

PPP in Trade Facilitation Working Group

PPP in Trade Facilitation key points

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1. Basic principles

1.1 Definition of PPP

The Public-Private Partnership (PPP) Alliance of the United Nations Economic Commission for Europe (UNECE), established in 2001, has proposed the following definition of PPPs in its “Guidebook on Promoting Good Governance in Public-Private Partnerships” of 2008:

Public-Private Partnerships (PPPs) aim at financing, designing, implementing and operating public sector facilities and services. Their key characteristics include:

- a) Long-term (sometimes up to 30 years) service provisions;
- b) The transfer of risk to the private sector; and
- c) Different forms of long-term contracts drawn up between legal entities and public authorities.

They refer to ‘innovative methods used by the public sector to contract with the private sector, who bring their capital and their ability to deliver projects on time and to budget, while the public sector retains the responsibility to provide these services to the public in a way that benefits the public and delivers economic development and an improvement in the quality of life’.

There are different types...

There are various types of PPPs, established for different reasons, across a wide range of market segments, reflecting the different needs of governments for infrastructure services.

Although the types vary, two broad categories of PPPs can be identified: the institutionalized kind that refers to all forms of joint ventures between public and private stakeholders; and contractual PPPs.

1.2 Trade Facilitation – A practical definition

The fundamental purpose of trade facilitation is to simplify the trading process whether domestic or international. To achieve this objective trade facilitation measures aim to provide transparency of supply in the buying and selling of goods and services. Trade facilitation measures can be broadly divided into three categories; simplification, harmonisation and standardisation.

- Simplification is the process of streamlining trade procedures by removing redundant requirements and activities, and reducing the cost and burdens in administering the trade transaction.
- Harmonisation is the process of rationalising the information flows that accompany the movement of goods in the domestic marketplace, or in international transit especially at national borders.
- Standardisation is the process of ensuring information requirements and individual data elements are unambiguous and uniform in both understanding and application. Many international organisations have developed standards concerning the description, definition, use and transfer of information related to international trade.

Trade facilitation begins with an analysis of the business process to establish the purpose, relevance and function of practices and procedures, and the information requirements needed to conduct the transaction. Once the review is completed redundant procedures can be removed and unnecessary data requirements eliminated; the remaining activities can then be rationalised and standardised. The review of the business process is a continuous, evolutionary methodology requiring commitment (particularly political will), appropriate resources (both human and financial) and positive action to monitor regularly the application of specific measures, and where necessary a willingness to adapt any measure with regards to experience gained.

The business community must demonstrate the enthusiasm to examine constantly the commercial practices for buying and selling, the systems for generating and processing information and the methods used to record and store transaction data with trading partners. Equally government must accept the responsibility for creating a trade-friendly environment that actively encourages the private sector to conduct legitimate trade fairly, speedily and profitably. Particularly the legal framework for trade must be non-discriminatory and official requirements and procedures should be proportionate for the efficient and effective control of the trading process both domestic and cross-border.

2. Good Governance in Trade Facilitation-Related PPPs

2.1 Principles of good governance in TF PPPs

Beyond the general guidance for good governance in PPPs (Chapter 2 of Good Governance in Public Private Partnerships) there are specific considerations relevant to TF given that international trade by definition involves 2 or more national governments.

- i. Best practice would suggest that where practical and applicable contracts would be let by the relevant regional trade body, ensuring that supranational authorities own any trade corridors and that a single contractor is responsible for the length of the corridor.
- ii. Where a contract will involve a 'shared space', such as a one-stop border post, the governance and rules regarding this shared area must be established before contracting.
- iii. Governance groups to include relevant stakeholders, with the ideal being a single governance board incorporating the national entities that the TF contract will impact on.
- iv. Regular review of financial status of the project undertaken by the Service Delivery Board, since costs cannot be set for the entire duration of the contract, it is necessary to have appropriate mechanisms to manage excess profits and to ensure that as the cost model changes, all charges remain reasonable in relation to the service provided and beneficial to those engaged in trade, as per WTO requirements.

Benefits of a partnership.

Good governance is then that the situation will evolve all the time.

When setting up the project: there was a goal – this needs to be monitored and checked on a regular basis.

Agreement between the partners and benefits and risks expected by all concerned.

Should try to set out the difference between Private-Private partnership and Public-Private partnership... or are these principles the same for all types of partnership?

1. Do not replace existing systems which perform satisfactorily
2. Strong enabling institutions // The choice of public agency in charge // Governance
 - a. Care should be given to the choice of partners (ensure that everyone can bring something to the table with no conflicts of interest)
 - b. individual persons) do not make good partners
3. Business Professionals
 - a. Involving the right people at the right time with the right skill set – within the design and management
 - b. Use of consultants // use of suppliers
 - c.
4. Design and customization in conjunction with all stakeholders
 - a. Ownership
 - b. Quality standards integration
 - c. Constraints on use
 - d. Open and transparent approaches
5. Monitoring and evaluation by an independent third party
6. Best practice contract management
7. Stakeholders
 - a. Business model should work for all partners

b. Involve the appropriate stakeholders at the right time

2.2 Policy

Policy aspects related to Trade Facilitation in Public-Private Partnership

In a Public-Private Partnership (PPP) it is important to have a policy regarding Trade Facilitation (TF) aspects by all involved parties. Normally a policy that relates to facilitation is not difficult to create and maintain.

However, other important TF aspects do not facilitate the business operations of the partnership directly but are more focused on longer-term benefits. This could for example be to base information exchange on TDED and using code lists provided by the UN/ECE.

In a partnership it is therefore important for all involved parties to have a Policy regarding TF. If the Policies of the different parties are compatible it is much easier for the Partnership to benefit from TF aspects.

A Policy for an organization could for example include items such as:

- We use standardized data elements in communication when possible
- We use standardized code lists when possible
- We use standardized messages when appropriate
- We use Process Analysis Methodology (BPA) when appropriate
- Etc.

When a Public and Private organizations form a PPP and each has a Policy it is much easier to agree and implement TF measures. This will speed up the partnership and bring benefits faster to the project.

A stated policy also has the benefit of identifying areas in which TF cannot be done. This could for example be that an organization is not in position to make use of standardized data element due to inherent constraints in existing business application. To have this fact clearly stated in a Policy makes it possible for the partnership to handle this at an early stage.

~~Policy in this context should be interpreted as:~~

~~Policy is where both partner's understandings meet. If there are conflicting interpretations of key aspects (such as IPR), this can cause major problems — their policies need to be compatible. If the policies work together, then it's possible to set up a partnership. The second step would be to set up a business plan (includes environmental aspects, sustainability...).~~

~~Legislative aspects have to be taken into account. The legislative framework can dictate or restrict the form that a PPP can take...~~

~~Need to set up a calendar of the roll out of the project with the priorities, the benefits, the connections within the project or with other projects...~~

1. A coherent PPP policy

2.3 Capacity-Building

Capacity building on what level? – capacity building of local development

How infrastructures can become more efficient in international trade – making one part of the supply chain more efficient can have positive impacts on other links of the supply chain. If there are not sufficient infrastructures in a given part of the supply chain, it can make the entire supply chain insufficient. How infrastructures are linked with administrative procedures.

1. Sustainability of project / continuous development / evolution /
2. Achieving sustainable development
3. Local capacity building vs. international exploitation
4. Must not create barriers to trade
5. Training and ensuring that the users take possession of the tool
6. Ensure that capacity building is done within the country – build local capacity
7. Change management (human nature is perhaps resistant to change)

2.4 Improving legal framework

The main laws playing a part in the agreement

If a joint venture between partners in several countries doing a project in a third country – must define the legal framework to be applied.

The authorities that launch the project (make the public proposal) is a key factor (to determine the legal framework to be considered).

1. Legal framework « fewer, better, simpler » (simplify legal framework as much as possible)
2. IPR obligations (who owns the IPR – government or company...) commercial/legal issue
3. Government provides direction, Private sector provides the drive
4. Instruction to the tenders. Agreements between public and private stakeholders.
5. Legal framework consistent with procurement and project needs
6. Research other contracts that could affect the PPP (overlapping contracts)

7. Exit strategies (the legal framework governing how administration can withdraw from a project [in order to ensure the clarity of contract]) prévisibilité

Also for consideration in this section:

- Defining critical terminology up front- e.g., parties to the contract, goals, plans
- Improvement of the local judiciary to enforce contracts
 - This might require an “education” of sorts of any existing international guidance in this area
 - Recognition of arbitration as a means to resolve issues
- Removal of burdensome legal constraints
- Streamlining approval procedures
- Contemplation of sustainability once the project is complete

2.5 Risk

Public authorities usually have the risk of applying administrative and procurement law. This allocation of risk might lead into a situation where private partners are overly keen on suggesting

different partnership ideas to the public party, not considering the legal consequences and even hoping to obtain an exclusive right through the partnership. The public authority runs the risk of breaching principles of transparency and non-discrimination.

As long as the rules on PPP are not completely clear, private partners can see PPPs as ways to obtain competitive edge in the markets without having to take part in competition (by way of concluding public contracts). Public authorities could be convinced of thinking that they can choose their private partners as they wish. The fact that legal risk tends to go to the public partner might encourage private firms into trading with public authorities. It is, however, uncertain whether the outcome of this is, actually more facilitating to trade (in general) than trading with public authorities through transparent procurement procedures.

As there are legal risks usually involved in PPPs, public authorities usually resort to private partners in national markets and not economic operators situated abroad. Organizing PPPs usually touches on a plethora of different laws (contract law, administrative law etc).

~~There can be risks that are specific to Trade Facilitation PPPs such as policy change. These can be seen in WTO negotiations, for example.~~

~~Another example, if you implement a standard like UNCTAD, the time to resolve problems related to other code lists which are only national and the government does not want to risk time to exploit, etc.~~

~~“Bottleneck of trade facilitation work”~~

- ~~1. PPP = risk sharing (Core aspect of PPP is the sharing of risks)~~
- ~~2. Complementary objectives and mutual support~~
- ~~3. Appropriate Cooperative risk sharing (risks that private sector can manage, they should take; risks that public sector can manage, they should take)~~

2.6. PPP Procurement

Beyond the general guidance for procurement of there are specific considerations relevant to TF given that international trade by definition involves 2 or more national governments.

1. Prior to entering into the procurement process it is necessary to understand current international best practice at the supranational level (either bi-lateral , regional or bi-regional) pertinent to the intended contract, to ensure harmonisation and alignment of relevant trade legislation, not just national law applicable to the contract (as would be the case with a typical PPP.)
 - a. Harmonisation should be achieved before a contract is let
 - b. Where harmonisation does not exist, the contract specific conflicts must be identified and addressed, along with an assessment of the associated risk and how it will be shared.
 - c. The contract should be designed such that legislative risk never sits with the contractor.
 - d. Contracts should be issued and held by a Prime Agency.
 - e. Output specifications should be based on appropriate standards at the supranational level to ensure equality of service for the entire length of the relevant trade corridor. Output specifications should mirror one another in the case of duplicate contracts covering a single trade space.
 - f. Where data transfer is required between third parties, best practice would be

to ensure outputs require compatibility and interoperability with mirrored systems.

- g. The recommended procurement model would be to transfer ownership of the facility following the build stage, with the contractor then engaged on a concessions basis for the duration of the operate phase.

This should be restricted to PPP procurement process related to Trade Facilitation.

1. Procurement Practice
 - a. Must be done in compliance with local procurement law, but where possible in line with international best practices.
 - b. Terminology has to be such that it enables appropriate competition
 - c. Avoid publication in regional language only which doesn't allow other service providers to respond
2. There must be transparency in procurement process
 - a. Proposals of procurement – call for proposal (transparency requirement). Must provide same information to all the tenders
 - b. Best practice must be applied to retendering / unsolicited tenders
 - c. Due diligence (coming into the process – ethical, financial, technical)
3. Quality of service
 - a. How to define the quality in the tendering?
 - b. Identify quality and performance indicators
 - c. sometimes PPP is just to provide technical assistance – in this case, how to define quality
4. Business Data
 - a. sometimes in the tender, development of minimum requirements (server needs to provide x number of services to the ships, for example)
 - b. Careful consideration should be given to business data volumes (do not estimate, ensure that there is a critical mass that merit the investment...)
5. Operational and financial sustainability
 - a. Profile of partners
 - b. Project must be “bankable”
 - c. Payment needs to be related to quality of service and performance
 - d. Ensuring that the cost of usage does not create an unreasonable financial barrier to trade
 - e. Private sector has to make a reasonable return.
6. Must provide value for money for the tax payer
 - a. Limit the ability of the private sector to make super profits

2.7. Putting people first

1. There should be no conflicts of interest with local inhabitants in the development, preparation and delivery
2. Need to consider all stakeholders and users and the context in which the PPP will be delivered
3. Use of local staff
4. Ethical & National Sensitivities (due diligence, constraints on service providers)
5. Alternatives to PPP – local initiative with local stakeholders...
6. Repatriation of profits – external partner does not drain money out of the country

(some countries require setting up joint-venture with local partners and limit expatriation of funds)

2.8. The environment

- 1.** The project needs to be appropriate for the particular environment
- 2.** ethical Issues