

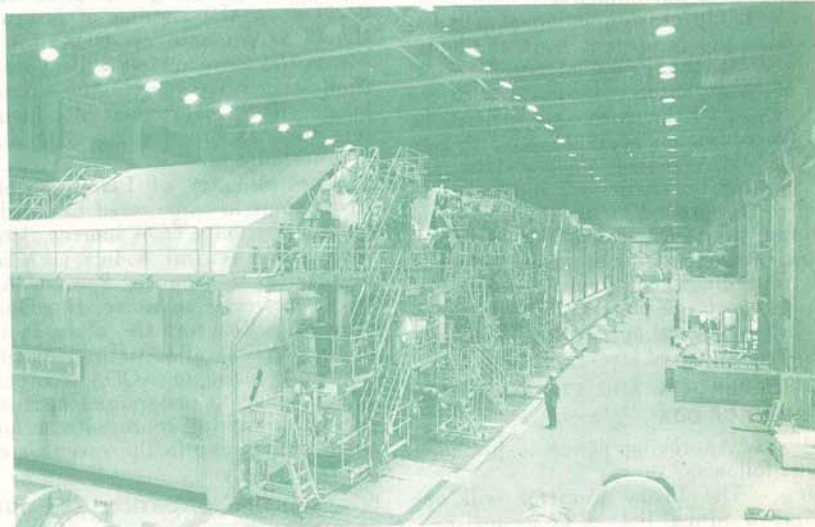
# SOME LEGAL ISSUES IN THE PROCESS OF MANAGING AND IMPLEMENTING ODA-FUNDED PROJECTS

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To implement and institutionalize the Law on State Budget issued on April 1996, the Government promulgated Decree 87-CP dated Dec 19, 1996 giving detailed regulations on the decentralization, establishment, execution, and settlement of State budget; the Article 1, regarding revenues, said that there are 14 items of revenues, including (13) non-refundable aid in money or kind from foreign governments, organizations, and individuals; (14) foreign loans to compensate for deficit...So, the Law on State Budget and financial legal documents have confirmed the revenues of the State Budget include official development aid (ODA) from foreign countries.

The Government's Decree 87-CP dated Aug 5, 1997 determined regulations on management and use of ODA including four main forms: (1) ODA for payment balance; (2) ODA for programs; (3) ODA for technical assistance; (4) ODA for projects (Article 1).

This article refers to only analyses of legal issues, exclusive use when using ODA and status quo of some localities in the process of implementing ODA-funded projects. Because the ODA for projects is smaller than that for national payment balance or for programs, but it has many active effects on ministerial bodies or localities receiving projects in the direction of socio-economic development and involves public international law.



The ODA arises from the needs of a nation, locality, sector and shall be considered and funded by an international organization or foreign country via an international convention signed by representatives of both parties - recipient and donor. This agreement is affected by public international law.

At present, the Government stipulates forms of preference and exclusive use in using ODA.

## I. FORMS OF PREFERENCE AND EXCLUSIVE USE OF ODA

ODA includes non-refundable aid and preferential loan of which 25% at least is non-refundable.

1. Non-refundable ODA will be

prioritized for programs and projects in the following fields: health care, population, and family planning; education and training; social issues such as hunger eradication and poverty alleviation, development of rural and mountainous areas, water supply...; protection of environment and ecology; research, planning and development; budget support; assistance in techno-scientific studies; improvement of administration skill; other fields defined by the Prime Minister.

2. Preferential loan will be used for projects and programs on building or renovating socio-economic infrastructures in the following fields: power; transport and communications; irrigation and drainage; infrastructures of industrial parks; social welfare such as health care, education, water supply and environment protection; other fields determined by the Prime Minister.

3. Some specific programs and projects using non-refundable ODA and preferential loans (Articles 2

and 3).

To attain commitments to assistance in payment balance, programs, technique and projects, the two partners shall investigate, consider, analyze and evaluate demands and abilities including the recipient's solvency (or insolvency). The process shall be implemented from negotiation to signing in compliance with the local law and international practice.

## II. THE PROCESS OF NEGOTIATION AND SIGNING AN INTERNATIONAL CONVENTION ON ODA

1. The Prime Minister will assign a representative body to carry on the negotiation of an interna-



tional convention on ODA with the foreign party. In case an ODA international convention shall be negotiated and signed by the Socialist Republic of Vietnam, the Prime Minister proposes the State President to appoint an agency in behalf of the Government to enter into the negotiation.

2. The body which carries on the negotiation shall submit to the Prime Minister and requests ministries, branches, and localities to assign representatives to take part in the negotiation in line with their responsibilities and rights.

3. In the process of negotiation, if the draft of agreement changes against the approved ODA-funded program or project, then the authority will decide on amendments. As for the programs, projects approved by the Prime Minister, the body which is responsible for negotiating shall obtain opinions written by the Ministry of Planning and Investment and relevant bodies concerning those amendments.

4. Up on completion of negotiation, the competent body shall present to the Prime Minister results of negotiation, documents to be signed, at the same time suggest the Government's representative to sign the ODA convention with the foreign party... (Articles 7 and 8).

The ground for negotiating, signing the ODA convention is documents, programs and projects (regarding ODA-funded projects, it is reports on pre-feasibility or feasibility studies) approved by Vietnamese authorized level.

### III. APPROVAL AND STATE MANAGEMENT OF ODA

1. Approving power is provided as follows:

- The Prime Minister will approve annual lists of programs, projects using ODA, including relevant amendments and supplements; credit programs using ODA; programs and projects using non-refundable ODA capitalized at US\$500,000 and above each and those concerning institutions, policies, laws, information, defense regardless of the amount of capital...

- The minister and the chairperson of province, city directly under the central government will be entitled to endorse the programs, projects using non-refundable ODA worth under US\$500,000 and the projects beyond the group A approved by the Prime Minister in accordance with the regulations on investment and construction man-



agement in the Government's Decree 42-CP dated July 16, 1996.

#### 2. State management:

The Government will be the only body to seek way to lobby for foreign countries to grant ODA; and decides on the signing of international agreements on ODA, afterwards the Government will allocate this source through the State budget. The Government also monitors the process of using ODA and appraises its results.

The Ministry of Planning and Investment is empowered to coordinate and manage ODA sources along with other central bodies such as Ministries of Finance, Foreign Affairs, Justice, Commerce, the Government Office and the State Bank in the process of initiating, receiving and managing ODA sources. This is easy to understand because the ODA capital represents a not small percentage in the revenues of the State Budget.

### IV. CURRENT SITUATION OF ODA SOURCES

According to recent statistics of the Ministry of Planning and Investment, the ODA source from international organizations and foreign nations offered to Vietnam from now to 2000 still remain high and stable. From now to 2000, the World Bank (WB) pledges to fund above US\$600 million annually against an average of US\$400-500 million before; the Asian Development Bank (ADB) commits to funds of over US\$400 million in the period from 1998 to 2000; although Japan does not specify its long-term ODA to Vietnam, but it is forecast that its donation may reach US\$900 million per annum in the next years. According to experts' analyses, the

ODA sources are contributing an important percentage to the country's development investment capital. Expectantly, in the five-year plan (1996-2000), ODA is secured to make up 17% to 19% of the total need for investment capital and 35% to 38% of the total foreign-invested development capital. Until now, the Government has signed agreements worth US\$7.1 billion with international organizations and foreign nations. This figure accounts for 83% of the total ODA already committed, including US\$2.03 billion funded to the power sector in building Phú Mỹ 1, Phú Mỹ 2, Đa Mi, Phả Lại 2 and Đa Nhim power plants; US\$1.39 billion to the transport and communications sector; US\$553 million to agriculture, forestry and fishery; US\$486 million to health care and education and US\$382 million to projects of urban development, water supply and waste treatment in Hà Nội, Hải Phòng, HCMC, Huế, Nam Định and Đồng Hới Town. Most ODA identified specific aims of use such as for renovating power grids in big cities; building and upgrading Cái Lân, Hải Phòng and Sài Gòn Ports; restoring and upgrading the National Route 1 from Lạng Sơn to Cà Mau; the Highways 5, 18; developing 5,000 km of rural roads in 15 provinces; restoring the irrigation system in the central and southern areas; developing primary education and many projects of health care, culture and education.

### V. IMPLEMENTATION OF ODA-FUNDED PROJECTS

1. Based on the signed agreement, the development of ODA-funded programs and projects shall proceed via bidding.

Regarding projects which the



foreign party develops initial steps via international bidding, commonly a consulting company of the donor country wins the bid and it is called the main contractor. In the process of implementing the project, the main contractor invites other companies to take part in bidding in Vietnam so that local consultants help the main contractor with the work. The bidding for implementing ODA projects shall abide by the Regulations on Bidding accompanied by the Government Decree 43-CP dated July 16, 1996 and inter-ministerial Circular 02/TTLĐ dated Feb 25, 1997 guiding the implementation of those regulations.

Since the ODA-funded projects came into being in recent years, many localities obtaining the ODA-financed projects thought they would receive an amount of ODA money from a foreign country in order to spend in accordance with Vietnamese law. But it's not true because the implementation of ODA projects must be done via international and local bidding. Now, the Government's Regulations on Management and Use of ODA is a legal base to identify this issue. As a result, an ODA-funded project will help the locality with urban management and development, administrative reform, etc. But the locality receives only results of the project when it has been completed and transferred to the locality.

2. Notably, when the international agreement has contents different from the Vietnamese law, how can the problem be solved?

a. The management and use of ODA for capital construction must comply with the regulations on management and use of ODA (De-

cree 87-CP dated August 5, 1997) and other current regulations on management of investment and construction; in case the ODA agreement has different provisions, then it will observe the agreement already signed (Article 22). According to international practice, concerning public law and justice, if there is a gap between provisions in the agreement signed with an international organization and those in a nation's law and regulations, the agreement will prevail. The Article 827 of the Vietnamese Civil Code stipulated that: "In case the international agreement signed or joined by Vietnam contains provisions different from those of the Civil Code, then the provisions of the agreement shall be applied".

b. The Vietnamese Government has signed with the United Nations Development Program (UNDP) some agreements on the public administration reform program. Most of projects of administrative reform piloted in central and northern provinces are within the UNDP's program and provided with non-refundable ODA which makes up a very large percentage while the Vietnamese party's contribution is small and different by localities, for example, 12.4% for Quảng Bình Province and another province, over 40% of the total project cost (urban development projects). The concept "pilot project" has not been clarified by Vietnamese legal documents yet; but when there are some pilot projects already developed, some models have been suggested. Lessons from this pilot project will be drawn, learned and generalized into administrative reform projects for other provinces

(VIE/96/002/A/01/99).

3. A matter will arise and be internationalized from ODA sources, it's tax.

a. As for the donor country, when they accept to grant ODA, that is, they spend money from their budget, then, their contractor will win the bidding so that they directly implement the project in accordance with the agreement approved by the two nations. When foreign experts or contractors work in Vietnam, they will be exempt from income and profit tax. Normally, the provision on various kinds of taxes is clearly defined in the agreement as follows: "The foreign party will enjoy preferences and exemption such as: Import of equipment, goods, autos used for the project will be free from tax; foreign experts are not subject to income tax...". Most of ODA-funded projects have provisions on tax. The Decree 87-CP dated Aug 5, 1997 confirmed this exemption including direct and indirect taxes. So we can see the foreign party always places tax issues in their macro-financial management. The foreign experts shall pay income, profits taxes to their home country, if any, except for indirect taxes on meals, accommodation, and other services.

4. The final issue in the process of implementing ODA projects is the disbursement. The disbursement usually faces with difficulties, slowness in the national program for the large projects controlled by ministries in accordance with agreements on loans or technical assistance, but it can be done without big obstacles in the implementation of local projects. This slowness is attributed to the Vietnamese party because they do not ensure procedures of international bidding as requested or other procedures following ODA commitments. For example, the WB's US\$100 million loan for the project of national health care realized from 1996 to 2002 with a view to building and upgrading health stations in communes of 16 provinces. But the disbursement for this project is slow because the Ministry of Health has not completed procedures to open the bid for purchase of equipment, and financial institution concerning lists of major medicine for the WB's approval.

Just because of this, we can say although our country are badly in need of ODA capital for our socioeconomic development, but the disbursement of this source is not actually easy.

