

# ***Legal Framework of Foreign Investment in Nepal***

***A brief presentation on foreign investment law and policies of Nepal***

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# Outline of the Presentation

- 1. Nepali Legal System at a glance,*
- 2. Major Laws and Policies Governing FDI,*
- 3. Foreign Investment under the law of Nepal,*
- 4. Entry and exit of FDI in Nepal,*
- 5. Incorporation of Business Enterprises & Companies in Nepal,*
- 6. Rights ,guarantee and security of FDI under the law of Nepal,*
- 7. Repatriation of foreign investments,*
- 8. Conclusion*

# Welcome and Namaste to Nepal



# Nepal and the World



# Map of Nepal



# Nepal At A Glance

- **Area:** 147,181 sq. km
- **Geography:** Situated between China in the north and India in the South.
- **Capital:** Kathmandu
- **Population:** 27 Million
- **Language:** Nepali is the national language. However, travel-trade people understand and speak English as well.

# Nepal At A Glance ....

- **Currency:** Nepalese Rupee (approximately US\$ 1 equals NRs. 95.00 ).
- **Political System:** Multi-party Democracy, constitution is under preparation.
- **Economy system:** market economy.
- **Climate:** Nepal has four major seasons, namely,
  - (1) Winter: December-February,
  - (2) Spring: March-May,
  - (3) Summer: June-August,
  - (4) Autumn: September-November.

A marble statue of Lady Justice, the personification of the Roman goddess Iustitia. She is depicted from the waist up, wearing a blindfold and holding a pair of scales of justice. The scales are balanced, with the pans hanging from a central point. The statue is set against a dark, neutral background.

# *Legal Framework*



# *Nepali Legal System at a glance*

- Nepali legal system: a combination of Common law, Continental law and Indigenous legal norms, principles and values,
- Absence of codification of laws,
- Nepali legal system is under process of modernization,
- Business/corporate laws are under influence of Anglo-Indian laws,
- Nepali judiciary is independent and courts are autonomous bodies,
- Three tiers courts(first instance, appellate and supreme court) are functioning to deliver justice,
- Private law professionals are independent.

# *Nepali laws and policies governing foreign direct investments( FDI)*

- Interim Constitution of Nepal,2006 (Art.19,34(4)and art.35(12))
- Various separate sectorial parliamentary Statutes, Rules, Guidelines, Directives etc.
- Sectorial Policies :FIOW policy,1992,Industrial Policy,2011 and many other policies,
- Judicial precedents,
- International treaties :BITs/BIPPPAs,

# *Major relevant laws concerning FDI*

- Foreign Investments and Technology Transfer Act,1992,(FITTA)
- Industrial Enterprises Act,1992,
- Electricity Act,1992,
- Nepal Petroleum Act,1983
- Private Investments in Infrastructures Act,2006,
- Mines and Mineral Resources Act,1985
- Bank and Financial Institutions Act,2006,
- Companies Act,2006,
- Investment Board Act,2011,
- Foreign Exchange (Regulation ) Act,1963,
- Contract Act,2000,
- Arbitration Act,1999,
- Income Tax Act,2002,
- Labor Act,1991,
- Privatization Act,1992 and many other sectorial Acts



# *Major sectorial Policies Governing FDI*

- Foreign Investment and One Window Policy,1992,
- Industrial Policy,2011,
- National Agriculture Policy,2004
- Hydro-power development Policy,2001,
- Telecommunication Policy,2004,
- Tourism Policy,2008,
- Aviation Policy,2006,
- Commerce Policy,2008,and many other sectorial policies,
- A new Foreign Investment Policy,2014 ( draft) is under consideration by GON that revisits and substantially amends the existing policy.

# *Foreign Investment under the law of Nepal*

- 1 Foreign Investment :Investment made by a foreign investor in any industry in form of :
  - a. investment in equity,
  - b. reinvestment of earning deprived from existing investment,
  - c. investment made in form of loan or loan facilities
  - d. transfer of technology,
  - e. lease finance,
  - f. opening a branch to carry out business.

# *Foreign Investment under the law of Nepal contd....*

2. Transfer of technology: transfer of technology under an agreement between foreign investor and an industry on the following matters:

- a. use of any intellectual property rights of foreign origin,
- b. acquiring any foreign technical consultancy and management,
- c. acquiring foreign market service.

3. Foreign investor: individual, firm, company, foreign government or international agency.

4. Portfolio investment is not a part of FDI so far.



# *Entry and Exit of FDI*

- 1.Theoretically, GON follows open/free admission/entry of foreign investments,
- 2.Foreign investment is opened almost in all sectors of economy ( both in manufacturing and service sectors),
- 3.A negative list (certain exceptions) is included in FITTA where FDI is restricted,
- 4.No limitation in equity ownership ( up to 100%) ,
- 5.No minimum threshold for foreign investment,
- 6.Foreign Investor may dispose off his/her investment at any time/free exit,
7. An investor has to follow approval requirements under the law,
- 8.Foreign Investor has to establish an enterprise to start business in Nepal.

# *Negative list under FITTA*

## *(schedule to FITTA)*

- A negative list means an area where FDI is restricted,
- Small scale industries like cottage industry and micro-industry,
- Sensitive industries –atomic energy , radioactive materials,
- Arms, ammunitions , explosives,
- Security printing, mint.
- Real estate business,
- Some other small scale business,
- *Proposed Foreign Investment Policy intensively revisits the existing negative list.*



# *Procedures for approvals of Foreign Investments*

- An investor has to apply GON,DOI/BOI depending the volume (amount) of investment for their approvals,
- An investor has to disclose details of the project,
- DOI has to approve FDI up to Rs.50 million (sec.3(3) to FITTA)
- DOI has to refer the case to Industrial Promotion Board if the amount exceeds to it, ●(sec.3(3) to FITTA)
- The authority that approves the investment has to approve within 30 days, (sec.3(3) to FITTA)
- Investment value of which exceeds 1 billion, BOI has to approve FDI, (BOI Act,sec.10(5))
- A permit/license is to be issued by the concerned authority,
- The potential investor has to incorporate a business enterprise to start business.

# *Projects fallen under the ambit of BOI (section 9, Investment Board Act)*

- A project cost of which is more than ten billion NRs,
- Certain infrastructure projects like tunnel roads, highways, high bridge, rope-ways, railways as GON prescribes,
- Regional or international airports,
- Chemical fertilizer and petroleum refinery plant,
- Hydro-power generation more than 500 MW capacity,
- SEZ, Export Promotion Zone or Special Industrial District, IT parks,
- Any other infrastructure, manufacturing or service industry cost estimate is more than ten billion NRs,
- Special treatment to the projects established under BOI Act,
- Additional facilities, incentives and exemptions shall be extended to the investment under BOI Act than those provided under Industrial Enterprises Act, 1992 and FITTA (sec.12,17 BOI Act),
- BOI Rules, 2012 in rule 28 provide the criteria and facilities to be given to such projects.

# *Forms of Business Enterprises in private sector in Nepal*

- Private firm: business enterprise established and operated by a sole trader,
- Partnership firm: business enterprise established by two or more individuals under an agreement,
- Cooperative firm: business enterprise to operate business among its members,
- Company: business enterprise for profit with limited liability,
- A company may be either private limited or public limited,
- Certain categories of companies should be public limited,
- A public company's paid up capital must be at least NRs.10 million,
- A foreign investor desirous to make/start DFI in Nepal is free to incorporate a company of his/her choice.
- Opening a branch company is possible under the companies Act,2006.

# *Incorporation of a Company in Nepal ( Companies Act, 2006,sec. 4,5 and 6)*

- An application to incorporate a company before company registrar office(CRO) along with fees,
- MOA and AOA
- Consensus agreement, if any,
- Permission/license to start FDI in Nepal for the particular business,
- Evidence that substantiates the nationality of the applicant/applicants,
- Incorporation certificate if a company/entity is an applicant,
- CRO has to issue a certificate of registration or inform the applicant specifying the reason for rejection to register a company within a period of 15 days.
- Once a company is registered ,it is deemed to be incorporated,
- An appeal may be made before the appellate court against the decision of rejection to register a company.

# *Rights , Guarantees and security of FDI*

- Fair and equitable treatment: No discriminatory treatment in all time,
- Most-favored nation treatment: transfer of funds, incorporation of a company ,FDI approval etc.
- National treatment: management, operation, protection, incentives etc.,
- Guarantee against expropriation: no nationalization,(Industrial Enterprises Act,sec.21)
- Nepal is a party to MIGA that protects political risks of FDI,
- An industry established under FDI in Nepal is entitled to the incentives awarded to other industries,(FITTA,sec.2(a),
- Guarantee for repatriation of FDI, (sec.5(2) FITTA)
- Nepal is a party to BITs/BIPPAs concluded with some countries that protects FDI of the country concerned.

# *Incentives provided to an Industry established under FDI*

- Investment incentives: ‘measurable economic advantages that GON provides to the industry,
- Incentives may be regulatory, fiscal (tax holidays/concession) or non-fiscal (grants, loan, rebate),
- Incentives provided by the Industrial Enterprises Act, 1992 and Industrial Policy, 2011 are extended to the industry under FDI as well,
- Reinvestment and extension of industry under FDI is possible,
- Guarantee of incentives for the period prescribed at the time of registration/permission, (Industrial Enterprises Act, sec. 20)
- Nepal has concluded bilateral treaties on Avoidance of double taxation with some countries,

# *Land Acquisition Facilities*

- An investor is free to manage land by himself/herself,
- If the investor fails to manage/acquire land by his/her efforts, may request GON,
- GON shall have to acquire required land cost of which shall be borne by the investor,(land AcquisitionAct,1977),
- Land shall be registered with the company and title of the land shall be vested upon it,
- Government/public land required for the industry shall be given on long-term lease basis,
- If the land ceiling exceeds, GON may consider it.

# *Visa Arrangements for FDI Investors*

- Non-tourist visa: to study or to carry out any research work for FDI, (sec.6(1),FITTA)
- Business visa: to a foreign investor or his /her dependents or representatives ,( sec.6(2) FITTA)
- Business visa: to a licensee foreigner who invests for export trade, (Immigration Rules, rule 9(1))
- Business visa: to a licensee foreigner who invests for trading and industrial enterprise. Immigration Rules ,rule 9(1)
- A foreign investor who makes FDI exceeding one hundred thousands US Dollars at a time and his/her dependents shall be given residential visa,(sec.6(2) FITTA)



# *Foreign Exchange and Repatriation Facilities*

- An investor is entitled to open and operate bank accounts in Nepal in foreign currency,
- An investor is entitled to transfer funds in foreign currency through banking channel,
- An investor making investments in foreign currency is entitled to repatriate the following amounts:
  - a. amount received from sale of shares of foreign investment,
  - b. amount received as profit or dividends in lieu of FDI,
  - c. amount received as payment of principal and interest on any foreign loan,
  - d. amount received as royalty, fee etc. under the technology Transfer Agreement( FERA,sec.10 c(5)

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# *Resolution of investment Disputes*

- Investment disputes are contractual matters under Nepal law,
- Disputes between a foreign investor and Nepali investor or concerned industry shall be settled by mutual consultation in the presence of DOI,(sec.7,FITTA)
- If disputes could not be settled in that manner it shall be settled by arbitration under UNCITRAL Arbitration Rules,(sec.7(2) FITTA)
- Disputes in regard to foreign investment exceeding NRs.500 million, may be settled by any manner as the parties design,( Parties are free to decide the manner for dispute resolution),( sec.7(4),FITTA)
- Nepal is a party to New york Convention on Recognition and Enforcement of Foreign Arbitral Award(1958),
- Arbitration Act,1999 is based on Model UNCITRAL Commercial Arbitration Act (1985)
- Nepal is also a party to the ICSID Convention (1969)

# *Brief scenario of FDI at Present: at a Glance*

- Remarkable portion of FDI is in Infrastructure ( energy, telecommunication) and also in manufacturing,
- Hydro-power generation has become most attractive area for FDI for huge investments,
- Approximately 58% of commitment for FDI in current fiscal year is found in hydro-power sector,
- Service sector ( banking, insurance, tourism and education) also is considered most attractive destination for FDI,
- Almost all banking , financing and insurance companies where there exists FDI are in profit,
- Approximately 50% out of 10 major tax payer companies are under FDI.

*Thank you very much*

