

## Where are we?

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## The ICRC and its Retinue

Public-Private Partnerships (“PPPs”) have been used globally as a unique model for undertaking infrastructure projects for decades.

Nigeria finally took a major step towards accessing the benefits of PPPs with the enactment of the Infrastructure Concession Regulatory Commission (Establishment) Act (“the ICRC Act”) in 2005.

The ICRC Act primarily:-

- allows for private sector participation in infrastructure development projects; and
- establishes the Commission (“the ICRC”) as the regulator of PPPs at the Federal level.

### Who can enter into PPPs?

The ICRC Act permits any Federal Government Ministry, Agency, Corporation or body involved in infrastructure development and financing to enter into contracts with private sector proponents for the development, financing and operation of infrastructure.

Essentially, only Federal bodies undertaking Federal projects will fall under the scope of the Act.

Infrastructure Development projects involving State government bodies and State infrastructure will not be regulated by the ICRC or subject to the Act. The implication of this is that State Governments have autonomy to develop their own legal frameworks for projects.

Private project proponents can be assured that irrespective of the provisions of the establishing law of any federal government agency with respect to private participation, federal agencies can now statutorily enter into PPP arrangements.

On the private side, public bodies are obliged to ensure that private partners possess the financial capacity, relevant expertise and experience in undertaking infrastructure development and maintenance.

### What projects can be undertaken as PPPs?

Generally, only projects involving Federal Government assets or undertaken by Federal Government bodies fall within the purview of the Act.

From a contracting perspective, the definition of ‘Concessions’ is fairly narrow as it focuses on elements of the build, finance, operate and transfer model of PPPs without including other



**Conceptual design of Lekki-Ikoyi Bridge**

Credit: [www.nidf.blogspot.com](http://www.nidf.blogspot.com)

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aspects such as leases, management contracts and service contracts.

In practice, however, the ICRC regulates various types of PPP arrangements.

### How are projects procured?

The procurement process endorsed by the Act is open competitive bidding, which meets global standards, but falls short of addressing critical issues such as the relationship between the Act and any procurement law.

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## Milestones

2005 - ICRC Act enacted

2008 - ICRC Board inaugurated

2009 - National PPP Policy passed

2010 - World Bank Nigeria PPP Program initiated

# Where are we?

## The ICRC and its Retinue

The ICRC has issued a series of guidelines relating to unsolicited proposals and the process for planning and securing approval for projects, but these matters should either be addressed in the Act or in comprehensive Regulations and should include detailed processes and timelines for all relevant parties to PPP transactions to address the issue of bureaucracy.

Without these detailed provisions, the process for planning and procuring projects can become unduly lengthy and cumbersome and increases the cost of the PPP process.

The Commission has hinted on a number of occasions of its awareness of the shortcomings in its enabling law. To establish a conducive and comprehensive framework for PPPs, the ICRC Act must be amended to reflect the full roles and responsibilities of all parties and stakeholders involved in PPPs.

### *What is the ICRC's Role?*

The ICRC's primary responsibility is to ensure proper execution of PPP projects and take custody of PPP Agreements in order to monitor project progress and compliance with contractual terms.

Critically, the Act addresses the issue of adverse government action by prohibiting arbitrary suspension and cancellation of Concession Agreements. The Commission is empowered to act as a mediator on disputes that arise on PPP projects.

Given that any trends towards cancellation of projects and government intervention would deter foreign participation in PPPs in Nigeria, this is a strong sell for PPP projects in Nigeria and assures investors of an official stance against political action in

projects.

### *How has the ICRC fared?*

The Commission was operationalised with the appointment of Engr. Mansur Ahmed as the Director-General in 2008.

The ICRC has performed optimally in creating awareness of the benefits of private sector participation in Infrastructure development. It has also held a number of capacity-building workshops for Ministries, Departments and Agencies to build knowledge of PPPs on the public authority side.

The ICRC has acted as a mediator on a number of projects, working with the contracting authority and the private partner to ensure projects are renegotiated and salvaged rather than terminated.

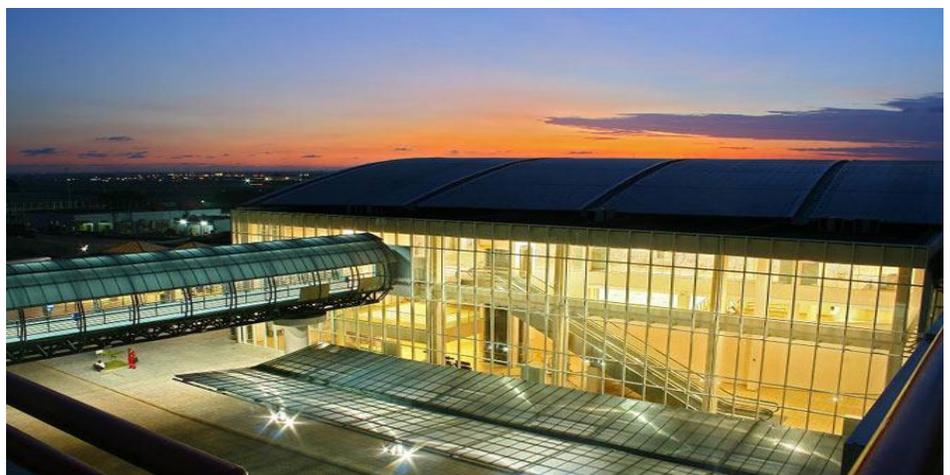
Generally, the perception is that Nigeria positions itself as a country that is ready to encourage investment in infrastructure projects. This is an agenda that needs to be aggressively pursued when you consider that the Infrastructure Bank estimates that N30 Trillion (approximately \$200 Billion) is required to close Nigeria's infrastructure

gap.

Having said all, the only way to close the infrastructure gap is to actualize real projects—project developers are attracted to tried and tested markets. Perhaps with the continuous effort of the ICRC, the World Bank's support on an already identified project pipeline, and political will of the Federal Government, we may see some more tolled roads, concessioned railways and more in the next 3—5 years.

Interest in PPPs must be driven by successfully closed projects, which is the best precedent for attracting project developers and financiers to infrastructure projects in Nigeria.

**The volume of ongoing projects is low—significantly lower than the \$200 Billion required to close the infrastructure gap in Nigeria.**



**Murtala Mohammed Airport; Domestic Terminal**

Credit: [www.icrc.gov.ng](http://www.icrc.gov.ng)

## Good to know:

### Is there an 'alternative road' obligation?

Public-Private Partnerships are most popular in infrastructure development projects such as roads, bridges and highways. Users are typically charged user fees or tolls for utilizing such infrastructure developed under PPP models.

There have been questions as to whether or not there is an obligation on either the investor or the government to provide alternative routes for road users who are unable or unwilling to paying tolls.

In Lagos State, for example, the Lekki Concession Company Toll Road, which is the seminal PPP Toll Road project in Nigeria, has faced many challenges including agitations by the Lekki-Epe residents for either LCC or the State Government to provide a full alternative route for users.

Commentators have criticized the project for lacking a full alternative route and protested that PPP toll road contracts should *always* have provisions for an alternative route. Over time, people have come to believe there is a legal obligation to provide an alternative route.

This assertion however has no legal basis in Nigeria. The relevant law for the LCC Project is the Lagos State Roads, Bridges and Highway Infrastructure Law 2005, (repealed by the Lagos State PPP Law 2011) which makes no imposition on either the State Government or the Concessionaire to provide an alternative route where tolled roads are created.

**Nigerian law does not impose an obligation to provide an alternative route to a toll road.**



**Conservation Plaza, Lekki Toll Road PPP Project**

*Credit: [www.lcc.com.ng](http://www.lcc.com.ng)*

At the Federal level, neither the Infrastructure Concession Regulatory Commission Act nor the Highways Act imposes such a duty.

Internationally, some countries have passed laws making it obligatory for an alternative route to exist (not necessarily that the Concessionaire has the obligation to provide the alternative road). There are several instances of reversals of alternative road obligations. The Hungarian Government, for example, had a free alternative route policy for toll roads. However, after the construction of the M5 toll road, traffic increased to unprecedented levels on the alternative routes as road users sought to avoid M5 tolls. The Government eventually had to renegotiate the Concession Agreement after complaints from residents along the alternative road route.

On several projects (Don Muang Tollway

in Bangkok, Birmingham Toll Road in the United Kingdom), the creation of alternative routes has made projects less commercially attractive due to reduced revenues resulting from diverted traffic. Private sector partners are driven by returns on investment and few investors would be willing to undertake projects where demand and revenue risk is borne solely by the private partner.

On a lighter note which will no doubt be relevant in Nigeria, it was found that company trucks and cars regularly defrauded companies by providing receipts for tolls paid while taking alternative routes.

In Lagos, at least, users need not despair, Lagos State Government has taken on the obligation to provide an alternative route at Admiralty Plaza, which is the busiest Toll point along the Lekki Toll Road.

## Major PPP Projects in Nigeria

Project/PPP Model	Contracting Authority	Private Partner	Size/Value	Status
Akamkpa Toll Road Project - Cross River / BOT	Cross River State Government	Daystar Akamkpa Investment Company Ltd	45km	MOU signed with Cross River State Government
Lekki Toll Road / BOT	Lagos State Bridges Roads & Highway Authority	Lekki Concession Company	N50 Billion	Financial close achieved.
Lagos-Ibadan Toll Road / DBOT	Federal Ministry of Works	Bi-Courtney Consortium	105km/ N89 Billion	Project renegotiations.
Katampe District Infrastructure / Design, Finance, Construct & Transfer	Federal Capital Development Agency Nigeria	Deanshanger Project Ltd	N61 Billion	Financial close achieved.
Teragro Benfruit Plant/ Lease	Benue State Government	Transnational Corporation of Nigeria	26,500 metric ton capacity plant	Project Agreements Executed; Operations commenced.
Tinapa Free Trade Zone /Concession	Cross River State Government	Tinapa Business Resort Limited	265 hectares	Operations stage
Akwa Ibom Agro-Industries Ltd/ Concession	Akwa Ibom Investment and Promotion Council (AKIIPOC)	Southern Investment Ltd	Estimated at \$38million	Feasibility study completed.
Greater Port Harcourt Housing Scheme	Greater Port Harcourt City Development Authority (GPHCDA)	DSC International	Estimated at N25billion plus N9.5 billion for Internal Township Services.	Construction stage.
Lagos Urban Light Rail Project/BOT	Lagos Area Metropolitan Transport Authority	Eko Rail Limited	\$550 Million	Contract negotiation stage
MMII Airport Project/ DBOT	Federal Airways Authority of Nigeria	Bi-Courtney Aviation Services Limited	N34 Billion	Construction completed; Operations stage

The table above focuses on PPPs on a larger scale and in the more conventional use of the term, highlighting the key PPP Projects being undertaken in Nigeria. It is expected that this list would increase significantly over the coming years across new sectors including power and social infrastructure.

# State Survey

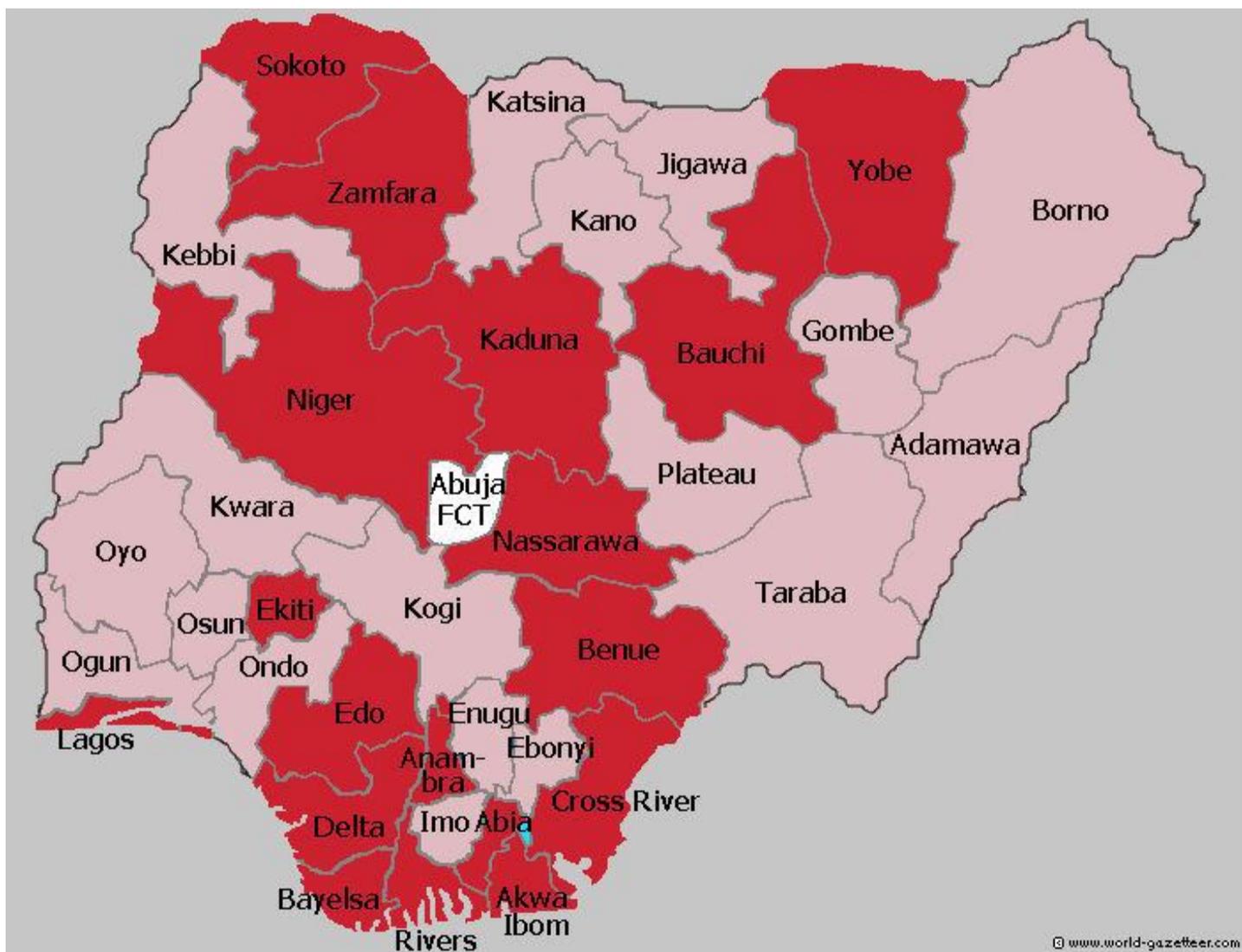


Figure 1.0

More developed framework  
 Less developed framework

A key aspect of PPPs in Nigeria is that there are dual regimes at Federal and State government levels.

The ICRC Act does not apply to infrastructure projects undertaken by State governments where no federal asset or ministry is involved.

States would have to develop their own frameworks for PPPs, and a number have made great progress in this

regard. The political map of Nigeria in figure 1.0 illustrates States that have taken significant steps towards creating an enabling environment for PPPs and are undertaking projects and highlights States that are yet to take such significant steps.

In creating the map, we have considered the following elements:-

- Existence of an Infrastructure

- Development or PPP Law or Policy
- Establishment of a PPP Office (by enactment or not)
- Successful undertaking of projects
- Existence of a public procurement law

## Industry News

- The Governor of Ekiti State on 26 July 2011, assented to a law enabling Public-Private Partnerships and establishing an Office for Public-Private Partnerships. The law permits state ministries, departments and agencies to enter into PPP arrangements with qualified private project proponents.
- Akwa Ibom State House of Assembly has passed a Public-Private Partnership Bill into law, which was assented to on May 8, 2012. The law establishes the Akwa Ibom State Public-Private Partnership Council, which is responsible for facilitating and regulating PPPs in Akwa Ibom.
- The National Pension Commission has released an exposure copy of draft Amended Regulations on Investment of Pension Fund Assets. Key changes include ability for pension fund assets to be invested in Infrastructure funds to a global portfolio limit of 10% (increased from 5%) and infrastructure bonds to a global portfolio limit of 25% (increased from 10%).
- The Federal Government has indicated that it will review and possibly re-negotiate the concessioning of the Lagos/Ibadan Expressway with a view to making the project more bankable.
- The World Bank continues implementation of its Nigeria PPP Program, which has an overall objective of increasing private investment in the Nigeria PPP infrastructure market and specifically the core infrastructure sectors.
- The Federal Airports Aviation Authority of Nigeria (FAAN) has unilaterally terminated its Concession Agreement with Maevis Ltd for upgrade, installation and management of automated airport service systems. Despite the intervention of the ICRC, the disputes, which involved allegations of breach of contract by both parties, could not be resolved amicably.



**Greater Port Harcourt City-Conceptual Design**

*Credit: [www.gphcity.com](http://www.gphcity.com)*

Nigeria PPP Review is a publication of Detail Commercial Solicitors, a commercial law firm based in Lagos, Nigeria. DETAIL has a leading Infrastructure and Public-Private Partnerships practice in Nigeria and is committed to driving the growth and establishment of the PPP sector in the Nation.

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