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Articulation between Soft Law and Hard Law in the Award of Public-Private Partnership Contracts through Unsolicited Bids in Burundi: Towards Harmonization with International Practice

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Abstract

The awarding of public-private partnership (PPP) contracts through unsolicited bids is characterized by flexible domestic law, with the involvement of public and private players aiming to achieve the general interest objective of public infrastructure development and, by extension, national development. These players are helping to build the normative framework for PPP project activities by spontaneous offer, given their increasingly widespread use on the bangs of positive law, while their standards are classically deprived of the binding force attached to hard law. Marked by its normative guarantee, the flexible law of unsolicited bids is situated at the threshold of the mandatory, and is essential to PPP law. It produces legal effects by linking up with the hard law of PPP contracts, which is the law of the parties. This link between soft law and hard law has a major legal impact on the transformation of the law and legal certainty, for the benefit of investment confidence, especially international investment confidence. Faced with the limitations of positive law on the award of PPP contracts in unsolicited bids, and the difficulties of interpreting soft law and hard law standards, there is a need for harmonization with international practice. To this end, the instruments of the United Nations Commission on International Trade Law (UNCITRAL) on PPPs are being used to link up with Burundian hard law through a transposition mechanism. It is therefore possible that our positive approach to PPP contracting could be improved, highlighting the principle of competition and the exception of non-competition, while taking into account the win-win principle, risk sharing and performance. Finally, the article considers the adjustments to the hard law that would be necessary if Burundi were to decide to revisit the

legal framework to make it more attractive to investment, and thus ensure the completion and financing of PPP contracts by spontaneous bidding.

Keywords

Spontaneous Offer, Soft Law, Hard Law, Articulation of Law, Mutation of Law, Legal Certainty, Competition and Harmonization Principles

1. Introduction

Reflecting on the issue of the relationship between soft and hard law in the award of public-private partnership (PPP) contracts by unsolicited bid in Burundi, immediately raises questions about the relevance of PPP investment in attracting investors to public infrastructure projects, and about the emphasis placed on the principle of competition and its exception of non-competitive bidding. Our positive law (Loi n˚1/19 du 19 juillet 2019 portant modification de la loi n˚1/14 du 27 avril 2015 portant Régime Général des Contrats de Partenariats public-privé), known as hard law (compulsory), makes no provision for the unsolicited bid procedure, and the latter has a normative place that we qualify as soft law (non-compulsory), which is effectively deployed with the conclusion of PPP contracts, which is also hard law.

For a French-speaking African and Burundian jurist accustomed to concentrating more on the law applicable and in force, and faced with the absence of any case law, the task of identifying this flexible law as a source of law requires an approach to interpretation that will be based on doctrine through the chosen term of legal pluralism. Legal pluralism describes a contemporary situation in which legal systems are not hierarchical, but interact with each other, without any of them denying the independence or normativity of the other. This is a movement towards harmonization of legal orders, tending towards a common law which, however, does not go so far as to merge legal orders (Brunet, 2010; La Rosa & Colavitti, 2022).

Both in general international law and in Burundian domestic law, there are normative texts of flexible law that coexist with positive law, and in Burundi they are still perceived as insusceptible to being invoked in court. These include, on the one hand, the instruments of the United Nations Commission on International Trade Law (UNCITRAL) on PPPs (Commission des Nations-Unies pour le Droit Commercial International; NATIONS UNIES, 2019) and, on the other hand, memorandums of understanding and decisions of the Council of Ministers. It is in this perspective that the present study seeks to make its contribution to the articulation of the law for the purpose of harmonizing our positive law with the instruments of flexible law. The aim is to achieve the completion and financing of PPPP contracts.

However, the context of PPP investments in Burundi, as elsewhere, is that of a market economy, which in principle requires private capital (Fall, 2018). Private

individuals need an appropriate legal environment to enable them to make their investments bear fruit. It is a legitimate concern for both the State and private partners to have a legal framework that takes into account multiple parameters, including the legal security of investments in the award of PPP contracts through unsolicited bids.

To this end, as mentioned in the PPP guidelines of the Common Market in East and Southern Africa (COMESA), the omnipresence of unsolicited bids is a constant practice in Africa in general, while the laws of many countries make no provision for examining this type of project proposal (MARCHÉ COMMUN de l'Afrique orientale et austral, 2014). This international organization, of which Burundi has been a State-Party since 1994, recommends that PPP projects based on unsolicited bids based on innovative ideas be maintained in a competitive process. The UNCITRAL instruments on PPPs take into account both competition and non-competition for compelling reasons of general interest (NATIONS UNIES, 2020).

In positive law, this raises difficulties in interpreting soft law and hard law standards for PPP contract players, whose current legal investment tool is the unsolicited bid. In the prevailing opinion, the spontaneous offer is perceived as a legal tool for public procurement carried out without competition.

The public procurement code and the 2019 PPP law are two such instruments (Loi n˚1/04 du 29 janvier 2018 portant modification de la loi n˚1/01 du 4 février 2008 portant code des marchés publics). It is a tool that has emerged in the service of development (Périchon, 2019), but is governed by the same founding principles as PPP contracts: "The award of a partnership contract is subject to the principles of freedom of access to public procurement, equal treatment of candidates and transparency of procedures" (n˚1/19 du 19 juillet 2019 portant modification de la loi n˚1/14 du 27 avril 2015 portant Régime Général des Contrats de Partenariats public-privé). These three principles are enshrined by the Burundian legislator in a way that encourages bidders to participate in PPP public procurement using one of the following procedures:

"1. Open tender preceded by a pre-qualification procedure;
2. Restricted invitation to tender;
3. Competitive dialogue;
4. Gré à gré or entente directe" (Loi n˚1/19 du 17 juin 2021 portant modification de la loi n˚1/24 du 10 septembre 2008 portant Code des Investissements du Burundi).

However, the applicability of these legal provisions requires public bodies to plan their PPP project needs, and to carry out preliminary technical, financial and legal studies (Mohamed Salah, 2001). These studies, especially the technical ones, entail financial costs that are difficult to meet, and make the competitive tendering provided for under positive law unthinkable. As a result, non-competition has an impact on all the mechanisms for complying with advertising obligations and selecting the most economically advantageous offer for

Burundi.

However, in this age of the primacy of attractiveness, or the imperative for a legal system to be as attractive as possible to investors, the analysis of unsolicited bids in the award of PPP contracts cannot escape the harmonization of international practice embodied in the UNCITRAL instruments on PPPs (NATIONS UNIES, 2020; Ferchaud et al., 2020; Pelek, 2019). This harmonization approach is not synonymous with standardization or uniformity. It ensures respect for ordered legal pluralism, which designates an ordering, a movement towards order that provides an explicit or implicit national margin of appreciation that enables harmonization and allows for a kind of right to difference, provided we consider that the notion of margin enables pluralism to be ordered through a set and controlled threshold of compatibility, the variability of which enables an evolving conception of law (Delmas-Marty, 2004).

To support our approach of linking the law to harmonization with international practice, we have chosen to draw inspiration from the UNCITRAL instruments on PPPs, which articulation propose a model for awarding PPP contracts through competitive bidding and, exceptionally, through non-competitive bidding. These instruments recommend that all States take due account of the model provisions and the Legislative Guide when amending their PPP legislation. The aim is to support the adaptation of positive law, in order to facilitate private participation in the development of infrastructure, works or public services through PPPs, and these instruments are recognized as effective by economic operators (NATIONS UNIES, 2020). The legitimacy of these instruments lies in the fact that developing countries participate in them, and they are adopted by a resolution of the United Nations General Assembly (NATIONS UNIES, 2020).

In this context, we would like to point out that the expression “soft law” refers to the idea of a “soft” law, i.e. without obligation or sanction (Thibierge, 2003), or with little sanction. This non-mandatory, but recommendatory approach (Amselek, 1982) has permeated the PPP field, and is particularly conducive to it. This observation may still be a source of scientific curiosity for any researcher seeking to resolve the difficulties of interpreting the norms of soft state and non-state law in relation to hard state law, and the mechanism for articulating the law in a context where Burundian jurisprudence and doctrine are non-existent in PPP, even though the legal and economic stakes are considerable. Questions arise as to whether soft law supplements hard law, replaces it, contradicts it or simply complements it, or even interprets it, or whether it should be transposed or incorporated into PPP law by harmonization with UNCITRAL instruments. In analyzing all these questions, we need to focus on one main issue: how can PPP contracts be implemented and financed by means of unsolicited bids? The choice of technique is to articulate the law through the complementarity of domestic soft law and state hard law, and through the transposition of international soft law to domestic hard law. We therefore accept that soft law and hard law do not act in competition or opposition, but are ar-

ranged around the same purpose to achieve, in our opinion, the same objective of carrying out and financing the PPP contract. This study will focus on two main areas. On the one hand, the scope and legal impact of PPP contracting, which highlights the link between flexible state law and hard domestic law through the process of complementarity (2); and on the other hand, the legal mechanisms of perfectibility for competitive bidding in PPP contracting, which highlights the link between flexible international law and hard domestic law through the technique of transposition (3).

2. Methods and Methodology

We use the exegetical method, which consists in interpreting legal texts, and the documentary method, which consists in consulting works that have focused on this topic of harmonization between soft law and hard law in the award of public-private partnership contracts through unsolicited bids like scientific publications, periodicals and others. Once we had gathered the relevant information, we had to turn to a comparative method.

Throughout this paper, Zotero tool has been used in reference and biography.

3. Analysis Results

The articulation between soft law and hard law in the award of public-private partnership contracts through unsolicited bids in Burundi is analyzed through two options:

1) Articulating the law through complementarity with an eye to the scope and the legal implications of awarding contracts through unsolicited bids. This is to be analyzed in two sides; the implications for the award of PPP contracts through unsolicited bids on one hand and the legal implications of awarding contracts through unsolicited on the other hand.

2) Legal mechanisms for the perfectibility of PPP contracting through unsolicited bids: articulating the law through transposition perceived in two angles also; the legal mechanisms for improving domestic hard law with competitive bidding followed by dialogue on one hand and the legal mechanisms for improving domestic hard law with non-competitive bids followed by direct negotiation on the other hand.

4. Discussion of the Results

4.1. Articulating the Law through Complementarity: Scope and Legal Implications of Awarding Contracts through Unsolicited Bids

Unsolicited bids for PPP contracts are common practice in Africa in general, and in Burundi in particular. The international organization COMESA (MARCHÉ COMMUN de l'Afrique orientale et austral, 2014) notes that some countries find it difficult to appreciate unsolicited bids because of the problems they entail, particularly the risks involved in terms of lack of competition. To date, there are

no legal provisions for examining them in the positive laws of these countries. This article also draws on concepts related to flexible law, such as usage, custom, even spontaneous law and technical standards, to clarify the historical benchmarks and judicial non-assimilation, before examining the legal implications of flexible state law, both in terms of the transformation of the law and the legal security of PPP investments.

4.1.1. Implications for the Award of PPP Contracts through Unsolicited Bids

This procedure originates from the empire of law n˚1/14 of April 27, 2015 on the general regime for public-private partnership contracts, but it was always practiced prior to this law by mechanism of non-competitive bidding (Loi n˚1/19 du 19 juillet 2019 portant modification de la loi n˚1/14 du 27 avril 2015 portant Régime Général des Contrats de Partenariats public-privé, arts. 11, 33 al.2 and 35) preceded by the signing of a memorandum of understanding and authorization by the Council of Ministers. The resistance of international investors to spontaneous competitive bidding in return for an indemnity based on preliminary studies by the project contributor was one of the reasons for its modification by the current 2019 law. This has the effect of creating a risk of confusion with related concepts, which must be resolved quickly.

Under the 2015 law, private partner candidates could submit unsolicited bids, provided that they entrusted the preliminary studies to the independent administrative authority known as the "Agence d'appui à la réalisation des contrats de partenariat public-privé-ARCP", which was required not only to assess the acceptability of the studies, but also to carry out a preliminary assessment of them, backed up by an opinion on their appropriateness, before making them available to all candidates. Candidates who submit unsolicited bids take part in the bidding process under the same conditions as other candidates.

Article 36 stipulates that: "The candidate who has submitted the unsolicited bid to which the contracting authority has responded may benefit from equitable remuneration for his bid in the event that the contract is not awarded to him, in accordance with the following procedures:

1˚ granting of a bonus, the amount of which is specified in the invitation to tender when the bids submitted to the candidates are evaluated;

2˚ collection of an equitable amount for studies carried out by the contractor in support of its bid, if the latter is unsuccessful;

3˚ in both cases, the candidate whose bid is accepted is responsible for paying this amount, which is determined by the Agence d'appui à la réalisation des Contrats de partenariat (Loi n˚1/19 du 19 juillet 2019 portant modification de la loi n˚1/14 du 27 avril 2015 portant Régime Général des Contrats de Partenariats public-privé, art. 36).

This strict procedure, which is preceded by preliminary studies by the private partner, is admissible if the contracting authority has not made known, at the date of submission of the bid, its intention, even if it is eventual, to carry out

such a project. When the contracting authority in collaboration with the ARCP intends to proceed, it organizes a call for tenders under the conditions set out in the 2015 PPP law in Articles 32 and 34.

However, despite this legal framework, which ensures competitive bidding and transparency of procedure in the case of unsolicited bids, the general observation has been the persistence or survival of unsolicited bid PPP contracts without competitive bidding, but preceded by a memorandum of understanding and authorization/approval by the Council of Ministers. This confirms the complementary nature of flexible and strict law. The fear of private partner candidates who objected to the nature of competitive procedures, which offer no assurance of being awarded a PPP contract, was keenly felt. In addition, the unsuccessful private partner candidate had no guarantee that the successful candidate would reimburse the fair amount of the studies carried out. The private sector was more-keen to see rules allowing the contracting authority to negotiate unsolicited bids directly with their authors, and saw this as an incentive to submit such innovative bids for the development of infrastructure in Burundi.

Doubts about the outcome of the compensation route for the unsuccessful candidate who implemented the project combined with the State's concern to ensure the principles of access to PPP public procurement (freedom, equality and transparency), were, in our opinion, probably one of the reasons for amending the 2015 law to replace it with the 2019 law. As it stands, the absence of competition is the rule in PPP contracting before, during and after the 2015 PPP law. What's more, there has been no experience of competitive bidding using the classic tender procedure based on preliminary studies by public bodies. The lack of such studies is the main reason for this. There is even a misconception that when we talk about unsolicited bids, we are talking about PPPs without competition. This view also contributes to the erroneous legal assimilation of spontaneous bidding with related notions, leading to confusion that deserves to be cleared up.

The 2015 PPP law defined the spontaneous offer as: "a procedure by which any individual or legal entity can spontaneously submit a partnership project to the contracting authority" (Loi n˚1/19 du 19 juillet 2019 portant modification de la loi n˚1/14 du 27 avril 2015 portant Régime Général des Contrats de Partenariats public-privé, art. 2 §5). The UNCITRAL Model Provisions on PPPs define it as: "any proposal for the execution of an infrastructure project that is not submitted in response to a request for proposals issued by the contracting authority as part of a selection procedure" (NATIONS UNIES, 2020). The common denominator of these two definitions is the procedural nature of the project to be submitted to the contracting authority, but the aspect of the innovative project and the objective of achieving a PPP contract are not taken into account, even though the intention of the project initiator is to achieve a PPP contract. Furthermore, as mentioned in the definition of the UNCITRAL Model Provisions, it concerns the execution of a project, which implies that

the contract will have been concluded with or without competition. The UNCITRAL PPP instruments also recognize that, in exceptional circumstances, contracts may be awarded without competition in view of the particular aspects of the project. So, to give a normative instrument to Burundian flexible law, we add the indispensable conclusion of the memorandum of understanding and authorization of the Council of Ministers to the definition of the unsolicited bid. We formulate the definition as follows: An unsolicited bid is any PPP contract with or without competition, accompanied by the conclusion of a memorandum of understanding and the authorization of the Council of Ministers, between a private partner known as the project promoter and a public entity that accepts the single bid with the aim of implementing it within the framework of a public-private partnership contract. The merit of this definition encompasses the selective and non-selective nature of the unsolicited bid, and allows the highest State authority to use the options best suited to the general interest objective.

This spontaneous bidding procedure is consubstantial with PPP contracts, and does not imply legal assimilation with related legal concepts such as usage, custom, spontaneous law or even technical standards and suppletive law.

Usage is a term used to designate both the norm resulting from repeated behavior, and the behavior itself that gives rise to it (Thibierge, 2006). Usage stems from the generalized repetition of a practice, and corresponds to a specific legal concept that should be distinguished from soft law. While flexible law and usage may generally resemble each other in terms of their non-binding nature, flexible law is often contained in a so-called standard instrument, guide, directive, guideline, etc., whereas usage is understood as a norm which finds its source in the widespread and constant observation of a practice in a given territory and in a particular setting, such as an economic or private activity, a profession or a group of people, because of the particular suitability of this practice to the needs expressed in this setting, or its conformity to common values (Brès, 2018).

In the case of custom, it is compulsory, which rules out its assimilation to flexible law. Moreover, customary law is spontaneous law, i.e. a set of rules born of "sufficiently constant and general repetition" (Deumier, 2000). In Burundi, only the inheritance system is governed by customary law.

On the other hand, spontaneous law is closer to flexible law in spontaneous offer than to flexible law in spontaneous offer, in that spontaneous law is the result of a precise formation process, to which flexible law does not respond.

Flexible law is not the fruit of repeated behavior, and does not contribute to opinion juris. Spontaneous law and flexible law are also distinguished by their process of modification and disappearance. Spontaneous law arises from its repeated application, and its existence is linked to its effectiveness. Conversely, a spontaneous norm disappears if its widespread ineffectiveness is observed (Roubier, 2005). Soft law, on the other hand, is based on a set of formal rules whose existence depends on compliance with the procedure from which they

derive their authority (Thibierge et al., 2021).

As far as technical standards are concerned, they are understood to be reference frameworks, prescriptive texts that are binding on their addressees, published by standards organizations or provided for in international treaties (ISO-International Standard Organization). Most of these standards are accompanied by sanctions. As a result, they take on the character of de jure or de facto imperative rules, far removed from the optional nature of the flexible law governing unsolicited bids.

Spontaneous offers differ from suppletive law, which is binding in the absence of a contrary will expressed by the parties to the contract. As Pérès - DOURDOU C, points out: One thing is the binding nature of a rule of law, which derives from the obligation to apply it in accordance with what it provides (...). Another thing is the determination of the conditions it requires for this purpose, i.e. the modalities which will enable it to be considered, in such a hypothesis, binding (Pérès, 2003). Spontaneous offers should not be confused with suppletive law, since the latter is a strict law in that it is mandatory rather than optional, unlike the flexible law of spontaneous offers, which is defined by its inability to impose obligations. This is not a case where the parties to the PPP contract can choose between unsolicited bids with or without competition. The decisive factor in awarding PPP contracts is whether or not the public authorities have carried out preliminary studies. Moreover, in the context of Burundian positive law, it is not the legislator who authorizes or directs the practice of awarding PPP contracts on the basis of unsolicited bids without competition, as a derogation from the general principle of competition, but rather it is the flexible law that complements the strict law in order to achieve the general interest objective of implementing PPP projects and developing public infrastructures.

On the basis of the above, it is considered that the unsolicited bid procedure as a soft law complements the hard law by its incorporation into the PPP contract, which integrates the inclusion of this procedure in the preamble and provision of the contract, which constitutes the Law of the parties and is fair and useful to achieve the objective of the general interest for the development of public infrastructures. In our view, this general interest objective underpins the binding force of the PPP contract, which incorporates the unsolicited bid. This method of action, based on the contractual acceptance of soft law, is clearly an articulation of soft law with hard law through the process of complementarity, and gives reason to believe that PPP investments are more contractual than legislative in nature. It is a big question to search for the legal implications of PPP contracts awarded by unsolicited bids.

4.1.2. Legal Implications of Awarding Contracts through Unsolicited

We have identified two major legal implications of PPP contracting: on the one hand, the transformation of PPP contracting law and, on the other, the objective of ensuring legal certainty for investments in PPP contracting.

Unsolicited bids have a legal impact on the shift from hard law to soft law. In

the current state of Burundi's legal system, this is the result of the State's approval and authorization of memoranda of understanding. The latter relies not only on positive law, but also on flexible law, as legal pluralism is both a fact and a value. For a French-speaking jurist accustomed to the reflexes of the civil law system of applying the law with primacy of the law, legal pluralism can be a polemical subject, and it is essential for us to clarify it by drawing inspiration from a few doctrinal positions before attempting to claim legal pluralism of the order of hard law and the order of soft law to finally establish a Burundian state legal system in the articulation of domestic soft law and hard law through the process of articulating law by complementarity.

As Dominique TERRE so eloquently put it: "Happy are the societies that know how to adapt their law to the colors of pluralism" (Terre, 2005).

An understanding of legal pluralism requires a prior representation of legal monism, which takes the form of the State, the only one authorized to order conduct in a unique and exclusive way (Terre, 2005). Carré de Malberg and Hans Kelsen were among the most influential and determined of the jurists who supported this conception.

Carré de Malberg's thinking, expressed in his contribution to the general theory of the state, is that the state alone is invested with the specific power of sovereignty (Carré de Malberg, 2008). The starting point of any legal order is the emergence of the creative power of law, i.e. the State itself. From this perspective, law, seen above all as an external constraint, can only derive from the state.

The Kelsenian perspective, as expressed in the pure theory of law (Kelsen, 1999), is different from that of Carré de Malberg, although the end result is the same. Unlike classical positivists such as Carré de Malberg, for whom the state is a subject of will and action existing independently of law, and even before law, Kelsen believes that the state and law are one and the same thing, designated by two different names (Terre, 2005). In his view, the three elements that make up the state, according to traditional theory—people, territory and public power—can only be defined in legal terms. Indeed, the population is the totality of human beings subject to the particular norms of a legal order; the territory is the space over which these norms are applicable; finally, public power is that which is exercised by means of these norms. Law and the state are thus one and the same phenomenon. People, territory and public power are obviously not synonymous, but are ultimately unified, because they are the same thing under a different disposition.

The pluralist position denounces the totalizing and exclusive nature of legal monism, which not only reinforces the idea of state supremacy, but also underestimates the complexity of social life by giving it the image of a coherent, homogeneous whole. Generally speaking, the problem of legal pluralism answers two fundamental questions: the first is that of the sources of law, and the second is that of the ways in which legal regulation is shared between different social organizations (Kelsen, 1999; Terre, 2005).

Legal pluralism is not limited to highlighting the non-state dimension of law,

or to characterizing the relationship between one legal order (structured as a system) and another, and above all between non-state legal orders and the state, since there are a multitude of normative sources. Theorists of pluralism have considered it essential to understand the relationships between them: independence, autonomy, complementarity, integration, and also competition (Terre, 2005). Although considered incomplete, this brief overview of the most important doctrines on legal pluralism may enable us to analyze the mutation of law from the angle of the articulation of law in spontaneous supply. Internally, there are two legal orders: the soft law order and the hard law order. They complement each other to form a state legal system in relation to the international soft law order of the UNCITRAL PPP instruments.

Our argument for the mutation of law in the articulation of soft law and hard law through a process of complementarity is based on legal analyses of the normative force (Hachez, 2010; Thibierge, 2009) of two standards, which cannot be dichotomous. We see this as a way of analyzing the mutation of law in the colors of legal pluralism.

In principle, strict law derives its normative force from state coercion, and the binding nature of the law must be supported by the executive. Without the support of the executive, there is a high risk that strict law will be devoid of normative force, or even have a recommendatory character (Thibierge, 2006, 2009). The flexible law of unsolicited bids runs counter to this hierarchy of norms. Indeed, the absence of preliminary studies by the contracting authority is an obstacle to PPP tendering under the PPP law, and only flexible law can achieve the objective of implementing PPP projects; the impression that flexible law is purely recommendatory, or even optional, is misleading here in unsolicited bids. The legal effect of soft law is the same as that of hard law, and hard law is not so effective as to give reason to believe that, from the point of view of the legal scene, soft law is more effective than hard law. This level of legal mutation reaffirms and completes each other, ultimately forming a single state legal system.

Spontaneous bidding is a legal tool for investment, and is supported by the executive (Council of Ministers) not only by authorizing the conclusion of memoranda of understanding, but also by approving PPP contract documents. In the limited scope of this article, we reserve the right to elaborate on doctrinal approaches to definitions, as the notion of legal certainty is elusive (Farjat, 2003). However, for the purposes of this study, we shall retain for all practical purposes that, according to Thomas PIAZZON, legal certainty is more a value and a genuine functional principle: "the ideal of reliability of an accessible and comprehensible law, which enables the subject of the law to foresee the legal consequences of their acts or behavior, and which respects the legitimate forecasts already built up by the subjects of the law whose realization it favors" (Piazzon, 2006). For Thomas LARDIEUX, legal certainty covers two realities. On the one hand, it is an idea or a direction to be taken. In other words, legal certainty is a requirement common to all legal systems, calling for stability, predictability, un-

ity and consistency in the law (Lardeux, 2021).

Before, during and after the 2015 PPP Act, PPP contracts were awarded on the basis of unsolicited bids, and their stability and consistency inspire confidence in the parties to the PPP contract. There is no legal risk to the investment, such as the cancellation and termination of the PPP contract on the grounds of the award procedure, since the parties are bound by strict contract law, which includes recourse to international arbitration for dispute settlement.

Of course, any investment can be subject to a number of risks (Fall, 2018). Some of these risks are normal, while others are not. Normal risks are those that any economic operator should face. It's up to the investor to take them into account. Ensuring the security of investments therefore means insuring them against abnormal risks that are identified as such. These are risks that are generally unforeseeable insofar as they are foreign to the purely economic environment, such as the security offered by the law. But what kind of law are we talking about? Soft law or hard law? The immediate answer to this question is likely to focus on positive law, or even the hierarchy of norms, in order to rule out flexible law. However, these are classic theoretical positions that can perfectly well be overcome. In any case, they are inadequate to explain why flexible law is in fact the rule, and why it is so successful in practice and enjoys the normative guarantee of being effective and respected by regulatory authorities (Thibierge et al., 2021) such as the executive (Council of Ministers), the ARCP, other authorities involved in the project and private partners.

Our legal certainty argument transcends positive law and the hierarchy of norms. As already stated, the nature of PPPs in Burundi is more contractual than legislative. This legal observation leads us to analyze the legal security of investments based on the theory of the normative guarantee of flexible law with the legal investment tool known as the memorandum of understanding.

The doctrine defines the normative guarantee as: "a dimension of force linked to compliance with the norm. What is guaranteed is not the norm itself, but rather its respect by legal and social actors, as well as its validity and conformity with other norms of the legal system" (Thibierge, 2009; Thibierge et al., 2021). This guarantee does not have to be effectively deployed; only the potential of the guarantee matters. The analysis of the normative guarantee corresponds in reality to the guarantee of respect for the norm of soft law and hard law by the executive power. The other normative guarantee is the acceptance of soft law by the PPP contract, which constitutes the hard law of the parties, whose stipulations state that the preamble recalls the context of the PPP contract are part of the contract. This gives the unsolicited offer a high legal value, in addition to the approval of the PPP contract by the Council of Ministers. In addition to the executive power, strict contract law comes to enshrine soft law. This level of penetration or interaction of soft and hard law in a state legal system provides legal certainty for PPP investments. The same applies to the legal investment tool of memoranda of understanding.

By definition, a memorandum of understanding (MOU) is an agreement that

sets out the terms of a planned collaboration or understanding between two parties. It is by nature non-binding. An MOU generally establishes the objectives of the collaboration and defines the roles and responsibilities of the parties, the scope of the project and its expected results, with the aim of facilitating the continuation of more comprehensive negotiations (Brewin, 2023). This agreement constitutes a preliminary phase and is crucial, as numerous pre-contractual steps are required to ensure that the investment will be carried out and operated responsibly in a way that respects the public interest. Foreign investors, in particular, may seek reassurance from a written agreement signed by the government, which can provide them with legal certainty that there is a clear and transparent process leading to a detailed and binding investment contract.

The normative guarantee of the MOU is that it is respected by the parties, and although it is non-binding, this does not mean that it is not legally sanctioned. In Yseult MARIQUE's words, there is "a reciprocal duty of loyalty and collaboration in administrative procedures" (Larcier, 2021), which entails obligations on the part of the prospective private partner to commit funding for preliminary studies once the MOU has been signed. In the event of breach of an obligation by one of the parties, particularly the private partner candidate, administrative sanctions are limited to administrative measures such as the administrative suspension of the various authorizations or permissions issued by the State and communes, and the suspension of access to state-owned land to carry out preliminary studies. On the basis of the good faith and trust placed in the private partner by the State, the executive power can act against the assets or the person of the prospective private partner who withdraws from the MOU without valid reason. On this last aspect, in the event of inaction on the part of the administration, the MOU may appear to have a weak normative guarantee that could jeopardize the legal security of the PPP contract award by unsolicited bid, and hence the justification for our approach of admitting flexible law to the State legal system in the same way as hard law. In our view, the opposite is true: the question of administrative sanctions is more a question of the degree, not the nature, of the normative guarantee of the MOU.

However, the fact that PPP contracts can be awarded on the basis of unsolicited bids without competition is not without its critics, for example in terms of transparency, which could jeopardize the attractiveness of international investments in countries with a culture of competition law as Treaty of Rome and Lisbon, which remains an instrument in the European integration process (Bakhoum, 2011; Brewin, 2023). Other criticisms may be based on the absence of eligibility criteria, including the innovative nature of the PPP project. Hence the importance of using the CNDUDCI's PPP tools (NATIONS UNIES, 2020; NATIONS UNIES, 2019). The legal mechanisms of the perfectibility of our strict law can be envisaged to bring it into harmony with flexible international law. The technique of linking flexible international law to hard domestic law by transposition is adaptable to Burundian realities.

4.2. Legal Mechanisms for the Perfectibility of ppp Contracting through Unsolicited Bids: Articulating the Law through Transposition

The UNCITRAL instruments form an important basis for harmonization and transposition, and are acceptable to States in all regions and to different legal or economic systems throughout the world. They aim to support the creation of a legal framework or its adaptation to facilitate private participation in the provision of public infrastructure, works or services through PPPs. The fundamental considerations provided are aimed at encouraging PPPs while preserving the public interest, and are recognized by most legal systems, even if the way in which they are taken into account from the political and legislative points of view differs significantly. These UNCITRAL instruments are designed to assess the various options and choose the most appropriate one in the national context (NATIONS UNIES, 2019).

Thus, given the degree of complexity and technicality involved in the implementation and financing of PPP contracts, it is assumed from the outset that flexible international law will contribute elements of modernization to the text of Burundian positive law in order to evolve into a comprehensive and predictable legal framework that takes into account the eligibility criteria for unsolicited bids. These should include projects that do not relate to those initiated or announced by the contracting authority in its selection procedure, projects involving new concepts or technologies, and those meeting a need not yet identified by the contracting authority. The UNCITRAL instruments use the term "unsolicited proposals" (NATIONS UNIES, 2020) instead of "unsolicited bids" to indicate that these are PPP projects originating directly from the private sector and are not linked to any project for which the public sector has launched a contract award procedure. The meaning is similar, and we regard it as synonymous. But in the context of our article, the use of the term spontaneous offer is more preferable as already used in the 2015 PPP law. What's more, the term "domestic hard law" refers to the 2019 PPP Law, not the strict PPP contract law. We're talking here about transposition within the framework of a law.

Thus, our analysis will focus on the legal mechanisms of the perfectibility of domestic hard law with competitive bidding followed by dialogue and the legal mechanisms of the perfectibility of domestic hard law with non-competitive bidding followed by direct negotiation.

4.2.1. Legal Mechanisms for Improving Domestic Hard Law with Competitive Bidding Followed by Dialogue

The principle of competitive bidding is fundamental to both soft and hard law, and its use is necessary for reasons of transparency. Transparency is a general principle of law, commonly accepted as an unwritten norm in terms of the value, usefulness and structuring of positive law. It provides a flexible framework for the behavior of public authorities, while guaranteeing their freedom and responsibility with regard to their decisions (Dougherty & Lombardi, 2016; La Rosa &

Colavitti, 2022; Larcier, 2021). The principle of transparency touches on the essence of administrative procedure in which there is competition, and is most relevant when there are public resources at stake. Transparency is a broader principle, and includes publicity as a condition that makes administration comprehensible. It enables effective monitoring of the process that leads to administrative decisions, which can later be reviewed and, above all, verifies that the various principles at stake have been respected, especially the principle of equality (La Rosa & Colavitti, 2022; Larcier, 2021).

According to legal doctrine, the principle of transparency is expressed principally in the following obligations to define the conditions for invitations to tender in a clear and comprehensible manner; to publish information relating to the procurement procedure: information on the start of the procurement procedure, the results of the procurement procedure (La Rosa & Colavitti, 2022).

Under Burundian law, this principle of transparency is enshrined in positive PPP contracting law (Loi n°1/19 du 19 juillet 2019 portant modification de la loi n°1/14 du 27 avril 2015 portant Régime Général des Contrats de Partenariats public-privé, art. 16), and is linked to the principle of freedom of access and the principle of equal treatment of candidates in public procurement. It is an autonomous principle, and is used in conjunction with others to provide administrative or jurisdictional control over acts occurring in the various phases of the procedures.

In the case of PPP contracts awarded on the basis of unsolicited bids, the principle of transparency is highlighted to achieve the objective of combating corruption in the direct negotiation of contracts without competitive bidding. In the collective imagination of Burundians, unsolicited bids are often associated with, or suspected of, corrupt practices. Such bids give rise to projects that do not guarantee the win-win principle, risk sharing and achievement of performance targets. The imbalance of PPP contracts in favor of private partners represents a high risk of renegotiation or even termination. These accusations raise the question of transparency in the event of costly projects, poor quality and inadequate levels of control on the part of the State. In this context, taking into account the need for transparency can avoid the risk of PPP contracts being the target of disputes, which often delay or even cancel project execution. Harmonization of our hard law can create a level playing field for competitive bidding and, in the long term, strengthen our capacity to develop quality projects.

Model provision 1 establishes this as a guiding principle for setting up approval and award procedures for PPP projects (NATIONS UNIES, 2020: p. 2). The strong preference for the use of competitive award procedures is widely recognized as the best way to promote economy, efficiency and transparency (NATIONS UNIES, 2019: p. 89). Competition helps to improve the business climate in all sectors of the economy, and is likely both to contribute to value for money and to increase the likelihood of achieving the desired results for the project concerned.

The enshrinement of this principle of competition is also in line with article

9-1 of the United Nations Convention against Corruption, as ratified by Burundi on January 18, 2005, which requires States parties to take: "the necessary measures to establish appropriate systems of public procurement which are based on transparency, competition and objective criteria for decision-making and which are effective, inter alia, in preventing corruption" (Convention des Nations Unies contre la Corruption du 31 octobre 2003).

With regard to the transposition of certain UNCITRAL model provisions on PPPs into domestic law, the unsolicited bidding procedure can ensure the promotion of investment in this field, while at the same time imposing restrictions on the number of participations. There are two reasons for these restrictions. Firstly, given the technical, financial and legal complexity of most PPP projects, the contracting authority would need considerable time and resources to examine numerous bids. Secondly, the costs of participating in the procedures are high, so private entities only commit themselves if they believe they have a considerable chance of winning the PPP contract. Consequently, the transposition procedure is that provided for in UNCITRAL model provision 18 (a) on request for proposals with dialogue, which states: "When a request for proposals with dialogue is implemented (...), the contracting authority shall invite each bidder that has submitted a responsive proposal to participate, up to the applicable maximum number. It shall ensure that the number of bidders invited is sufficient to ensure effective competition" (NATIONS UNIES, 2020: p. 14). This flexible procedure is similar to the competitive dialogue provided for under Burundian law, and is easily transposable (Loi n˚1/19 du 19 juillet 2019 portant modification de la loi n˚1/14 du 27 avril 2015 portant Régime Général des Contrats de Partenariats public-privé, art. 2 §4). The only difference is that, in a dialogue based on unsolicited bids, the identification of PPP opportunities is the responsibility of the private sector, whereas in a competitive dialogue, the identification of PPP opportunities is the responsibility of the public sector.

Thus, when the contracting authority receives an unsolicited bid and deems it acceptable and necessary to engage in dialogue to arrive at the solution that best meets its needs in accordance with the public interest, it can select the private partner by means of a request for proposals after dialogue with several bidders who have expressed interest. The only condition would be to exclude the requirement for preliminary studies and the MOU before selecting the best candidate-bidder who has provided useful and competitive information that takes account of the win-win principle, risk sharing and performance achievement. This procedure will put in place several bidders by way of a call for expressions of interest, followed by dialogue and direct negotiation with the best selected candidate. This unsolicited competitive bidding procedure combined with dialogue entails fewer risks for both the contracting authority and the private partner candidate. The contracting authority that decides to initiate this procedure will incur no liability, since its obligation lies in working with the ARCP to carry out the preliminary evaluation before launching the call for expressions of interest

followed by dialogue. Nor do project proponents run the risk of carrying out preliminary studies that entail financial expenditure, and can therefore claim no compensation or bonus if they are not selected at the end of the selection procedure. As a result, the implementation of preliminary studies with a bonus or indemnity, which was an obstacle to the implementation and financing of PPP projects under the 2015 PPP law, will be ruled out in the transposition.

It is also possible to add eligibility criteria to PPP contracts. According to the UNCITRAL PPP instruments (NATIONS UNIES, 2019: p. 134), two eligibility criteria are plausible. Firstly, unsolicited bids which, according to their authors, are based on new concepts or technologies to meet the contracting authority's infrastructure needs. Secondly, unsolicited bids which, according to their authors, meet a need not yet identified by the contracting authority.

These admissibility criteria already exist in Burundi's flexible domestic law, and the prevailing opinion considers them to be innovative projects, since they have already been tried out abroad, but not yet introduced in Burundi. These projects can be put out to competition, followed by dialogue, as recommended by international soft law. The aim is to obtain objective assurance that the project is the most advantageous response to Burundi's needs. UNCITRAL instruments recognize, however, that in exceptional circumstances, PPP contracts may be awarded without competition, taking into account the particular aspects of the project (NATIONS UNIES, 2019: p. 89).

4.2.2. Legal Mechanisms for Improving Domestic Hard Law with Non-Competitive Bids Followed by Direct Negotiation

The procedure of non-competition of unsolicited bids is exceptional and derogates from the principle of competition. Unsolicited bids are hardly conceivable outside PPPs. The procedure for handling unsolicited bids is generally less elaborate than that for awarding contracts by tender. It does not necessarily guarantee the same level of transparency. However, there may be grounds for allowing a degree of flexibility (NATIONS UNIES, 2019: p. 136).

The mechanisms of transposition do not mean that identical standards of UNCITRAL instruments now apply at national level. The mark of a right to difference in taking account of national realities is justified by the flexible process of harmonization, which is part of a tolerant and pluralist conception of law and aims to bring legal systems closer together through the establishment of minimum common rules (Faouzi, 2018; Mohamed Salah, 2001; Thibierge et al., 2021). The aim is not to eliminate all differences, but only to exclude those deemed incompatible. The national reality that militates in favor of maintaining PPP contracting without competitive bidding as a right to difference is, in our view, linked to the idea that this procedure, which exists in domestic flexible law, resolves several challenges.

On a structural level, it enables us to meet the challenges faced by the Burundian public sector in terms of carrying out preliminary studies and developing the technical and financial capacities needed to develop bankable projects and

obtain the necessary financing. Identification of innovative projects. The speed of analysis and execution of a project initiated by the private sector is presumably easier or faster than that of a project initiated by the public sector, and this is another challenge that justifies the constant recourse to unsolicited bids.

In terms of investment attractiveness, it enables us to take advantage of the innovation and creativity on offer in the private sector to meet the need for public infrastructure. This motivation is based on the notion that the private sector is in a position to propose creative solutions to infrastructure challenges that the public sector would be unable to develop itself.

In terms of the fight against corruption, which is also associated with the collective imagination, the normative guarantee of authorization and approval by the Council of Ministers makes it possible to participate in this fight. In view of the above, the reality in Burundi is that, with the exception of the qualifier of a project's innovative nature, no eligibility criteria have been established, as if to say that all PPP projects are eligible for unsolicited bids for reasons of general interest. It is therefore advisable to issue legal mechanisms for direct negotiations.

The desire to encourage the private sector to identify new or as yet unidentified infrastructure needs, or to formulate innovative bids to meet the State's requirements, constitutes a route to direct negotiation. In the interests of transparency and accountability, the decision to process unsolicited bids should not rest exclusively with the contracting authority, so once the latter has determined that the project is in the public interest, it should obtain the approval of a higher authority both to examine the unsolicited bid and to choose the procedure to be used for this purpose. The purpose of this approval requirement is, in particular, to guarantee that the award of a contract on the basis of an unsolicited bid will only be used in appropriate circumstances (NATIONS UNIES, 2019: p. 173) permitting direct negotiations.

This procedure, described in international soft law, bears a striking resemblance to the domestic soft law procedure whereby the Council of Ministers (the highest authority) authorizes the conclusion of the MOU and approves the draft documents of the PPP contract.

The circumstances in which direct negotiations are permitted are described in model provision 23 (NATIONS UNIES, 2020: p. 18), and include the urgent need to ensure the continuity of a public service; a project of short duration; the protection of essential state security interests where competitive tendering is not appropriate; the provision of a service involving intellectual property rights, trade secrets or other exclusive rights owned or possessed by one or more persons; and cases where an exception is permitted for overriding reasons of general interest. These admissibility criteria of international soft law can easily find a favorable echo in Burundi for transposition into domestic hard law.

5. Conclusion

Flexible law is omnipresent in Burundi in the award of PPP contracts on the ba-

sis of unsolicited bids. Public entities and private partners are the issuers and users of such contracts, even though they have legal instruments at their disposal to achieve the general interest objective of building public infrastructure. According to the thesis of ordered pluralism, the legal relationships between legal orders, and in particular between the Burundian state legal system (soft law and hard law) and the non-state legal system (soft international law), can be accounted for by taking into account their independence as well as their close interweaving. Non-hierarchical legal orders interact with each other through articulation between soft law and hard law, by means of complementarity and transposition, without either system denying the independence or normativity of the other. This technique of articulating the law makes it possible to envisage the harmonization of our domestic hard law, drawing inspiration from the UNCITRAL instruments on PPPs, which offer a number of advantages in terms of flexibility and universality. In our opinion, these legal evolutions are likely to attract investment.

Conflicts of Interest

The author declares no conflicts of interest regarding the publication of this paper.

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