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Background Research on

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Public-Private Partnership in Trade Facilitation

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PPP in Trade Facilitation

Background Research

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Foreword

51
52 A large number of trade facilitating initiatives are today made as Public Private Partnerships (PPP),
53 often constructed as Build Operate Train and Transfer. The PPPs for Trade Facilitation can concern
54 border crossing infrastructure, automation of trade documentation exchange, scanning equipment,
55 Single Windows and many more. Some experience suggests that the cost of using such facilities can
56 become very high for the end users.

57 A lot of resources on PPP are devoted to infrastructure development (hospitals, toll roads, energy,
58 etc.), but there has as yet been no substantive work put together on PPP in the domain of Trade
59 Facilitation.

60 Through this study, the working group concludes that there are aspects that are specific to Trade
61 Facilitation PPPs. It has been concluded that it would be positive to propose a UN/CEFACT
62 recommendation project on the subject to not only provide guidance for these aspects which are
63 specific, but to also regroup information which is general to all types of PPPs, creating a single
64 reference document which could be used by governments and practitioners.

65 1. Basic Principles

66 1.1 Definition of PPP

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

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

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

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

81 *There are different types...*

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

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

88 **Further to this definition, it should be underlined that PPPs are a collaborative process**
89 **between Trade and the public sector. As much as possible, all stakeholders should be involved**
90 **in the PPP process including the end users.**

91 1.2 Trade Facilitation – A Practical Definition

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

- 96 • Simplification is the process of streamlining trade procedures by removing
97 redundant requirements and activities, and reducing the cost and burdens in
98 administering the trade transaction.
- 99 • Harmonisation is the process or rationalising the information flows that accompany
100 the movement of goods in the domestic marketplace, or in international transit
101 especially at national borders.
- 102 • Standardisation is the process of ensuring information requirements and individual
103 data elements are unambiguous and uniform in both understanding and application.

104 Many international organisations have developed standards concerning the
105 description, definition, use and transfer of information related to international trade.

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

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

122 **1.3 Scope of TF PPP (Some Examples)**

123 The aim of trade facilitation is to make international trade better, cheaper, faster. There are a
124 number of areas within trade facilitation where PPPs are appropriate and could be beneficial in
125 achieving these aims. These can include –

126 ***A National Trade Facilitation Organisation***

127 UNECE Recommendation 4 and its Guidelines outline the partnership which should be put in place
128 between Government Authorities, Providers of trade and transport services and Users of trade and
129 transport services. It further outlines how these actors should work together through a trade
130 facilitation body in order to foster consensus on key issues and how such organisms could be
131 funded.

132 ***Single Window***

133 UNECE Recommendation 33 foresees the establishment of Single Window facilities through a
134 collaborative effort with all relevant governmental authorities and the business community
135 (recommended practice 6b). In 2005, this recommendation identified that two out of the twelve
136 single windows that were implemented were led by public-private partnerships. It further outlines in
137 point 8.3 of the Guidelines that PPP should be considered for the establishment and operation of
138 Single Windows... *“The ultimate success of the Single Window will depend critically on the*
139 *involvement, commitment and readiness of these parties, to ensure that the system becomes a*
140 *regular feature of their business process.”*

141 ***Port Communities***

142 Port communities are often established in maritime ports encompassing all actors within such a
143 zone, often with both from the public and from the private sector. These communities often
144 mandate a system to electronically manage all transactions with the zone.

145 **Trade Corridor**
146 (Johan will send something)

147 **Coordinated Border Management**

148 This is another area where cooperation between government departments and the private sector
149 through a PPP can produce efficiencies at the border of a country to the benefit of its trading
150 community. This can include involvement of software and IT services companies to ensure that the
151 appropriate platform is built to allow this coordination to operate smoothly.

152 The WCO Research Paper No.2 on Coordinated Border Management from June 2009 clearly
153 indicates that multiple agencies within government should be involved, but it also outlines the
154 importance of including the private sector in the development and implementation of border
155 management and cooperation (Section 5).

156 **Infrastructure**

157 In many countries the infrastructure surrounding a sea- or air-port may have a deleterious effect on
158 the efficiency of the port operations. Sub-standard road or rail access can make it difficult to
159 transport goods to and from the port causing delay and damage. Other infrastructure projects which
160 directly affect trade facilitation include One Stop Border Posts, Toll roads, bridges, railways, ports,
161 airports. The most efficient consortium to address these issues is a PPP where private sector funding
162 and expertise enables the national or local government to afford the desired upgrade.

163 **Aligned Documents**

164 The development of aligned documents through a consultative approach (for the needs and
165 requirements). To meet the needs of the administration and business needs... Both parties may be
166 investing their work and intellectual property to the process.

167 **Mobile Trade Facilitation**

168 The use of mobile devices increases annually. In 2013, the use of mobile devices accounted for over
169 50% of all recruitment activity in Europe and the USA. Mobile devices have been the major medium
170 for trade in many LDCs. It is time for trade facilitation to become mobile-enabled. A recent UNECE
171 report 'Mobile Business' highlighted the importance of this medium. The European Commission has
172 recently launched a new policy framework for 4G technology, acknowledging its fundamental
173 importance in all spheres of business. A high-level PPP, similar to that outlined above, could ensure
174 that international traders keep up with the game.

175 **2. Good Governance in Trade Facilitation-Related PPPs**

176 **2.1 Principles of good governance**

177 The UNECE PPP Alliance identified within its *Guidebook for Promoting Good Governance in PPP* six
178 core principles of good governance:

- 179 ● Participation (the degree of involvement of all stakeholders)
- 180 ● Decency (the degree to which the formation and stewardship of the rules is undertaken
181 without harming or causing grievance to people)
- 182 ● Transparency (the degree of clarity and openness with which decisions are made)

- 183 • Accountability (the extent to which political actors are responsible to society for what they
- 184 say and do)
- 185 • Fairness (the degree to which rules apply equally to everyone in society)
- 186 • Efficiency (the extent to which limited human and financial resources are applied without
- 187 waste, delay or corruption or without prejudicing future generations)

188 The working group has identified some key factors that should be considered under this theme.

189 These include the following:

- 190 • The situation will evolve all the time (before, during and after a project has been identified).
- 191 It is important to identify the goal of the project and to monitor and check it on a regular
- 192 basis. This monitoring and evaluation may be best left to an independent third party.
- 193 • An existing system which performs satisfactorily should not be replaced
- 194 • A strong lead agency should be chosen with care.
 - 195 ○ Partners who are chosen to participate should also be chosen with care; everyone
 - 196 should bring something to the table with no conflicts of interest.
 - 197 ○ It is also recommended to avoid individual persons within a PPP consortium as they
 - 198 do not make good partners.
 - 199 ○ The business model should work for all partners
- 200 • Involve professionals with the right skill set at the right time within the design and
- 201 management. Consultants and suppliers may provide resources.
- 202 • Design and customize solutions in conjunction with all stakeholders taking into account key
- 203 points such as:
 - 204 ○ Ownership
 - 205 ○ Quality standards integration
 - 206 ○ Constraints on use
- 207 • Private-Private Partnerships that provide public services in trade facilitation should be
- 208 assimilated into the scope of this paper.

209 *Specific to Trade Facilitation*

210 Beyond the general guidance for good governance in PPPs (Chapter 2 of Good Governance in Public

211 Private Partnerships) there are specific considerations relevant to TF given that international trade

212 by definition involves 2 or more national governments.

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

225 2.2 Policy

226 *“PPP policy should begin by fixing clear economic objectives... with strong social objectives... that is*
227 *linked to core values and principles. ...PPP Policies should incorporate the possibility of change... and*
228 *reach consensus both within the government... and outside government. ...It is crucial to identify the*
229 *right PPP projects... which have realistic targets... and establish procedures for consultation... while*
230 *simultaneously communicating the benefits of PPPs... and building market interest.”* UNECE
231 *Guidebook on Promoting Good Governance in PPPs, 2008)*

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

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

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

240 *Specific to Trade Facilitation*

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

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

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

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

- 251 • We use standardized data elements in communication when possible
- 252 • We use standardized code lists when possible
- 253 • We use standardized messages when appropriate
- 254 • We use Business Process Analysis Methodology (BPA) when appropriate [add a note
- 255 **referencing what BPA is – from the tfig website]**
- 256 • Etc.

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

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

264 **2.3 Capacity-Building**

265 Capacity building includes skills, institutions and training. Many PPPs involve complicated structures
266 that require new skills, which are found more in the private than the public sector. The UNECE
267 *Guidebook...* proposes to establish PPP Units / Task Forces which should concentrate all the skills
268 needed for a specific project which in turn should increase the impact of the acquisition of these
269 skills within the actors of the project.

270 Further to this, making one part of the supply chain more efficient can have positive impacts on
271 other links of the supply chain. If there are not sufficient infrastructures in a given part of the supply
272 chain, it can make the entire supply chain insufficient.

273 Other points which were suggested for consideration within this project's working group include:

- 274 • How infrastructures are linked with administrative procedures.
- 275 • Local capacity building vs. international exploitation

276 **Specific to Trade Facilitation**

277 Some considerations which are specific to some trade facilitation PPPs include:

- 278 • Sustainability of project / continuous development / evolution /
- 279 • Achieving sustainable development
- 280 • Must not create barriers to trade
- 281 • Training and ensuring that the users take possession of the tool
- 282 • Ensure that capacity building is done within the country – build local capacity
- 283 • Change management (human nature is perhaps resistant to change)

284 **2.4 Improving legal framework**

285 *"A clear framework of law and regulation... must be based on key principles and priorities... fewer*
286 *laws... better laws... and simpler laws will all lead to successful PPPs. ...Improving legal processes*
287 *means better arbitration processes...together with fair and consistent enforcement... as well as fuller*
288 *consultations. ...It is important to train lawyers and judges, particularly about lenders' rights to 'step*
289 *in'... while empowering citizens to use the legal processes is also essential to creating good*
290 *governance."* (UNECE *Guidebook on Promoting Good Governance in PPPs*, 2008)

291 Many aspects must be considered before the establishment of a PPP.

- 292 • Defining critical terminology up front such as parties to the contract, goals, plans.
- 293 • The commercial and legal issues around IPR obligations such as who owns the IPR –
294 government or company.
- 295 • The legal framework needs to be consistent with procurement and project needs.
- 296 • The legal framework governing how administration can withdraw from a project (Exit
297 Strategy) should be defined in order to ensure clarity of the contract and predictability.
- 298 • All other contracts that could have an effect on the PPP project need to be researched in
299 order to avoid any overlapping contracts.
- 300 • Contemplation of sustainability once the project is complete.

301 Very often, it is considered that government provides direction and the private sector provides the
302 drive. In line with this, government should remove any burdensome legal constraints and streamline

303 the approval procedure. Government will also need to consider improvement of local judiciary to
304 enforce contracts; this might entail capacity building of any existing international guidance in this
305 area and recognition of arbitration as a means to resolve issues. Instructions for tender should also
306 be well thought out finding consensus between public and private stakeholders.

307 *Specific to Trade Facilitation*

308 Many Trade Facilitation projects will encompass services. The provider of such services may have
309 their headquarters outside of the country with the PPP project, or there may be a joint venture with
310 several providers who have their headquarters in various countries. Special care must be taken to
311 define the legal framework to be applied in such projects. Of course, the mandating authority of the
312 PPP project will be key in determining the applicable legal framework. Nevertheless, there may be
313 some laws to which the providers may need to adhere to within their headquarters' jurisdiction
314 even for services provided in third countries. (The UK anti-bribery law for example must be applied
315 by British-based companies no matter where they do business in the world.)

316 **2.5 Risk**

317 *"Theory in project finance suggests that risk should be borne by the party best able to manage them,*
318 *but many PPP projects often fail because the parties cannot agree on the allocation of risk, with each*
319 *side trying to shift the risk to the other. It is also difficult to calculate risks, especially in transition*
320 *economies when the rate of economic growth is sometimes less predictable, which makes forecasting*
321 *demand especially in transport projects a difficult exercise."* (UNECE, *Guidebook on Promoting Good*
322 *Governance in PPPs*, 2008.)

323 One of the key aspects of collaboration through PPPs is the sharing of risks; both the public side and
324 the private side have complementary objectives in a PPP project and bring mutual support. There
325 are, however, different types of risk taken by both sides which correspond to a cooperative risk
326 sharing where each side assumes the risks that they can best manage.

327 *Some of the Situations to be Wary Of*

328 Public authorities usually have the risk of applying administrative and procurement law. This
329 allocation of risk might lead to a situation where private partners are overly keen on suggesting
330 different partnership ideas to the public party, not considering the legal consequences and even
331 hoping to obtain an exclusive right through the partnership. The public authority runs the risk of
332 breaching principles of transparency and non-discrimination.

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

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

343 *Specific to Trade Facilitation*

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

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

349 **The legal framework in multiple countries can also be a potential source of risk.**

350 **2.6. PPP Procurement**

351 Procurement processes must be transparent, neutral and non-discriminatory. All information
352 concerning PPP opportunities must be made available to all interested parties in their entirety; all
353 who wish must have access to the information. The governing authority must provide the same
354 information to all tenders. Furthermore, it is recommended that procurements not be published in
355 regional language only, which would limit the accessibility to the information. Due diligence and
356 applying best practice to retendering / unsolicited tenders should also be practiced.

357 The legally enabling environment must also be considered. Procurement practice must be done in
358 compliance with local procurement law and where possible, in line with international best practice.

359 The information which is provided for the tender can either be input design or output design. In
360 input design, the governing authority details the aspects that must be implemented in the PPP
361 solution. Input design implies that the risk lies with government for example, if key elements were
362 overlooked in the preparation stages and the authority forgot to put it in the design. In output
363 design, the governing authority outlines the resulting process which is desired without providing
364 specific specifications. The risk in such designs lies with the private sector who must consider the
365 elements which must be taken into account to arrive at the desired outcome.

366 Careful considerations should be given to volumes to be handled by the PPP solution (whether it is
367 physical volumes in an infrastructure project or data volumes in an electronic solution). There must
368 be a critical mass that merits the investment. At the same time, the resulting service or
369 infrastructure must provide value for the money for users (this implies that the private sector should
370 perhaps not make super profits from the project). The cost of usage should not create an
371 unreasonable financial barrier to Trade and users; but at the same time, the private sector has to
372 make a reasonable return. Payment should be related to the quality of service and performance.

373 Quality can be difficult to define, especially in the tendering stage. An option can be to identify
374 quality and performance indicators.

375 *Specific to Trade Facilitation*

376 International trade by definition involves two or more national governments. Prior to entering into
377 the procurement process it is necessary to understand current international best practice at the
378 supranational level (either bi-lateral, regional or bi-regional) pertinent to the intended contract, to
379 ensure harmonisation and alignment of relevant trade legislation, not just national law applicable to
380 the contract (as would be the case with a typical national-centric PPP.)

- 381
- 382 • Harmonisation should be achieved before a contract is let
 - 383 • 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.

- 384 • The contract should be designed such that legislative risk never sits with the contractor.
- 385 • Contracts should be issued and held by a Prime Agency.
- 386 • Output specifications should be based on appropriate standards at the supranational level to
- 387 ensure equality of service for the entire length of the relevant trade corridor. Output
- 388 specifications should mirror one another in the case of duplicate contracts covering a single
- 389 trade space.
- 390 • Where data transfer is required between third parties, best practice would be to ensure
- 391 outputs require compatibility and interoperability with mirrored systems.
- 392 • The recommended procurement model would be to transfer ownership of the facility
- 393 following the build stage, with the contractor then engaged on a concessions basis for the
- 394 duration of the operate phase.

395 **2.7. Putting people first**

396 *“People are important in PPPs... and so it is paramount to define the public interest...
397 consult the people on policy... and ensure that PPPs provide value for money.
398 ...Governments must also make sure that the public is well informed... and that these
399 obligations can be overseen by an objective third party... thus giving citizens more choices
400 and more power.”* (UNECE, *Guidebook on Promoting Good Governance in PPPs*, 2008)

401
402 There should be no conflicts of interest with local inhabitants in the development, preparation and
403 delivery of a PPP project. Stakeholders and users must be considered as well as the context in which
404 the PPP will be delivered. Ethical and national sensitivities should be respected. As much as possible,
405 local staff should be used.

406 With the repatriation of profits, it is important to ensure that external partners do not drain money
407 out of the country (some countries require setting up joint-venture with local partners and limit
408 expatriation of funds).

409 **Training and building local capacity should be an aspect of Trade Facilitation PPPs.**

410 **2.8. The environment**

411 The project needs to be appropriate for the particular environment; ethical Issues