密信息，包括商业秘密或保密数据达成协议，以限定特定参与者接触此类机密信息
- **IV.6.** ... Signatories to the CERC Protocol (or their designees) and its Participants may enter into agreements with respect to their business-confidential information, including trade secrets or protected data that restricts access to such information to only certain of the Participants.

保密性

Confidentiality

研究人员及其他参与者为保护商业机密信息、政府敏感信息和商业秘密而签订的保密协议，例如：
Confidentiality agreements for researchers and other participants to protect Business Confidential Information, government sensitive information and trade secrets, for example:

- 学术性公开的规定，以确保申请专利前非公开信息的保密
- Academic publication restrictions to preserve non-publication before filing for patents
- 在技术管理计划下，保密协议可规定仅部分参与者能获得有关信息
- Under TMP, confidentiality may require that only some Participants may be permitted to have access to certain information
- 遵守政府制定的有关信息获取、使用或分配的规定，这些规定有可能是国家国家机密（例如：地缘信息）
- Compliance with government restrictions on access, use or distribution of information that may be deemed state secrets (e.g., geological information)
 - V. 1.“如果中方ACTC或美方ACTC其中一方的国内法规定禁止使用、披露或允许其他人使用或披露知识产权或任何研究数据或其它信息的，本计划予以支持”
 - V. 1. “Where the domestic law of the territory of each, China ACTC or U.S. ACTC, prohibits the use, disclosure or permitting of others to use or disclose intellectual property or any research data or other information, this TMP supports such law.”

所有条款应在合同中列明

All Terms and Conditions Should be in Contract

- **V.6.** “有关合作活动中知识产权的权力分配可由各参与者制定分配细则，通过各参与者之间签订分协议、项目附件或单独的协议的方式分配该等权力”
- **V.6.** “...intellectual property rights allocations relating to Cooperative Activities may be established by Participants ... in sub-agreements, Project Annexes, or separate agreements among Participants engaged in such Cooperative Activities.”
- V.4和V.5条的许可是需要的，但
- **Section V.4 and V.5 licenses are required... but...**
 - 许可协议的条款应由IP的所有权人基于其可接受的商业条款来协商该等许可条款
Terms of licenses are left to IP owners to negotiate on acceptable commercial terms
 - “合作活动”的项目知识产权所需的许可协议限于“研究与开发”
Licenses required for “Cooperative Activity” Project IP is limited to “research and development”
 - “共同资助研究项目”的项目知识产权应基于公平协商的商业条款
 - **Licenses required for “Jointly-Funded” Project IP based on fairly-negotiated commercial terms**
 - 对其他国参与者的许可较对第三方（非参与者）的许可应以对其他国参与者有利和可接受条款为前提
Licenses to other country’s Participants must be on favorable terms as compared with 3rd Parties

背景知识产权

Background IP

- ▶ 如适用，在合同中描述用于项目的背景知识产权（你方，他方或第三方各自拥有的）
- ▶ If appropriate, describe in your contract Background IP (yours, theirs and third-party) that will be involved in the project.
- ▶ 与背景知识产权的所有权人签订使用该等背景知识产权的许可协议
- ▶ Require licenses from the owners of Background IP for the use of that IP.
- ▶ 研究项目所需的背景知识产权许可协议是一个内容宽泛的许可协议
- ▶ Be certain that you have a broad license to use the Background IP for the research project.
- ▶ 如果背景知识产权与研究所生产的产品有关，应描述背景知识产权的使用期限以及是否因此而产生专利费或与之有关的义务
- ▶ Describe the terms for the use of the background IP and whether royalties or other obligations arise if the Background IP is implicated in the product of your research.

项目知识产权

Project IP

▶ 确定谁将会是成果的享有者

▶ **Be clear who owns the results**

- 由一方单独创造的应由该方单独拥有知识产权的所有权
- **Sole ownership for IP created by only one party**
- 共有
- **Joint ownership**
 - 所有权分配
 - **allocation of rights**
 - 包括专利费的制定（包括核算专利费）；分许可的权利
 - **Including right to royalties (including a right to accounting); rights to sub-license**
 - 职责分配（例如：专利申请、专利维护、IP实施的权利）
 - **Allocation of responsibilities (e.g., filing patents, maintaining patents, enforcing IP rights)**
- 政府是否在该等知识产权中享有利益？
- **Is there any government interest in the IP?**

项目知识产权

Project IP

- ▶ 谁能够开发IP，在哪开发？
- ▶ **Who can exploit the IP, and where?**
 - 国界内或国界外
 - Within or outside of national borders
 - 全球性的权利
 - Worldwide rights
 - 其它地域限制
 - Other territorial limitations
- ▶ 目的
- ▶ **And for what?**
 - 仅用于研发
 - R&D only
 - 商业化
 - Commercialization
- ▶ 改进的权利有哪些？在合同中必须明确谁拥有改进（也就是进一步开发）的权利；明确美国法和中国法是否会对你们所达成的条款产生影响
- ▶ **What are the rights to improvements?** clear in your contract who has rights to *improvements (i.e., further developments)*; understand how US and China laws effect what you can agree to.

合同须符合中国的相关法律

Contracts May be Subject to PRC Law

- 中华人民共和国专利法以及中华人民共和国专利法实施细则
- Patent Law of the PRC and the Implementing Rules for the Patent Law of the PRC
- 中华人民共和国商标法
- Trademark Law of the People's Republic of China
- 中华人民共和国版权法以及中华人民共和国实施细则
- Copyright Law of the PRC and the Implementing Rules for the Copyright Law of the PRC
- 反垄断法
- Anti-Monopoly Law
- 中华人民共和国合同法
- PRC Contract Law
- 中华人民共和国技术进出口管理条例（中华人民共和国对外贸易法）
- Technology Import and Export Provisions (PRC Foreign Trade Law)
- 科技进步法（科技法）
- Science & Technology Progress Law (the “S&T Law”)
- 企业国有资产监督管理暂行条例
- Interim Measures for the State-owned Assets Management of Institutional Entities
- 中华人民共和国保守国家秘密法
- Law on Guarding State Secrets

合同须符合美国的相关法律

Contracts May be Subject to U.S. law

- 专利法
- The Patent Act
- 版权法
- The Copyright Act
- Lanham商标法
- Lanham Act on trademarks
- 美国合同法（例如：美国统一商法典）
- U.S. and state contract law (e.g., Uniform Commercial Code)
- 商业秘密法（例如：国家商业秘密法；美国统一商业秘密法）
- Trade secret law (e.g., state trade secret law, e.g., Uniform Trade Secrets Act)
- 两用技术出口管理
- Export Controls on Dual-Use Technology
- Government contracting requirements (e.g., Bayh-Dole & Federal Acquisition Rules)
- 1977美国反海外贿赂惯例法
- U.S. Foreign Corrupt Practices Act of 1977

遵守相关法律以及你方组织的要求

Compliance with Applicable Law and Your Organization's Requirements

- 明确各参与方所在国适用的法律并在合同中引用该等法律规定（节能法规/许可要求；政府批准）；明确权利和义务！
- Know what laws apply in each country and reference those laws in contracts (also: energy regulations/licensing requirements; government approvals); be clear on rights and responsibilities!
- 有适当的管理知识产权的内部程序，保密信息的保护等。确保合同条款与这些规定和要求相吻合。
- Make sure all involved in your project have appropriate internal procedures for managing IP, protecting confidential information, etc. Ensure your contract addresses compliance with these requirements.

谢谢!

Thank you!



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