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

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5. Incorporation of Business Enterprises & Companies in Nepal,
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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,
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: FLOW policy, 1992, Industrial Policy, 2011 and many other policies,

• Judicial precedents,

• International treaties: BITs/BIPPAs,
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 a 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 on 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 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 rule28 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))
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