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##### Recommendations and standards

##### Recommendations for noting

## Recommendation No. 41: Public-Private Partnerships in Trade Facilitation

### *Summary*

Public-Private Partnerships (PPPs) is a possible solution for financing and implementing public projects. These projects allow the public sector to benefit from private sector funding, expertise and capacity while allowing the private sector to partner with the public sector in providing critical public services.

There are a number of areas within Trade Facilitation where PPPs could be appropriate. Traditional PPPs in infrastructure, like ports and improvements to rail and road networks can facilitate trade, but so can PPPs in specific infrastructure and support systems such as a Single Window system, a National Trade Facilitation Body, infrastructure support for port communities, trade and transit corridors, and coordinated border management

This Recommendation and its guidelines aim at highlighting the best practices for using PPPs in Trade Facilitation, especially in the context of international agreements and related implementation planning. It describes key aspects and characteristics for PPPs in Trade Facilitation and draws upon the practical experience of practitioners.

A draft version of the Recommendation on Public-Private Partnerships in Trade Facilitation (PPP-TF) (ECE/TRADE/C/CEFACT/2016/INF.1), was submitted for noting to the 22<sup>nd</sup> UN/CEFACT Plenary, that approved the request to submit the Recommendation for intersessional approval (Decision 16-06, ECE/TRADE/C/CEFACT/2016/2). The final version of the Recommendation on PPP-TF, was submitted for intersessional approval to Heads of Delegations on 25 October 2016. The intersessional approval period ended on 25 December 2016; the only comment received was to remove the Case studies that were at the end of the document and to put them in a separate repository.

Document ECE/TRADE/C/CEFACT/2017/9 is submitted to the 23<sup>rd</sup> UN/CEFACT Plenary for noting.

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# **I. Recommendation No. 41: Public-Private Partnerships in Trade Facilitation**

## **A. Introduction**

1. A large number of public projects are today undertaken as Public-Private Partnerships (PPPs). These projects allow the public sector to use and benefit from private sector funding, expertise and capacity while allowing the private sector to partner with the public sector in providing a critical public service and to realise a reasonable return on investment for such effort. Initially used to deliver hard infrastructure, PPPs can combine infrastructure and/or equipment delivery with the provision of related services. A large body of guidance on PPPs in infrastructure (hospitals, toll roads, energy, etc.) exists but, to date, little substantive work has been produced on PPPs in the domain of Trade Facilitation as defined herein. This Recommendation draws upon the practical experience of practitioners in order to provide advice on PPPs in Trade Facilitation.

## **B. Purpose and scope**

2. A PPP is just one possible solution for financing and implementing public projects. The United Nations Centre for Trade Facilitation and Electronic Business (UN/CEFACT) does not necessarily recommend PPP over other financing methods, but acknowledges its growing effectiveness and frequency of use as well as its potential for bringing enhanced efficiency and value to the delivery of public services. This Recommendation and its guidelines, therefore, aim at highlighting the best practice for using PPPs in Trade Facilitation, especially in the context of international agreements and consequent implementation planning.

3. The aim of Trade Facilitation is to simplify, harmonize and standardize international trade. There are a number of areas within Trade Facilitation where PPPs could be appropriate. Not only can traditional PPPs in infrastructure, like ports and improvements to rail and road networks, facilitate trade, but so can PPPs in specific infrastructure and supportive systems such as a Single Window system, a National Trade Facilitation Body, infrastructure support for port communities, trade and transit corridors, and coordinated border management.

## **C. Benefits**

4. A number of potential advantages could be realized by choosing a PPP contract in Trade Facilitation.

5. Infrastructure and services dedicated to international trade can accelerate trade and bring key stakeholders together in a more coordinated, harmonized and standardized way. A PPP in Trade Facilitation can facilitate an enhanced open and transparent market, increase competition and even attract foreign investment.

6. Trade Facilitation can also contribute to reductions in the cost of performing international trade. These reduced costs may come directly or indirectly from simplifying commercial practices and modernizing regulatory and administrative procedures. Lower costs could also result from the speedier and more predictable movement of traded goods, such as reduced clearance times, increased transparency of controls and enhanced integrity.

The generation of the correct (or increased) revenue yield accelerates economic and trade development.

7. There are other potential benefits that can be driven by PPPs in Trade Facilitation. These include having access to the skills and resources of the private sector, which can increase the potential for streamlining, and bringing cost effective processes through more effective service delivery. Further, the increase in access to investment that a PPP can offer could enable process re-engineering and enhance capacity while providing more flexibility and improved structure to public systems.

## **D. International guidance and standards**

8. These guidelines are aimed at PPPs in Trade Facilitation. However, additional detailed guidance and reference materials exist internationally (although arguably more developed in infrastructure PPPs).

9. The United Nations Economic Commission for Europe (UNECE) has a section specializing in Public-Private Partnerships under the Economic Cooperation and Integration Division (ECI). This section has a wealth of resources on international PPP best practices and implementation, including good governance, and is developing sector-based international standards in PPPs. Furthermore, the PPP Alliance of the UNECE was established in 2001 to improve the awareness, capacity and skills of the public sector in developing successful PPPs in Europe. To this end, the Alliance prepares guidelines on best practices in PPPs and other PPP-related educational and training materials, including sponsoring PPP conferences and workshops.

10. The United Nations Commission on International Trade Law (UNCITRAL) is also developing guidance concerning PPP implementation and the procurement process. The World Bank, the Organisation for Economic Co-operation and Development (OECD) and the United Nations Convention against Corruption have also made a number of contributions on good governance in PPP implementation.

11. UN/CEFACT strongly advises the use of the international guidance, standards and other best practices published by these international organizations. If a PPP is selected as the preferred option for a Trade Facilitation project, the use of these materials and other available resources will assist in the design, development and delivery of the project to the collective benefit of all the partners.

## **E. Recommendation**

12. UN/CEFACT recommends to governments and those involved in international trade to actively consider PPPs as one possibility for partnering with the private sector, accessing additional financing and capacity, and delivering Trade Facilitation projects. If PPPs are selected, the following should be considered:

- Analysing the potential benefits that a PPP could bring to planned projects that would benefit from the application of private sector know-how or investment, or are otherwise unaffordable.
- Ensuring that the procurement process is undertaken in a transparent manner and that it delivers affordable and value-for-money services within an effective and robust governance structure.
- Ensuring that contractual mechanisms are in place to minimize behavior that could lead to an increase rather than a reduction in barriers to trade.

- Considering common risks in PPPs that might undermine the desired outcome of Trade Facilitation and establishing systems and controls to avoid this situation.

## **II. Guidelines for Recommendation No. 41: Public-Private Partnerships in Trade Facilitation**

### **A. Introduction**

13. Increasingly, governments are turning to the private sector for the financing, design, construction, and operation of core governmental services, from infrastructure projects to information and communication technology (ICT). Successful implementation of PPPs in Trade Facilitation can increase the quality of services provided, reduce costs, increase efficiency, reduce disputes among partners, and even eliminate corruption.

14. PPPs, however, are just one among the many ways that the public sector may decide to provide a Trade Facilitation service, especially under budgetary constraints. These guidelines aim to provide a better understanding of PPPs in Trade Facilitation, and outline some of the more common risks which might undermine the overall objective, should a government decide that, under particular circumstance, PPPs are the preferred approach. It aims to provide a useful guide for those in governments who have not given sufficient consideration to working in a coordinated and complementary manner with the private sector, providing an outline of all of those areas that “together” need to be taken into account when considering PPP and Trade facilitation.

15. This guidance, therefore seeks to identify that group of topics that together impact on Trade Facilitation and in so doing highlights any relevant specific concerns. In addition, each topic area is (or will be) subject to its own comprehensive guidance.

#### **1. Definition of Trade Facilitation<sup>1</sup>**

16. Trade Facilitation is defined as the simplification, standardization and harmonization of procedures and associated information flows required to move goods and services from seller to buyer and to make payments.

17. The fundamental purpose of Trade Facilitation is to simplify the trading process, whether domestic or international. To achieve this objective, Trade Facilitation aims at transparency in all commercial and regulatory rules and procedures in order to allow the trading community to prepare and comply in an efficient manner. UN/CEFACT aims to contribute to a comprehensive set of efficient and effective trade processes, as well as to optimize the level of government control and oversight so that these are consistent with the costs and risks involved.

18. Trade Facilitation activities (especially in relation to the application of electronic business) can be broadly divided into three categories – simplification, harmonization and standardization:

- Simplification is the streamlining of trade procedures by removing redundant requirements and activities, and reducing the costs and burdens in administering the trade transaction.

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<sup>1</sup> “UN/CEFACT Prospective Directions” (ECE/TRADE/C/CEFACT/2016/20/Rev.1), p. 2.

- Harmonization is the means for aligning or rationalizing the information flows that accompany the movement of goods or services in the domestic marketplace or in international transit, especially at national borders.
- Standardization is the means for ensuring that the required information is described, understood and applied in a consistent manner. Many international standards development organizations, consortia and communities have developed standards concerning the description, definition, use and transfer of information related to international trade.

## 2. Definition of Public-Private Partnerships (PPP)

19. There is no global consensus in terminology, scope or content of PPPs. Legal frameworks, when present, vary enormously from country to country. Additionally, there is a wide variety of business models in PPPs and they can vary by sector, which makes them more difficult to identify.

20. This Recommendation relies, in part, on the descriptions contained in the UNECE “Guidebook on Promoting Good Governance in Public-Private Partnerships”<sup>2</sup> and considers PPPs to have some of the following distinguishing characteristics:

- A public service which is financed in part or in whole through private sector contribution.
- A procurement process to allow the public sector to choose the private sector partner, resulting in a contract between the public and private sectors in which the risks are distributed; such a procurement process needs to be in line with national law and international agreements.
- The private sector will seek to find a return on investment during the operational phase of the project.

21. PPPs are defined more fully below. However, these characteristics are highlighted so that a government can be better equipped to decide whether to engage in a PPP and, if so, how.

22. Broadly there are three types of PPP each type is currently described differently in different countries and areas of the world. They represent different partnering relationships and economic drivers. They are:

- **Developmental** – Projects that economically would not be expected to make a level of return that would be sufficiently attractive to the private sector for them to invest. The objective of these PPPs is normally developmental to improve infrastructure through donor funds and know how. Often referred to as Institutional as they are supported by both governmental and non-governmental institutions
- **Hybrid** – Projects that are intended to be commercial and operated by the private sector but the business cases demonstrate that they would not be commercially viable. By providing third party funding and investment the project becomes as a hybrid as it retains commercial features whilst receiving some kind of subsidy. In some countries these are also known as triangular as they involve the public sector the private sector operator and a third sector donor or fund.

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<sup>2</sup> Descriptions start on page 1 of the “Guidebook on Promoting Good Governance in Public-Private Partnerships”, UNECE, 2008, available at:  
<http://www.unece.org/fileadmin/DAM/ceci/publications/ppp.pdf>

- **Commercial or contractual** - A PPP where a contract is signed between the public sector and the private sector, as a consequence of which the private sector is expecting to invest resources and to make a reasonable return.

23. The figure below provides more detail on each type of PPP. When designing a PPP and preparing a feasibility study it is important to consider the nature of the PPP and the approach to be adopted. Different forms of PPP will result in a different procurement approach.

24. These three general types of PPPs can be summarized with the main characteristics detailed in Figure 1.

Figure 1 - Main Characteristics of Institutional, Blended and Contractual PPP Projects.			
Characteristics	Developmental/Institutional	Hybrid/Blended/Triangular	Contractual/Commercial
Contractual relationship	Not always required, but varies from some kind of memorandum of cooperation to joint venture relationships	A contract is required and should define the responsibilities/obligations and liabilities of each party	A contract is required and should define the responsibilities/obligations and liabilities of each party
Joint funding	Typically, there will be inputs from two or more providers; this may be in the form of in-kind contributions or direct financing	Yes and/or other risk-sharing	There may be project finance (loan finance or similar) and self-financing
Service delivered	Typically a public/private sector fund that contracts services	By the private sector on behalf of the public sector; may be some third sector delivery	By the private sector on behalf of the public sector
Risks	Donors/third sector funders agree responsibilities and risk profile	Some (or all) of the private sector risk may be underwritten by the third sector	Risks shared but significant risk should be borne by the private sector
Payments	Normally jointly managed funds into which the parties contribute and then make payments to implementers	Service delivered – could be concession (payments made by service users) or public sector unitary charge or a combination of both	Service delivered – could be concession (payments made by service users) or public sector unitary charge
Length of service	<p>The length of the contract should be such that the contractor is responsible for the asset for a period that represents the life cycle of the asset and all loans can be repaid by the supplier. Charges made by the supplier to the user or the public sector should be low enough for them to be deemed acceptable and affordable, while allowing the contractor to also make a reasonable return.</p> <p>For example:</p> <ul style="list-style-type: none"> <li>- 7-10 years for ICT service arrangements that include associated infrastructure</li> <li>- 25-30+ years for large infrastructure projects</li> </ul>		

### 3. Sample Trade Facilitation PPP projects

25. PPPs are typically contractual or structural partnerships between the public sector (government agencies or ministries, for example) and the private sector (commercial companies, for example). PPPs can involve a ‘third sector’ – not-for-profit organizations, non-governmental organizations (NGOs), foundations and/or company social responsibility

programmes. However, from the government's perspective, these play the private sector role within a PPP. There should be recognition of the particular expectation of the third sector organization which might not be expressed in the same way as that of a purely commercial, private sector partner (and, for example, might accept a lower return on investment).

26. For the purposes of this guidance, the parties agree to share risks and to provide funding and support in kind although they may work together or share the delivered service and any generated revenues. This type of arrangement does not necessarily have a contract and as such are sometimes not considered as a PPP.

27. Infrastructure and ICT PPPs will be explained, as they are the most common projects for Trade Facilitation PPPs. Certain of the most widely used contractual approaches will also be highlighted in order to demonstrate the related PPP structure and discuss the expected benefits.<sup>3</sup>

### **3.1. Infrastructures PPP**

28. Infrastructure PPPs often have a significant underlying asset that is constructed or renovated and then maintained as part of a service contract. Trade Facilitation infrastructure PPPs can include buildings, road or rail networks, ports and dry ports that promote trade. These are typically longer-term contracts of up to 20 or 30 years and may be even longer for roadway or bridge projects. The service provider will expect to earn its return on investment through some form of payments made by the public sector partner or user fees related to the use of the infrastructure, or a mix of both.

### **3.2. ICT PPP**

29. ICT PPPs can include Single Window systems, international trade websites, and also supporting ICT components of other projects such as trade corridors and coordinated border management facilities. They can differ in that the inherent characteristics of technology must be taken into consideration. For example, the constant and rapid changes result in a shorter life cycle for technology assets. Thus, private sector partners will be very reluctant to take on the contractual risk in an ICT PPP beyond the life cycle of the ICT deliverable, which could be as short as 5 or 10 years. As a result, contract lengths can be shorter and the return on investment expectations of the private partner accelerated. Also, given the complexity of technology and the need to integrate with other systems, ICT PPPs require very clear procurement and contract documentation detailing, for example, how interface complications will be handled and who bears such risk.

30. Though various approaches to partnering exist, Trade Facilitation PPPs are typically contractual PPPs where the public sector engages a private sector partner to provide services, often including financing of the project, in return for a reasonable return on that private sector investment.

### **3.3. Design, Build, Operate, and Transfer (DBOT) PPP**

31. The most common form of engagement is the contractual, Design, Build, Operate, Transfer (DBOT) model. A DBOT is a PPP project that is designed and built by the private sector partner and the long-term operation of the asset is performed primarily by the private sector partner, with ownership of the asset passing back to the public sector at the end of

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<sup>3</sup> Other models can exist; these are detailed in the UNECE document, "Guidebook on Promoting Good Governance in Public-Private Partnerships", UNECE, 2008.



the contract term. Each of these elements can exist in varying degrees. Therefore, for example, the public sector partner can elect which elements of operation will be performed by the private sector and which will be retained by the public sector.

32. DBOTs are also typically sequential, with the design, build, operate and transfer tasks unfolding as follows:

- Design (led by the private sector, to the public sector's satisfaction)
- Build (by the private sector)
- Operate (wholly private or a negotiated level of public and private sector activity)
- Transfer (from the private sector back to public sector)

33. There are multiple benefits that could motivate the public sector to call upon the private sector to deliver a DBOT project. The “design” phase captures the innovation of the private sector and allows the exploration of potential solutions that may not have been previously considered. It can be structured such that the design is a joint exercise between the public authorities and the private sector. It may also be carried out separately and, for example, the risk of design implementation can be allocated between the design team and the service provider, rather than resting with the public sector partner. It is common for conceptual design risk to sit with the public sector whilst the detailed design risk is with the implementing and delivery partner.

34. The “build” phase and associated construction risk almost always remain with the private sector. This follows the assumption that the private sector can best manage the risks associated with this phase and is better suited to bear the risk of delivering the project on time and on budget.

35. In particular, many infrastructure PPPs have followed a DBOT delivery path, where the private sector partner ‘owns’ the asset during the operation phase, increasingly, public sector sponsors are requiring asset transfer back to the public sector immediately upon completion and prior to the commencement of service. This is particularly true for assets that are deemed strategic for the government. The appropriate transfer timing and mechanism, as well as the allocation of the risks until such time, is agreed in the contract.

36. An important feature of the DBOT approach is that, in the event that the PPP is cancelled or the service provider fails to complete the asset or commence service, the asset (or what is completed of it) is under the control of the public sector and can be brought into operation to deliver the required public services.

37. The operation of the service often remains with the private sector service provider for the duration of the contract; however, it is subject to performance and contract terms.

## **B. PPPs in Trade Facilitation**

38. In some industries the nature of PPPs will be similar within a sector, for example in the power industry, sanitation or hospitals, on each occasion a PPP will follow a similar approach. Practitioners can therefore build a detailed knowledge of the best practice to be adopted. However, in trade facilitation PPPs will include a range of different economic activities each with their own different risk profiles and lifecycles. Consequently, each economic activity will develop specific best practice. Whether the PPP relates to, single window, trade and logistics corridors, ports or coordinated border management the nature of these activities differs considerably and contractual arrangements are likely to differ from one to another. Each area of activity is considered in turn below.

## 1. Single Window systems

39. Single Window is defined in UNECE Recommendation 33 as a facility that allows parties involved in trade and transport to lodge standardized information and documents with a single entry point to fulfill all import, export, and transit-related regulatory requirements. If information is electronic, then individual data elements should only be submitted once. The private sector could be involved in a Single Window facility either as a builder and implementer of the ICT infrastructure or at the operational and service level. A Single Window facility could involve multiple projects, including the establishment of conformance standards to be met as part of the operational control of the Single Window authority (transmission protocols, licensing, security, insurance).

40. The implementation of a Single Window project under a PPP will involve a number of steps. First, the services to be achieved in Single Window implementation should be defined. At this step, the integration or the possibilities for sharing information with other Single Window facilities must be analyzed. The public institutions that will be involved in the collaboration will also need to be defined.

41. Then, the information should be classified according to the lead agency in charge of the Single Window facility. This could be around a stand-alone customs system, a stand-alone partner cross-border regulatory agency system, a port community system or a community logistics system. Such classified information should be defined, analyzed and reconciled as outlined in UNECE Recommendation 34: “Data Simplification and Standardization for International Trade”.

42. The drafting of any PPP contract on Single Window should take into consideration a number of aspects. Of course, the goals and services must be defined, but also the scope of functions to be covered by the private sector partner (development, operation, maintenance). Financial aspects will also need to be addressed in such a contract, such as identifying how the private sector partner will be remunerated and what will be the source of the revenue, but also what will be the value added to end-users taking into consideration the expected demand, and contingency financing in case of low demand.

## 2. Trade and logistics corridors

43. A corridor is the link from the production site of a product to its final destination, and it is designed to facilitate transportation. This could integrate an entire supply chain nationally, within a region and/or internationally. In terms of Trade Facilitation, a corridor allows the harmonization and simplification of the procedures from origin to destination, which should, in turn, enhance trade opportunities.

44. In a corridor, the elements that facilitate trade could come from very different sources: the improvement, upgrading and expansion of transport infrastructure (port, airports, railways, and road networks); intermodal facilities and procedures; cargo tracking systems; customs information systems; regulation of transport; procedures to export and import products; regulation in trade; number of documents for trade and tariffs; development of Single Window facilities; and many other trade issues. A corridor has a geographical dimension, but additionally could be specialized in a specific sector or product. The private sector could provide the knowledge to increase efficiency in terms of time and cost, in terms of the traded products and/or in terms of reducing bottlenecks and technical barriers to trade. Given the private sector interest in such developments, a PPP project could be a pertinent financing and development solution. It is essential for both the public and private sectors to make the facility usable on a fair and open basis and promote usage by all parties, including small and medium-sized enterprises (SMEs).

45. If a PPP solution is chosen for a trade corridor, the private participation could be rather diverse. The choice of partner(s) will largely depend upon the goals and objectives of the resulting corridor and how the cost of these services will be ultimately passed on to the end-users. These choices will define the nature and type of PPP. It should be noted that both the private and public sector parties need to understand their responsibilities under a PPP contract in order for it to work effectively and to reach its contractual end date.

### **3. Ports**

46. Seaports and airports are key logistics sites in international trade. Any port will include both services and infrastructure, and eventually ICT solutions. The various services that are proposed include customs clearance processes, licensing, cargo handling and storage, as well as tracking and tracing of merchandise. The various infrastructures will include the actual port terminals, the warehouses and offices, the hinterland (sites in proximity but not geographically part of the physical port), the equipment to load or unload freight, and other facilities.

47. In developing a port environment as part of its governmental role, the public sector may wish to create a PPP with private sector partners to either enhance the services or improve the infrastructure within ports, or eventually both. The private sector will often have a direct interest in such projects since they will want to render these key logistics sites more effective and efficient. Furthermore, the private sector often has experience in other ports and they would be able to bring best practices to the service of the public sector partner.

### **4. Coordinated Border Management**

48. Coordinated Border Management is another area where cooperation between government departments and the private sector through a PPP can produce efficiencies at the border of a country to the benefit of its trading community. This can involve software and IT services companies. It is important to ensure that a shared technical platform is built to allow this coordination to operate smoothly. Multiple agencies within government should be involved, but it is also important to ensure the inclusion of the private sector in the development and implementation of border management and cooperation.<sup>4</sup> At the same time, it is important to take into account the compatibility and Intellectual Property Rights (IPR) issues that might arise and give consideration as to how these might be mitigated.

## **C. Feasibility Study**

### **1. Introduction: the strategic case**

49. Private sector participation in Trade Facilitation measures should increase the quality of the services provided. At the same time, care must be taken and mechanisms must be created to ensure that services are procured in a transparent manner. Moreover, the contractual mechanism itself should be designed to reduce barriers to trade and also to encourage the service provider to innovate in order to reduce barriers to trade.

50. In this context, an initial feasibility study needs to be undertaken. This should involve consultation with identified stakeholders, which is one of the key tools employed to

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<sup>4</sup> See WCO Research Paper No.2 on Coordinated Border Management from June 2009, section 5.

improve transparency, efficiency and effectiveness.<sup>5</sup> The consultation process should be used to improve management effectiveness, regulation and governance and, at the same time, to avoid pitfalls and conflicts of interest.

51. It is important to promote transparency from the very beginning of the project. Although some of the data within the feasibility study may remain confidential and undisclosed by the public partner, for example because of commercial concerns or to maximize competition, as much of the study as possible should be disclosed, and also shared and discussed with stakeholders. Transparency and accountability are the best tools to ensure against corruption. One of the characteristics of transparency is access to information.

52. Such information should include:

- The business aim, clearly articulated – why do we need to undertake this project? (At this stage it should not be stating whether the project is a PPP or not.);
- The range of services included in the contract;
- The revenues, benefits and performance levels agreed and to be achieved as well as the cost of the project and payments to be made;
- The use of government grants, guarantees and other financial support including significant risk-bearing; and
- The creation of mechanisms to reduce corruption, inefficiencies or protect against individual interests (e.g. IT solutions, supervision agency, verification systems).

## 2. Maturity model

53. As part of the feasibility study, it is important to be able to identify, assess and quantify risks that might arise that are associated with each option identified. The challenge is to fully analyse the risks associated with conventional (i.e. non-PPP) contracting as opposed to those associated with PPP, as the latter are often not fully understood.

54. Risks are not just public sector risks, but also risks that may deter (or fully prevent) a private sector partner from bidding on the project. One such risk is the contracting environment that exists in the country and the country's attitude towards using the private sector to deliver public sector services. To this end, it is very important to undertake a PPP maturity model/readiness review. This comprises seven key elements and focuses on the maturity of thinking on PPP (private sector engagement) in the public sector, the ease of doing business and the economic and environmental factors, more specifically:

- Enabling framework (appropriate legislative framework and PPP-aware public servants).
- Ease of doing business (how easy it is to set up a business operation in the country, i.e. number of days, need for local partners).
- Political attitude – there is a widely held (or shared) belief amongst politicians and civil servants that the private sector has a role to play in the delivery of public sector services.
- Money markets: What is the state of the financial market place? How familiar are the local financial institutions with PPP as a concept? How quickly will they assess

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<sup>5</sup> See UNECE Recommendation 40 on Consultation Approaches, 2014.

and respond to funding requests? How will they assess the risk? Will interest rates be reasonable or loaded, making projects unaffordable?

- State of the economy: If there is a period of high inflation, how will the private sector protect its income stream? Is it the right time to invest in the local marketplace?
- Availability and sophistication of investors: Is there a wide choice of investors and who are they? Will the proposition result in investment into the country but also ultimately be withdrawn from the economy? To what extent do investors understand the business model?
- Availability of competent service deliverers: To what extent are builders and operators available locally? Is there a labor force readily available? What level of training would be required to bring the employees to an appropriate level of competency? Are there any funded programmes or grants that are available to build up local competencies and business, and would the service provider have access to these? To what extent is the supply of experienced competent workers clearly engaged in other projects? Would the project be more or less risky than competing PPP projects being developed elsewhere?

55. Good practice would be to undertake two assessments, the first based on the domestic market and the second based on the international market. The outcome of the assessments enables stakeholders to assess the risk of the project failing and this data can be fed into the feasibility study as part of the risk-adjusted whole-life cost assessment that is undertaken as part of the economic assessment. The outcome does not determine whether the PPP will or will not succeed, but will indicate the areas of risk and enable practitioners to take these into account when developing the risk-sharing model and imposing any contractual constraints.

### 3. Economic assessment

56. To decide on the delivery mode of a specific service or project, governments and the private sector should conduct a value-for-money analysis that considers a variety of public and private delivery options.

57. A value-for-money analysis is the evaluation of the cost and the benefits of the project. It is a quantitative assessment of a PPP project that includes the costs of the design, build and operations, including upgrading and maintenance, and financing, transaction and other contract governance costs. The value-for-money assessment should also weigh the particular benefits provided by a PPP project, such as improvements in the service delivery and predictable changes in end-user requirements. At the same time, projects should consider options and variations and compare these to the original project specification (in technical requirements, technology, methodology) in order to achieve the best value for money.

58. The analysis should also include an economic impact study (not just the facility delivery, but the impact on the economy itself, e.g. the local area). This is undertaken using discounted cash flows and by calculating an equivalent annual charge.

59. The analysis should test whether a PPP approach delivers the best value for money and would be the best option based on a risk-adjusted whole life cycle cost basis, as compared to a public sector approach.

60. The intention is to identify the project that delivers best overall value for money. The assessment is based on whole life cycle costing, starting with the upfront design and capital build costs to the revenue cost over the life of the contract and any exit costs. All

costs and benefits are matched in the years that they arise and then discounted back to a specific date using an agreed discount. The costs associated with risk and risk mitigation need to be added to this in order to arrive at the overall risk-adjusted whole life cycle costing.

61. This process has to be based on the best available unbiased data and a clearly specified and standardized evaluation process in order for the most appropriate investment decision to be identified (See Annex II Value for Money Factors).

62. One advantage of PPP is that the private sector may propose innovative solutions, options and variations and, subject to the rules of the procurement, these can be taken into account and compared to the original project specification (in technical requirements, technology, and methodology). If the solution still meets the output-based specification and achieves best value for money, then consideration should be given to adopting the more innovative or variant approach.

63. When a bidding process is used in any infrastructure or concession project to select the private sector party, the efficiency is increased by selecting the best proposal based on the technical solution, the budget needed, the operational feasibility, the quality and variety of services provided and the compliance with environmental standards and/or the society. The best solution that wins the bid reduces the risks of the project (it is not necessarily the cheapest project).

64. There are specific factors in calculating the value for money for each type of PPP in Trade Facilitation project, each with its own challenges. The value for money depends on risk assessment, risk allocation (public or private), the length of the PPP project, the demand, and the sources of revenue for the project (e.g. taxes, grants, price paid by customers).

65. A number of options should be evaluated to determine the option that provides the best value for money. The financial source of investment could come from the private sector in the form of debt or equity and the source of the revenue that will pay back the investment (by taxes, user charges, or price of the services). However, the financial source of investment is more linked with the risks of a PPP project, and the source of the revenue is more linked with the business model and the value for money of a PPP project. PPP projects allow joining the best of two approaches: the private sector introduces terms of efficiency (reducing cost, allocating resources, and increasing profitability), client orientation and service quality; and the public sector brings the defense of general interest, planning and regulation.

66. For completeness, it is recommended that two model costings are prepared: one based on the public sector delivering the service, known widely as a Public Sector Comparator (PSC), and one for the private sector often referred to as a reference bid.

#### **4. Affordability**

67. As well as assessing the value for money, the feasibility study also needs to assess the affordability of the project. Governments must examine how the project is going to be funded and whether sufficient funds will be available throughout the whole life cycle of the contract and whether payments to the service provider. It may be that budget or other financial/treasury constraints mean that the only affordable option for a government is to seek external funding such as through a PPP. Where users are expected to make payments, the fees should be set at an affordable level to encourage end-user engagement.

68. In some cases, there may be a conflict between the project that delivers the best value for money over the time of the contract and the project that is most affordable on an annual cost basis. The project implementation should ideally be self-financing from

revenues generated. If there is a net cost and there is no availability of government budgetary support (e.g. subsidy) but the project is a vital economic growth enabler, then other financing solutions should be considered, such as seeking third sector involvement. If budgetary support or third sector funding is not available, then ways of reducing the cost should be considered (this could be a reduction in scope, output requirement, or performance levels). If the project still cannot be modelled to show that it will break even or make a surplus over time (i.e. make a financial return for the private sector service provider(s)), then it should not be pursued. The project would be neither affordable nor economically viable.

69. Another reason that there might be a funding gap is as a result of pledged resources that may or may not materialize. An example of this may be a trade corridor that involves more than one country and one country either decides not to go ahead with its part of the deal or can no longer afford to make contributions to the unitary charge.

70. For completeness, it is recommended that two model costings are prepared: one PSC, and one reference bid.

## 5. Good governance

71. Good governance encompasses the need for a clear, predictable, legitimate and appropriately resourced institutional framework. This will involve public awareness through consultations on the relative costs, benefits and risks of PPPs and public procurement. It further involves the need to maintain key institutional roles and responsibilities (to ensure a prudent procurement process and clear lines of accountability) as well as the need for regulations to be clear, transparent, enforced and not excessive. A transparent budgetary process minimizes fiscal risks and ensures integrity of the procurement process in PPPs, with disclosure of all costs and contingent liabilities and the need to ensure the integrity of the procurement process.<sup>6</sup>

72. Ensuring appropriate good governance standards is a critical pre-requisite where private sector or third sector funds are sought as co-financing. In many cases, it may be desirable that the PPP operate under the country's own framework. If the private sector or third sector partner agrees to this use of country systems, the fiduciary assurance obligations of the private sector or third sector partner will require them to be as rigorous as their own. Clearly, there are additional considerations if the private sector is contracting with a supranational or cross-border agency.

73. Contracts are more likely to fail if there is poor governance. The governance arrangements within the contract need to be robust as well as adherence to them. At the outset of the contract, it should be agreed, as part of the process, that there should be an agreement on the level and type of information to be published throughout the life cycle of the contract. Stakeholders should be made aware of:

- The state of evolution of the project on a regular basis;
- Any contract or specification changes since the contract was originally signed; and
- Any relevant side agreements including government guarantees.

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<sup>6</sup> See the work of the OECD as of March 2015: [www.oecd.org/governance/oecdprinciplesforpublicgovernanceofpublic-privatepartnerships.htm](http://www.oecd.org/governance/oecdprinciplesforpublicgovernanceofpublic-privatepartnerships.htm) as well as that of the World Bank as of March 2015: <http://wbi.worldbank.org/wbi/Data/wbi/wbicms/files/drupal-acquia/wbi/WBIPPIAFPPPReferenceGuidev11.0.pdf> and the work of the UN Convention against corruption as of March 2015: [www.unodc.org/documents/corruption/Technical\\_Guide\\_UNCAC.pdf](http://www.unodc.org/documents/corruption/Technical_Guide_UNCAC.pdf)

74. For all these reasons, it is important to create effective data collection systems and tools among partners in order to monitor PPP projects. Disclosure of information has to be a standard practice undertaken as a matter of course, in which information is accessible without any specific active request.

75. The tender procedure will be one of the key milestones of a PPP; this must be open, fair, equal, and transparent to ensure efficiency throughout all its stages to select the private partner. These stages include tender preparation, bid preparation, bid submission, bid evaluation, and tender award. The national legal framework will play a large role in this procedure; care should be taken since often there is no clear definition of the boundaries and scope applicable to PPPs, which might in turn threaten contract validity.

## **D. Main aspects to be considered in PPPs in Trade Facilitation**

76. One of the advantages of a PPP is that the participating partners can share the risks of the project. Ideally, each party should do what it does best in order to allocate risks to the party that can minimize them better. A joint risk schedule should form part of the contract, clearly identifying the ownership of risks. At the lowest level each risk should be allocated to a specific party (i.e. no risks should be “shared”), thereby giving clarity as to who is responsible for mitigating and managing risks.

77. The public sector should retain the right to cancel the contract as a consequence of inadequate provision or non-performance. If the contract is a DBOT PPP, the underlying asset will be with the private-sector partner and a transfer clause is required for the government to recover the asset.

78. In any type of PPP project, risk allocation and management are critical in order to provide responsibility and accountability. For this, several aspects need to be taken into consideration, including the objectives of the project, the funding or financing structure through the length of the contract, the quality of service standards agreed, the variability of the demand and the value of assets at the end of the contract.

79. General considerations for risks to be considered are outlined within Annex III and are also incorporated into Annex I. However, the more general risks are detailed below.

### **1. Return on investment**

80. Contractual PPP projects will be between the public sector and the private sector. The latter participates within PPP projects in the expectation that it will make a reasonable return on investment. Except in projects with third sector organizations, the business case of PPP projects is usually based on the ability of the private sector to make a return and for the project to be affordable (to end-users) over the period. In addition to undertaking a full value-for-money assessment, using a risk-adjusted whole life cycle costing, there also needs to be careful consideration of the contractual commercial clauses associated with payment and reward mechanisms, step-in and exit clauses and the freedoms, rights and constraints the contractor (the private sector) has in order to operate the service and to generate additional revenue streams.

### **2. Insufficient funds**

81. PPPs risk failure because they are underfunded. If a project is publicly supported, the level of public funding available within the national (or regional or supranational) budget must be determined. Before the project commences, the public authority will need to secure



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the revenue funding required to support the project.

82. In PPPs where charges are levied on end-users, there may be a need to subsidize the operation. The public sector will often regulate the value of charges that can be levied from end-users. It is important to assess the extent to which regulation may result in a shortfall of income. Depending on the nature of the PPP, the public sector may or may not be willing to top up a shortfall in income. The need for any top-up, including the value and reason, will need to be identified and negotiated prior to the contract being signed.

83. For example, a government department may sign a deal with a private sector contractor, which contains a price escalator to deal with the impact of inflation over the period of the contract. The basis may be the same as that used internally within government, in which case if internal funding continues on the current basis for the period of the contract and the funding is available, there should not be a funding gap. However, if the funding basis changes or the government adopts a different inflation escalator over a period of time, the government department may no longer have the funds to support the contract. If the department applies for additional funds and these are not forthcoming, the public sector may have to renegotiate terms or default.

84. If there are insufficient funds identified through the affordability analysis, the appropriate actions suggested are:

- Seek additional funds to support the project (from internal or external sources).
- Review the project to see if the scope or specification or performance levels can be adjusted to reduce the overall cost.
- Consider different and mixed charging and budget support mechanisms.
- Renegotiate the terms of the initial contract.
- If the budget gap cannot be bridged, to make a clear decision not to go ahead with the project.

### **3. Contract length**

85. There are three considerations when agreeing the length of a PPP contract: investment cost, affordability and life cycle of the asset.

86. The length of time it takes for the service provider to pay off its debts and to make a reasonable return will be affected by the need to keep the prices affordable. A large infrastructure project will typically have a longer contract length, as it will need a longer period before the initial investment is recovered and before a reasonable return can be achieved. The earlier the private sector service provider can repay the loan, the lower the overall cost of the loan, thus potentially improving the return made by the service provider. This depends on how much the end-users and government can afford or are willing to pay. If at the outset of the project, financial modeling indicates that a shorter contract period might be possible, this can be considered taking all factors into account, but it is not necessarily the right thing to do.

### **4. Tender process**

87. It is important to engage procurement experts that understand both the development of good practice and the pitfalls associated with contracting for PPPs. It is essential for the public sector to prepare and issue complete and clear documentation that describes:

- the business need;
- the service required;

- the procurement process; and
- high-level scoring and evaluation methodology.

88. In order to ensure an effective competition, it is beneficial to attract at least three bidders. Having more than one or two bidders should encourage better quality submissions and competitive pricing. Having excessive bidders has the separate effect of becoming unmanageable given the complexity and cost of many PPPs. This may require the public sector to undertake a “market making” exercise such as a bidders’ conference where interested companies, both domestic and international, can meet and potentially form consortia.

89. The investment made by companies preparing bids can be significant, so it is important to ensure that they are properly scrutinized and evaluated. Bidders should be given an equal opportunity to present, discuss and clarify their bid submissions. Although given equal opportunity, the bidders need not take advantage of the time made available to them.

90. Best practice recommends that PPP contracts include a hierarchy of precedence for the controlling documents and deliverables, which should include a schedule or series of specifications that clearly identifies the government’s requirements (and as far as possible on an output basis), and written schedules that describe how the service provider is going to meet those requirements. Where this is an acceptable contracting approach within a jurisdiction, this approach is to be encouraged, as it retains the public sector’s output-based requirements and also provides some comfort as to the method or service delivery mechanism to be used.

## **5. Barriers to trade**

91. It is important that the private sector is restricted from operating in a manner that will or might create barriers to trade. These barriers could be in the form of fees (tolls, levies) or physical such as invasive searches or the time associated with the administration required to pass through border posts. It is important to be forward-thinking when creating the contract and to lay clearly down all such considerations.

## **6. Cooperation of relevant parties**

92. Some projects, such as those involving a Single Window, will require cooperation among several government agencies to create a new border-related service. These agencies will need to coordinate with each other as well as with all the private sector partners and other stakeholders. In order to address this, it would be pertinent to perform a risk assessment of the partners and clearly define the relationships, rights, obligations and liabilities of each partner.

93. As described in UNECE Recommendation 33, it is important to ensure the full participation of all relevant government agencies as early on in the process as possible.

## **7. Public perceptions**

94. The overt use of the private sector can lead to resentment from the end-users, particularly if they believe that the private sector is unfairly benefitting from the contractual arrangements. In some cases, it can lead to problems, non-compliance and avoidance.

95. Public authorities usually have the risk of applying administrative and procurement law. This allocation of risk might lead to 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. Here the public authority runs the risk of breaching principles of transparency and non-discrimination.

96. As long as the rules on PPP are not completely clear, private partners can see PPPs as ways to obtain a competitive edge in the market without having to take part in competition for related projects (by way of concluding public contracts). Public authorities could be convinced that they can choose 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 enabling for trade (in general) than trading with public authorities through transparent procurement procedures.

97. Some solutions to this would be to consider all legal issues pertinent to the proposed project and also to include all interested parties (especially end-users) in the process as early as possible through relevant consultation approaches (see UNECE Recommendation 40).

## **8. Protection of commercial and sensitive information**

98. While the principle should be full disclosure between the parties to the PPP contract, there need to be appropriate safeguards to avoid the disclosure of information that should remain confidential. The public authority may occasionally be prohibited by law from disclosing some information (for example, public health and welfare information), depending on the nature of the market concerned, or where national law requires prior judicial authorization for disclosure. More commonly, commercially sensitive information that could impede fair competition under the current PPP in Trade Facilitation or a future PPP in Trade Facilitation should not be disclosed.

99. An example of this might be a set of two competitors for a particular contract, in which information arising in one contractual relationship might affect competition in other contractual relationships. Given the need to apply the overriding principle of full disclosure, and to avoid abusive reliance on this type of exemption, the law allowing any exceptions from disclosure should be quoted describing the information that can be withheld and the categories of authorized or unauthorized persons allowed to use the data.

## **9. Risks in ICT PPPs**

100. Data (ownership, hosting, management manipulation, archiving, retrieval and disclosure) is another significant issue in ICT PPPs. The data should not be in the public domain and will need to be in compliance with both local privacy laws and any relevant legislation concerning the access to information. Access to data by the public sector when required is critical to the normal operation of governments.

101. Data ownership should be compatible with national laws governing this issue and therefore varies from one country to another. For effective ICT implementation, the place where the data is managed, maintained and distributed may be dictated by the data use needs of the private sector. However, the ultimate responsibility for the data should be with the public sector in order to protect its security and privacy. Depending on national legislation on the subject, the end-user originally providing the data may be considered the legal owner of the data and, as such, it may be necessary to allow that party to exercise a number of rights, such as: a) access to its data; b) verification of the accuracy, proper maintenance and upgrading of the data; and c) preservation of its privacy. Entities such as

National Agencies of Data Protection, can help to solve conflicts that might occur between the owner, the administrator, and the party responsible for warehousing the data.

102. It may be the case that the supplier wishes to mirror data on its own servers for back-up purposes. Access to servers and use, storage and destruction of data must be carefully considered by government when contracting the private sector. The importance of these issues should not be underestimated. For example, the government may not wish data to be held on servers in another country, in which case, this must be made clear to the service provider. Such constraints could have a negative impact on the price and should be considered as part of the business case. Equally, if these matters are not addressed, the risk of data going missing or not being accessible should be included in the business case and the costs associated to the data risks (for being inaccessible, inaccurate, or lost) must be included in the risks assessment.

103. When establishing the procurement and the contract, a choice will need to be made between the private sector and the public sector as to the final party responsible for the stewardship, collection, use, maintenance and disclosure of the data. It would be advisable to opt for the public sector partner to retain such responsibility. This implies that the government retains a constant access to the servers even beyond the life cycle of the contract and regardless of any claims from the private sector partner. Care should be taken, as the private sector usually possesses more advanced knowledge and skills in providing software and hardware.

104. In the event that the private sector partner goes bankrupt, the public sector will need to continue to use the systems on which the trade data is held. This needs to be considered during negotiations and dealt with appropriately in the contract. Consequently, it is advisable that ownership can be transferred. If licenses are held by the private sector partner in the PPP, arrangements should be made for the public sector to inherit the licenses at the end of the contract period or ensure that they can be transferred to a new private sector partner chosen by subsequent procurement.

105. Finally, when a new private sector service provider is contracted, the existing data should be freely handed over to the new supplier without the original private sector partner creating commercial or technical blockages. Such considerations will need to be addressed in the procurement and contract.

## 10. Legal aspects

106. There are a number of legal risks involved in PPPs. Organizing PPPs usually touches on a range of different laws (contract law, administrative law, etc.).

107. The legal framework in multiple countries can also be a potential source of risk. Where countries have signed up to various trade treaties, those treaties typically will identify the legislative authorities, mediators and arbiters and conflict resolution routes. Even if a specific contract is silent or a contradictory situation arises, it is possible to fall back onto international trade agreements to which the host country is a signatory.

108. For example, some countries will require companies based in their territory to respect certain legal obligations no matter where they conduct their business. In this way, the private sector partner who responds to a procurement tender may need to respect not only the legal constraints outlined in the procurement tender, but also those of the country linked to its head office. This could eventually provide further guarantees to the public sector publishing the tender, just as this could provide multiple constraints on the private sector respondent.

109. Critically, issues arise where a Trade Facilitation project requires contracts to be signed with authorities in different jurisdictions. Where countries are facing different and

possibly difficult economic situations, or have different political approaches or legal systems, these risks need to be considered early on in the procurement process by potential service providers. If the commitment or management approach is likely to create governance problems, these need to be factored into the bidders' risk model.

110. A PPP in Trade Facilitation is more likely to be successful if it conforms to a set of contract rules. In order for a PPP in Trade Facilitation to deliver benefits, it will need to consider the technical and economic performance of the project. The qualitative and quantitative factors to evaluate the project need to be considered within the appropriate regulatory context, all within a framework of good governance with effective mechanisms of supervision, monitoring and control.

## **E. Governance of PPPs and Trade Facilitation**

111. Many projects fail because of poor governance. Good governance is not just about implementing best practice guidance but also about effective and experienced contract managers who are capable of negotiating on equal terms with the private sector service providers. The following identifies the in-country help and support that can be provided when setting up and procuring services through a PPP and the post-commercial monitoring and evaluation mechanism required to maintain value for money.

### **1. PPP units**

112. A PPP unit may be a single unit within the central government cutting across departments, or a central entity with additional separate units in those departments undertaking PPP projects for the promotion, coordination and development of the common good. In countries with a federal structure, there may be a federal PPP unit or units as well as a unit at the state or provincial level. The PPP unit(s) should collate and disseminate procurement and contractual best practices and lessons learned.

113. It is therefore critical to find out if there is a PPP unit with responsibility for scrutinizing or supporting projects and defining and setting the local rules, regulation and legislation. Where there is a PPP unit, it would be typical for a member of staff from the unit to be assigned to one or more PPP projects to provide expert advice.

114. In terms of Trade Facilitation, sometimes PPP units are very knowledgeable about infrastructure or concession PPPs and familiar with health, power, transport or ICT. However, usually they are not specialized and do not have much experience in the area of Trade Facilitation and the goals of intergovernmental or international bodies.

115. Furthermore, although the World Trade Organization (WTO) instruments and best practice guides are recognized as the basis for sound Trade Facilitation administration throughout the world, a generalist PPP practitioner will not be familiar with them. It will therefore be up to the Trade Facilitation practitioners to ensure any PPP does not conflict with WTO and other internationally acknowledged best practice, whilst the PPP practitioner will have the responsibility to ensure that due process is followed with regard to procuring, monitoring and managing PPP service providers.

116. The key objectives of a PPP unit will differ depending on the local environment and the extent to which the principles for PPP are already embedded in a particular market. PPP units should, as far as possible, work together across national borders to ensure that best practice is shared internationally as well as within the country. In doing so, it should provide an enabling environment for cross-border and supranational PPPs. The role of a PPP unit may include, but not be limited to:

- promotion and coordination;
- development and dissemination of best practice;
- prioritisation of schemes seeking funding;
- sourcing reviewers to monitor quality of projects being progressed; and
- bringing together of partners (investment and delivery).

117. The effective performance of these roles by the PPP units will bring significant benefits in the delivery of the PPP objectives.

118. It is worth noting, however, that the creation of a PPP unit is neither a necessary or prerequisite condition for a successful PPP programme. PPP units tend to struggle when:

- Senior politicians do not support the PPP programme.
- Procurement of infrastructure and capital works is not transparent or competitive.
- Coordination within government is weak.
- There is limited or no cross-boundary cooperation.

## 2. Monitoring and evaluation

119. One of the characteristics of a PPP contract is that income streams are not guaranteed. Rather, the PPP service provider is remunerated according to the quality and level of service delivered compared to that specified. The model that underpins the performance and payment regime needs to be established in principle at the outset of the procurement. The actual mechanism used during the life cycle of the contract will be negotiated and finalised before contract signature. The contract and governance procedures should allow for changes to the mechanism according to the contractually-based predefined set of rules.

120. Actual monitoring of performance needs to be transparent and the parties should meet on a regular basis to agree on the nature and reason for performance failures. Where the level of performance is such that it results in deductions to payments, the level of deduction needs to be agreed between the parties. Any disputed “service failures” will not lead directly to a deduction but instead be referred to the appropriate governance board and go through a pre-agreed procedure in order to achieve resolution. The mechanism should allow the authority and the service provider limited flexibility in its application. For example, the mechanism may be used only as a tool to assess and improve performance in the inception phase of the project (which typically may be up to one year) and not lead to financial deductions.

121. Repeated failures should not be encouraged and therefore the mechanism should result in an increasing impact as the failure is repeated or continues over time. At the same time, the mechanism should allow for rectification periods during which repairs can be made and for which deductions are not calculated.

122. The mechanism should allow for key indicators and other indicators. Typically, key indicators lead to financial deductions whilst other indicators are simply measured to ascertain overall quality of performance and to identify areas for improvement. Typically, the authority is allowed to undertake limited swapping of key and other indicators on an annual basis. This helps to ensure that the focus of the monitoring and evaluation continues to be relevant throughout the contract.

123. As part of the governance process, a Partnering Board should be held at least annually between the authority and senior representatives of the delivery partner to discuss the performance of managing staff and the partnership as a whole.



## Annex I [English only]: PPP in Trade Facilitation - Key Characteristics

### I. Development/institutional

Key characteristics	Development PPPs are partnerships where public money (such as USAID) is combined with private monies (from companies, foundations, NGOs) in a joint fund to achieve a development objective. Typically, it may be capacity building, civil society strengthening, or health delivery programmes. A development PPP may be used to train customs and revenue officials.
Best practices model	Joint venture: the public sector and the private sector control the capital, risks and administration of the joint venture. A joint venture has the advantage of being a separate legal entity different and independent of its founders, but has the disadvantage of having surety bond responsibility, which can make it difficult to have clear leadership in the project (partners have veto rights).
Barriers to trade	The absence of implication investment in Trade Facilitation development PPPs should lead to a more transparent environment as they focus on providing resources for implementing best practice and capacity building.
Charging	User charges – these programmes are normally free for the recipients. Contracts are let to third parties to deliver the programme on behalf of the fund partners. The service delivery may be through training or through technical support and advice.
Performance models	Contracts will be signed with service providers. Payments will be made to the service provider. The contract mechanism is based on the quality of service and will be subject to outcomes achieved as a consequence of the service provided. For example, the generation of increased revenues.
Contract length	These PPP programmes are relatively short, from a few months to three to five years (although in the health sector they may be as long as seven years).
Asset ownership	There are normally no significant assets associated with a development PPP.
Risk management	Development PPPs often use computers and related software. A key issue is to ensure that all training is undertaken on appropriate platforms.

## II. Information and communications technology

Key characteristics	<p>ICT (Information and Communications Technology) Infrastructure</p> <ol style="list-style-type: none"> <li>Single Window</li> <li>e-procurement systems</li> <li>CCTV/identification cameras/charging cameras</li> </ol>
Best practices model	<p>Design, Build, Implement, Transfer, Operate</p> <p>Design – the system to be designed to integrate appropriately with related wider government systems. The system needs to reflect local conditions, e.g. reliable power supply, back-up power supply, robust kit, secure communications (possibly by satellite).</p> <p>Build – the supplier to recommend and supply the materials to the authority. The supplier takes the risk on compatibility issues regarding the recommended kit.</p> <p>Implement – the supplier to install all equipment and commission the system. The supplier may have a simple support contract to maintain the ICT or may have a wider brief to provide the full service or part of the service.</p> <p>Transfer – following “build” and “implement”, all hardware and communications equipment to be transferred to the ownership of the authority.</p> <p>Operate – the Service provider operated the facility/service on behalf of the new owner (a public sector entity)</p>
Barriers to trade	<ol style="list-style-type: none"> <li>Incompatible systems – failure of systems to talk to one another – lack of a genuine Single Window and the associated time/cost inefficiencies.</li> <li>User charges – entry/processing/registration charges set at a level that may discriminate against SMEs and local service providers.</li> <li>Charges set by the supplier (service provider) rather than controlled and capped by a public authority.</li> <li>An unexpected consequence of contractual performance and payment could be that the operator behaves in a way that maximizes its revenue and slows down or impedes trade.</li> </ol>
Charging	<p>User charges – it is ideal to use a unitary charge payable by the government and subject to a performance and availability mechanism.</p> <p>Transaction charges to the user – these may need to be limited so as not to impede trade and should be set by the government and not be linked to the cost of the contract. Otherwise, there is State shadow charging.</p> <p>The Supplier should be paid a pre-agreed fee or set of fees. Any element specifically tied to the generation of additional revenues should be capped to ensure that the supplier does not generate excessive profits by operating the service on behalf of the public sector.</p>
Performance models	<p>There are two elements:</p> <ol style="list-style-type: none"> <li>Performance (i.e. speed of response) and availability of the system; and</li> <li>Availability of the system and its ability to handle a specific amount of traffic at any one point.</li> </ol> <p>This would normally be an acceptable risk to the contractor, although this may limit the ability to future-proof the technology (for example, if trade doubles beyond expected growth over the contract period). In such a scenario, server response times could be defined.</p>

<p><b>Contract length</b></p>	<p>PPP is a poor choice for long-term PPP contracts and typically ICT contracts are shorter than infrastructure projects due to the rapidly changing pace of technology.</p> <p>ICT service providers will not typically take on the risk of technological change after the first “refresh” (normally approximately five years and certainly no more than ten years). Typical Contract lengths are:</p> <ul style="list-style-type: none"> <li>• Three to five years for departmental or local projects</li> <li>• Five to seven years for large departmental and expensive projects</li> <li>• Eight to ten years for large national ICT projects</li> <li>• Ten to fifteen years for major very expensive nationally important ICT projects</li> </ul> <p>The smaller the ICT component and the larger the service domain element, the more the likelihood is for a five-year contract with possible extension. It is also possible that trade software would need to be based on mobile technology for smaller traders – particularly in Africa, where technology is more mobile-based than, for example, in the UK, where there is a greater proliferation of land-based internet technology.</p>
<p><b>Asset ownership</b></p>	<p>As far as possible, assets should be transferred into public ownership as soon as possible following construction, depending on the type of PPP (DBOT may transfer ownership at a later time, but many recent PPPs are looking to have the transfer of ownership at an earlier stage).</p>
<p><b>Risk management</b></p>	<p>Ideally, the public sector should contract separately for the wider service delivery and restrict the PPP contract to the technical delivery of the system.</p> <p>All hardware, software and communications are to be recommended, provided and implemented, by the contractor. The system implementation and operation should be integrated with existing government systems, based on a fixed fee for implementation and operation.</p> <p>Performance and availability mechanisms should be in place with the opportunity for a supplier to earn back some of the income lost by improved performance, etc.</p>

### III. Infrastructure

<p>Key characteristics</p>	<p>DBOT or similar with typically longer-term contracts of up to 20, 25 or 30 years. Roadways and bridge projects could be even longer.</p> <p>These include buildings, roads and dry ports. The service provider may require third party financing. As with all PPP projects, fees are earned by the service provider during the operation phase of the project, not during the construction phase.</p>
<p>Best practices model</p>	<p>Design, Build, Implement, Transfer, Operate (DBITO/DBTO) or Design Build Operate Transfer (DBOT) depending on the strategic nature of the underlying asset and the local political and public attitude towards PPP</p>
<p>Barriers to trade</p>	<ul style="list-style-type: none"> <li>a) Need to align applicable legislation across borders.</li> <li>b) Need to align systems and processes which may be incompatible with existing systems and processes.</li> <li>c) Any service provider should be seeking to minimize processing time.</li> <li>d) If possible, repeat processes should be eliminated along the trade corridor.</li> </ul>
<p>Charging</p>	<p>Unitary Charge – in order to minimize the barriers to trade, the supplier should be paid according to a robust payment model based on performance and availability of service. There should be no direct association between the level of charges at the border posts, dry ports, etc. and the receipt of income by the service provider. Rather, the number of units charged and the accuracy of that charging should be the clear indicators used to pay the service provider against an agreed initial payment schedule.</p> <p>Any bonuses must be limited in scope and financed from the use of best practice operations rather than through perceived harassment or the slowing down of traffic creating a trade barrier. With direct charging, the income collection by the service provider is vulnerable to alternative routes that enable their service points to be by-passed.</p> <p>The unitary charge may comprise budgetary sourcing from more than one national entity. In such circumstances, it may be the case that direct charging is less risky for the service provider.</p>
<p>Performance models</p>	<p>The performance mechanism associated with the unitary charge should be taken into account, and also any such policies that affect the usage and payment of dues by users on the service provider.</p> <p>On the assumption that users are not directly charged, a performance model based on availability of asset is the easiest solution. For example, roads can be based on the number of lanes available or the average time travelled between two points, and ports can be based on the number of docking spaces available or turnaround times.</p> <p>Alternatively, a government could set key performance indicators (KPI) for the operator/service provider or develop a service model (i.e. how the service provider should respond to customers).</p> <p>More analysis is required on specific projects to understand the benefits of one approach over another. In all cases, a monitoring and evaluation mechanism needs to be established.</p>

<p><b>Contract length</b></p>	<p>The length of the contract should depend on the type of PPP project. The contract should be long enough for the asset to generate suitable income for the private sector and allow secondary investments – thus making it an attractive investment prospect. Overall compensation to the service provider needs to provide it with a reasonable return. At the same time, it should be kept in mind that it should not become a barrier to trade.</p> <p>Public sector aspects also need to be considered. The contract needs to be long enough to incentivize private sector actors participate in the PPP; it is also important for the public sector to consider how the contract is managed/operated. This will allow the public sector to successfully operate the infrastructure when and if it takes over the project.</p>
<p><b>Asset ownership</b></p>	<p>Once infrastructures are built, assets are transferred to the institutional unit that intends to use them in production.</p>
<p><b>Risk management</b></p>	<p>It is important to consider local legislation. For example, facilities such as ports may not be able to be held as private sector assets or the private sector may not be legally allowed to deliver certain services. If the legislative environment is not taken into consideration, it might be perceived as a barrier to bidding for the PPP.</p> <p>A PPP service may start and later be proven that it is not a service which can be provided by the private sector – for example, health services in some jurisdictions. Therefore, consideration must be given to revising local legislation if necessary.</p> <p>Risks associated with the physical assets remain with the service provider regardless of ownership.</p>

## **Annex II [English only]: Value-for-Money Factors**

1. The value-for money of a PPP is defined as the maximum of the difference between the value of the services provided and the costs. Some of the factors that affect the assessment of value-for-money in a PPP project are the following:

- a) Bid criteria.
- b) Delays during the project.
- c) Penalty mechanisms (e.g. for lack of quality, missed deadlines).
- d) Poor specification of risks allocation and management (and the cost associated with the transferable and retained risks).
- e) Unrealistic affordability calculation (poor cash-flow estimation and unrealistic assessment of the capability to attend payment commitments).
- f) Possibility of re-competing contracts in regular intervals during the PPP project in Trade Facilitation.
- g) Low demand for the service.
- h) Inappropriate pricing or taxes recovery.
- i) Investments in new capital assets during the contract duration.
- j) Property rights payments associated to the service delivery of the PPP project in Trade Facilitation.
- k) The use of economies of scale in any stage of the project.
- l) Interest rates, taxes, inflation, discount rates, and exchange rates estimation.
- m) Variable, semi-variable and fixed (direct and indirect) costs.

## Annex III [English only]: Risks

1. The risk assessment should reflect the evaluation of the potential for additional costs and the consequences of each risk. When an accurate monetary evaluation of risks is made in a PPP project, it is easier to estimate the price that each party should be willing to pay to transfer the risks from the public to the private sector and vice-versa.
2. To provide the value of risks, a probability factor is introduced using the following formula:

$$\text{Value of risks} = \text{Outcome} - \left( \left( \text{Consequences of risks/risk severity} * \text{Probability of risk events} \right) + \left( \text{Contingency/mitigation} + \text{Loss of revenues} \right) \right)$$

3. The contract should include a comprehensive list of risks. Each partner should assume the risks that it can handle best, and the responsibilities assumed by each partner must be agreed in the contract.
4. Any risk will be calculated in terms of costs; this is called risk assessment. We calculate the value of risks as the result of normal outcomes minus the risk assessment. Thus, any risk has to be associated to a probability of occurrence and a severity of the damages that it could cause in monetary terms.
5. The contract will also consider ways to avoid those risks (mitigation or contingency plan, insurances, management of risks, etc.) and calculate the value of the mitigation plan. Finally, the project will specify for each risk the losses of revenues produced when an event takes place (because the tasks to be performed in the PPP project will not be 100% fulfilled when the risks occurs, and those underperformed tasks have a cost for the PPP that must be assessed).
6. In order to evaluate the consequences of a risk in monetary terms, the risk needs to be identified and its consequences analysed. In a PPP project, the types of risk that could occur include:

Types of risk	Risk description	Monetary consequences of risk
<b>1. Macro economic risks (Xu et al. 2012)<sup>7</sup></b>		
Political risks	Unsecured legal framework, dispute resolution, the regulatory framework, government policy, taxation, expropriation and nationalization	Asset costs, financial costs, interest rate costs, inflation, discount costs
Foreign exchange fluctuation	Increase of overall costs of the project by unpredictable and high changes of money value	Cost of construction and/or maintenance, cost of exchange rate insurances, less revenues
Interest rate fluctuation	Increase of financial cost during the full length of the project	Financial cost, less revenues
Types of risk	Risk description	Monetary consequences of risk
<b>2. Construction and operation risks (Xu et al. 2012)</b>		

<sup>7</sup> Xu, Y., Yang, Y., Chan, A. P.C., Yeung, J. F.Y. & Cheng, H. Identification and Allocation of Risks Associated with PPP Water Projects in China. *International Journal of Strategic Property Management*, 15(3):275-294.

<b>Design risks</b>	The project design is unable to meet the performance and service requirements in the output specification	Redesign costs, construction costs and/or delay costs
<b>Commissioning risks</b>	This risk appears when a license, administrative permission, or an output specification needed is not reached	Costs from delays and maintenance
<b>Construction risks</b>	Delays, exceeding the budget or not following the specification	Cost of construction and/or maintenance
<b>Operating risks</b>	Inefficiencies in the project development and exploitation, operation cost overrun	Less revenues, maintenance costs
<b>Project/operation changes</b>	The project needs to be redesigned and improved in its construction and/or operation	Redesign costs, construction costs and/or delay costs
<b>Conflicting and imperfect contract</b>	The contract under-defines tasks and responsibilities to be undertaken during the project	Construction and operation costs and/or delay costs, financial risks, less revenue
<b>Price change</b>	Unexpected price increases	Construction and operation costs, financial risks, less revenue
<b>Latent defect risks</b>	Inherent and hidden risks in the construction of the project (infrastructure, software, equipment or other)	Permission costs, delay costs, construction and maintenance costs
<b>Technical and technological risks</b>	The project is unable to provide a valid solution for partners and/or consumers and clients	Less revenue, maintenance costs
<b>Residual value risks</b>	The loss of the value of assets budgeted at the moment of transferring the contract	Financial costs
<b>Industrial relation risks</b>	Risk of conflict of interest among the partners of a project	Financial costs, construction costs and/or delay costs
<b>Data risks</b>	Inaccurate data, data lost, or data inaccessibility	Costs from delays and maintenance
<b>Financial risks</b>	Funding risks	Delay costs, financial costs
<b>Performance risks</b>	The project is unable to reach the results defined in the contract	Less revenues, maintenance costs
<b>3. Government maturity risks (Xu et al. 2012)</b>		
<b>Government corruption</b>	Risks of unequal decisions, lack of information and transparency, conflict of interest	Permission costs, delay costs, construction and maintenance costs, less revenue
<b>Imperfect law and supervision system</b>	Unfair competition and non-transparent market	Permission costs, unexpected taxes, delay costs, construction and maintenance costs, less revenue
<b>Poor public decision-making process</b>	Immaturity of public institutions and bureaucratic processes	Permission costs, delay costs, construction and maintenance costs, less revenues
<b>Types of risk</b>	Risk description	Monetary consequences of risk
<b>4. Market environment risks (Xu et al. 2012)</b>		
<b>Demand risks</b>	The demand for the service or the infrastructure was overestimated	Financial cost, less revenue



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<b>Environmental and social risks</b>	Environmental externalities	Construction and maintenance costs
<b>5. Economic viability risks (Xu et al. 2012)</b>		
<b>Subjective project evaluation method</b>	Lack of methodology to evaluate mainly assets, liabilities, demand and risks	Construction and maintenance costs, financial cost, less revenue
<b>Insufficient project finance supervision</b>	Insufficient cash-flows generated, access to higher interest rates	Financial cost, less revenue

## Annex IV [English only]: Governance Process and Performance Process

Figure 4. Contract Governance: A reporting, monitoring and management approach.

	Governance body	Responsibility	Sub-committees reporting	Core membership
1.1	Annual Partnering Board		Deal with high-level relationship issues and any staffing concerns, high-level strategic discussion	Senior representation from the government department meets with senior representation from the private sector partner; others participate by invitation only
1.2	Quarterly Contract Board	The Board sits on a quarterly basis to consider contractual issues including contract changes, quality management, risk management, performance and payment dispute resolution	Sub-committees on: <ul style="list-style-type: none"> <li>a) Contract changes</li> <li>b) Performance and payment dispute resolution</li> <li>c) Processes and procedures</li> <li>d) Quality management</li> <li>e) Exit and transfer of assets</li> </ul>	Representatives of the public and private sectors, Service Director, legal and financial personnel, Contract Manager, commercial users
1.3	Monthly Performance Board	Agree performance report and authorise payments to supplier	Report to Quarterly Contract Board, prepare performance report and calculation of payments	Commercial managers, Contract Managers, Service Managers
1.4	Weekly meeting	Small issues that can be quickly resolved, report to the Monthly Performance Board on activity	Local Contract Manager (meeting could be by phone, but any actions taken must be reported to the Monthly Performance Board)	Service Manager

## Annex V [English only]: Special legal and contractual clauses

1 Contracting parties	This will clearly state the contracting parties. This may be in the form of a special purpose vehicle on behalf of the private sector; the public sector may be an inter-governmental agency. It is important to ensure that the legal jurisdiction that applies is articulated in the contract.
2 Indemnities and guarantees	It is normal for parent company guarantees to be sorted by the authority and indemnities to be provided.
3 Services required	The authority's requirements (this has precedence over "Services to be provided").
4 Services to be provided	The service provider's response.
5 Payment and performance	Contract specific negotiation about the performance regime.
6 Direct agreements	Agreement between the public sector and the funders in the event that the service provider fails and the funder has to step in to run the business for a period.
7 Contract change	Contract change mechanism that simplifies the contract change process.
8 Dispute resolution	Pre-agreed process using project governance structures, mediation and experts to resolve disputes.
9 Condition surveys	Mechanism to ensure that there is an asset status baseline defined at the outset of the contract (if the service involves refurbishing existing assets and at the end of the contract to establish the need for any dilapidation payments or renewal works to be undertaken by the service provider).
10 Acceptance of any underlying asset	The authority should not "accept" the underlying asset, as this would suggest that the asset is of sufficient quality, thereby removing the design and build risk from the service provider. Instead, a third party expert should be jointly appointed to assess that certain pre-specified tests have been undertaken and that the outcome has been successful, thus enabling the building to be occupied and the services to begin.
11 Ownership of assets	The contract should clearly state who owns the asset and on what basis.
12 Ownership and use of data (ICT)	The conditions under which the private sector may collect, host, share, manipulate and dispose of data must be clearly articulated. It is important that the data is also held in a manner that is accessible and readable to the authority in the event that the service provider suddenly ceases to provide the service.
13 Condition of assets	Any requirements associated with the condition of the asset when it is transferred (back) to the public sector.
14 Public sector audit rights	The authority needs to retain the right to inspect and audit all records associated with the projects. The service provider should be charged with keeping the records in good order and making them easily accessible.
15 Governance	A proper governance structure needs to be articulated in the contract and then adhered to. The structure should allow for simple service changes to be rapidly

