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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.

1. Basic Principles

1.1 Definition of PPP

61
62 The Public-Private Partnership (PPP) Alliance of the United Nations Economic Commission for Europe
63 (UNECE), established in 2001, has proposed the following definition of PPPs in its “Guidebook on
64 Promoting Good Governance in Public-Private Partnerships” of 2008:

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

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

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

76 *There are different types...*

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

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

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

86 **1.2 Trade Facilitation – A Practical Definition**

87 The fundamental purpose of trade facilitation is to simplify the trading process whether domestic or
88 international. To achieve this objective trade facilitation aims at transparency on all rules concerning
89 trade procedures in order to allow the trading community to prepare and comply. Trade facilitation
90 measures can be broadly divided into three categories; simplification, harmonisation and
91 standardisation.

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

102 Trade facilitation begins with an analysis of the business process to establish the purpose, relevance
103 and function of practices and procedures, and the information requirements needed to conduct the
104 transaction. Once the review is completed redundant procedures can be removed and unnecessary
105 data requirements eliminated; the remaining activities can then be rationalised and standardised.

106 The review of the business process is a continuous, evolutionary methodology requiring
107 commitment (particularly political will), appropriate resources (both human and financial) and
108 positive action to monitor regularly the application of specific measures, and where necessary a
109 willingness to adapt any measure with regards to experience gained.

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

118 **1.3 Scope of TF PPP (Some Examples)**

119 PPP is one solution for financing and implementing public projects amongst many. CEFACT
120 does not necessarily recommend PPP over other financing methods but given its efficiency,
121 downsides and frequency, we want to highlight best practice of the use, especially in the
122 context of the WTO agreement and following implementation of measures. There are
123 examples of bad use that should be avoided and that will need to be addressed in a future
124 recommendation project. The aim of trade facilitation is to make international trade simplify,
125 harmonize and standardize. There are a number of areas within trade facilitation where PPPs
126 are appropriate and could be beneficial in achieving these aims. These can include:

127 ***A National Trade Facilitation Organisation***

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

133 ***Single Window***

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

142 ***Port Communities***

143 Port communities are often established in maritime ports encompassing all actors within such a
144 zone, often with participation both from the public and from the private sector. The combination of
145 public and private actors that usually are present in a port (Customs, port authority, freight
146 Forwarders, customs agents and so on) makes the PPP a plausible way of financing necessary

147 infrastructure commonly used like electronic information systems that manage all transactions with
148 the zone.

149 *Trade Corridor*

150 The development of multimodal transport corridors, the investment promotion and trade and
151 transport facilitation along the corridor routes are highly interdependent processes. There is a
152 strong link between transport costs and investment incentives. Many governments promote
153 investment in infrastructure and facilities and increased economic activities along the corridor
154 routes. Linkages and interfaces between the different sectors and the demands placed on these are
155 unavoidable and for many investments needed a PPP can be a suitable solution given that so many
156 private stakeholders are already concerned.

157 Multimodal transport corridors are perceived as one of the direct ways to bring about regional
158 integration. This is important to the growth prospects of middle and low income countries,
159 especially those that are landlocked. Regulatory and other constraints to trade facilitation obtain a
160 practical relevance at corridor level, enabling the design of appropriate interventions. Corridors
161 provide for a spatial framework to organize cooperation and collaboration between different
162 countries and public sector agencies involved in providing trade facilitation infrastructure and
163 services.

164 *Coordinated Border Management*

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

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

173 *Infrastructure*

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

180 *Aligned Documents*

181 The development of aligned documents can only proceed through a consultative approach (for the
182 needs and requirements). To meet the needs of the administration and business needs collaboration
183 between the UN, public administrations, traders and specialist technology companies will be
184 required. All parties may be investing their work and intellectual property to the process. This will be
185 of particular benefit to SMEs and traders in low to middle income countries, especially if it is mobile
186 enabled.

187 *Mobile Trade Facilitation*

188 The use of mobile devices increases annually. In 2013, the use of mobile devices accounted for over
189 50% of all recruitment activity in Europe and the USA. Mobile devices have been the major medium

190 for trade in many LDCs. It is time for trade facilitation to become mobile-enabled. A recent UNECE
191 report 'Mobile Business' highlighted the importance of this medium. The European Commission has
192 recently launched a new policy framework for 4G technology, acknowledging its fundamental
193 importance in all spheres of business. A high-level PPP, similar to that outlined above, could ensure
194 that international traders keep up with the game.

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

196 **2.1 Principles of good governance**

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

- 199 • Efficiency (the extent to which limited human and financial resources are applied without
200 waste, delay or corruption or without prejudicing future generations)
- 201 • Participation (the degree of involvement of all stakeholders)
- 202 • Decency (the degree to which the formation and stewardship of the rules is undertaken
203 without harming or causing grievance to people)
- 204 • Transparency (the degree of clarity and openness with which decisions are made)
- 205 • Accountability (the extent to which political actors are responsible to society for what they
206 say and do)
- 207 • Fairness (the degree to which rules apply equally to everyone in society)

208 The working group has identified some key factors that should be considered under this theme.
209 These include the following:

- 210 • The situation will evolve all the time (before, during and after a project has been identified).
211 It is important to identify the goal of the project and to monitor and check it on a regular
212 basis. This monitoring and evaluation may be best left to an independent third party.
- 213 • An existing system which performs satisfactorily should not be replaced
- 214 • A strong lead agency should be chosen with care.
 - 215 ○ Partners who are chosen to participate should also be chosen with care; everyone
216 should bring something to the table with no conflicts of interest.
 - 217 ○ It is also recommended to avoid individual persons within a PPP consortium as they
218 do not make good partners.
 - 219 ○ The business model should work for all partners
- 220 • Involve professionals with the right skill set at the right time within the design and
221 management. Consultants and suppliers may provide resources.
- 222 • Design and customize solutions in conjunction with all stakeholders taking into account key
223 points such as:
 - 224 ○ Ownership
 - 225 ○ Quality standards integration
 - 226 ○ Constraints on use
- 227 • Private-Private Partnerships that provide public services in trade facilitation should be
228 assimilated into the scope of this paper.

229 **Specific to Trade Facilitation**

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

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

245 **2.2 Policy**

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

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

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

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

260 **Specific to Trade Facilitation**

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

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

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

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

- 271 • We use standardized data elements in communication when possible
- 272 • We use standardized code lists when possible
- 273 • We use standardized messages when appropriate
- 274 • We use Business Process Analysis Methodology (BPA) when appropriate¹
- 275 • Etc.

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

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

283 **2.3 Capacity-Building**

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

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

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

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

295 ***Specific to Trade Facilitation***

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

- 297 • Sustainability of project / continuous development / evolution /
- 298 • Achieving sustainable development
- 299 • Must not create barriers to trade
- 300 • Training and ensuring that the users take possession of the tool
- 301 • Ensure that capacity building is done within the country – build local capacity
- 302 • Change management (human nature is perhaps resistant to change)

¹ <http://tfig.itcilo.org/contents/business-process-analysis.htm>

303 **2.4 Improving legal framework**

304 *“A clear framework of law and regulation... must be based on key principles and priorities... fewer*
305 *laws... better laws... and simpler laws will all lead to successful PPPs. ...Improving legal processes*
306 *means better arbitration processes...together with fair and consistent enforcement... as well as fuller*
307 *consultations. ...It is important to train lawyers and judges, particularly about lenders’ rights to ‘step*
308 *in’... while empowering citizens to use the legal processes is also essential to creating good*
309 *governance.” (UNECE Guidebook on Promoting Good Governance in PPPs, 2008)*

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

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

320 Very often, it is considered that government provides direction and the private sector provides the
321 drive. In line with this, government should remove any burdensome legal constraints and streamline
322 the approval procedure. Government will also need to consider improvement of local judiciary to
323 enforce contracts; this might entail capacity building of any existing international guidance in this
324 area and recognition of arbitration as a means to resolve issues. Instructions for tender should also
325 be well thought out finding consensus between public and private stakeholders.

326 ***Specific to Trade Facilitation***

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

335 **2.5 Risk**

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

342 One of the key aspects of collaboration through PPPs is the sharing of risks; both the public side and
343 the private side have complementary objectives in a PPP project and bring mutual support. There

344 are, however, different types of risk taken by both sides which correspond to a cooperative risk
345 sharing where each side assumes the risks that they can best manage.

346 *Some of the Situations to be Wary Of*

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

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

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

362 *Specific to Trade Facilitation*

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

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

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

369 **2.6. PPP Procurement**

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

376 The legally enabling environment must also be considered. Procurement practice must be done in
377 compliance with local procurement law and where possible, in line with international best practice.
378 UNCITRAL has provided some guidance on this subject with its "Guide of Privately Financed
379 Infrastructure Projects 2000", its "revised Model Law on Public Procurement 2011" and is currently
380 preparing further work.

381 The information which is provided for the tender can either be input design or output design. In
382 input design, the governing authority details the aspects that must be implemented in the PPP
383 solution. Input design implies that the risk lies with government for example, if key elements were
384 overlooked in the preparation stages and the authority forgot to put it in the design. In output

385 design, the governing authority outlines the resulting process which is desired without providing
386 specific specifications. The risk in such designs lies with the private sector who must consider the
387 elements which must be taken into account to arrive at the desired outcome.

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

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

397 *Specific to Trade Facilitation*

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

- 403 • Harmonisation should be achieved before a contract is let
- 404 • Where harmonisation does not exist, the contract specific conflicts must be identified and
405 addressed, along with an assessment of the associated risk and how it will be shared.
- 406 • The contract should be designed such that legislative risk never sits with the contractor.
- 407 • Contracts should be issued and held by a Prime Agency.
- 408 • Output specifications should be based on appropriate standards at the supranational level to
409 ensure equality of service for the entire length of the relevant trade corridor. Output
410 specifications should mirror one another in the case of duplicate contracts covering a single
411 trade space.
- 412 • Where data transfer is required between third parties, best practice would be to ensure
413 outputs require compatibility and interoperability with mirrored systems.
- 414 • The recommended procurement model would be to transfer ownership of the facility
415 following the build stage, with the contractor then engaged on a concessions basis for the
416 duration of the operate phase.

417 **2.7. Putting people first**

418 *“People are important in PPPs... and so it is paramount to define the public interest...
419 consult the people on policy... and ensure that PPPs provide value for money.*

420 *...Governments must also make sure that the public is well informed... and that these
421 obligations can be overseen by an objective third party... thus giving citizens more choices
422 and more power.” (UNECE, Guidebook on Promoting Good Governance in PPPs, 2008)*

423

424 There should be no conflicts of interest with local inhabitants in the development, preparation and
425 delivery of a PPP project. Stakeholders and users must be considered as well as the context in which

426 the PPP will be delivered. Ethical and national sensitivities should be respected. As much as possible,
427 local staff should be used.

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

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

432 **Conclusions of the preliminary study**

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

438