14 May 2019

BRIEFING NOTE:

FOREIGN INVESTMENT AND TRANSFER OF TECHNOLOGY ACT 2019

Foreign Investment and Transfer of Technology Act 2019 (the "**FITTA**" or "**Act**") was passed by the Parliament and received assent by the President on 27 March 2019. The Act was published in the Nepal Gazette and has become effective from 27 March 2019. However, provision on venture capital fund and issuance of securities in foreign market would be effective after a notification has been published by Government of Nepal (the "**GON**"). The FITTA repealed the Foreign Investment and Transfer of Technology Act 1992 (the "**Previous Act**") and aims to bring reform in the regime of foreign investment in Nepal. Moreover, this piece of legislation was passed together with Public Private Partnership and Investment Act 2019 (the "**PPPI Act**"). The FITTA has brought various changes in the foreign investment regime in Nepal. The major changes brought by the FITTA have been briefly set out below.

1. Applicability of the FITTA

1.1. The reading of the FITTA needs to be done together with PPPI Act, Industrial Enterprises Act, 2016 (the "**IEA**") as well as Foreign Exchange Regulation Act 1962 (the "**FERA**"). For the full implementation of the FITTA, regulations need to be made for both the FITTA and the PPPI Act. Investment in the infrastructure project to be developed under public private partnership modality or with private investment as specified under the PPPI Act, will require approval from Investment Board of Nepal (the "**IBN")**. Investment in and development of such projects are regulated under the PPPI Act.

1.2. The FITTA will not be applicable in foreign investment in certain sectors regulated by separate legislations, for example, foreign investment in the banking sector, as it is regulated by Nepal *Rastra* Bank, the Central Bank of Nepal (the **"NRB"**).

1.3. The FITTA provides that the minimum cap for equity amount of foreign investment would be as prescribed. The GON is in the process of prescribing minimum amount of foreign equity investment.

2. Foreign Investment and its forms

2.1. *Foreign Investor:* The definition of foreign investor has included Non-resident Nepali along with foreign person, firm, company, government as well as international institutions. Thus, investment made by a Non-resident Nepali will also be regarded as foreign investment under the current regime.

2.2. *Forms of foreign investment:* The Previous Act limited the form of foreign investment to (i) share investment in foreign currency, (ii) re-investment of dividends and (iii) investment made in the form of loan or loan facilities. In contrast, by listing the following investment as foreign investment, the FITTA has broaden the scope of foreign investment:

(a) Share investment in foreign currency
(b) Re-investment of dividends
(c) Lease finance in aircraft, ship, machinery and equipment, construction apparatus or similar apparatus
(d) Investment in venture capital fund
(e) Investment in listed securities through secondary securities market
(f) Investment made by acquiring shares or assets of a company incorporated in Nepal
(g) Investment received after issuing securities in foreign capital market by a Nepalese entity
(h) Investment made through technology transfer
(i) Investment maintained by establishing and expanding an industry in Nepal.

2.3. *Positive List and Negative List:* Foreign investment is only allowed in industrial activities and not in trading activities. Moreover, it is only permissible in sectors that are (i) classified as an industry under IEA (the **"Positive List"**) and (ii) sectors that are not included in the restricted sectors provided under Schedule of the FITTA (the **"Negative List"**). So, even if a sector is not included in the Negative List, if it is not classified as an industry under the Positive List then foreign investment in such sector is not allowed. Moreover, the FITTA provides for more restrictive regime than the Previous Act as business of mass communication, travel agency, primary sectors of agricultural productions and others have been added in the Negative List. Besides, the Negative List is applicable in the case of investment and loan, however, it is not applicable in the case of transfer of technology in industry set up with local investment.

2.4. *Maximum limit of foreign investment:* FITTA provides that the maximum limit of the amount and proportion of foreign investment is not be determined, except in the following two cases:

i. Maximum limit of foreign investment in equity of service industry may be prescribed so that the foreign investment is not less than the commitment made by Nepal at the time of obtaining membership of World Trade Organization; and
ii. Maximum limit of foreign investment in securities transaction may also be prescribed.

3. Foreign Loan Investment

3.1. *Permissibility:* The FITTA fails to define what amounts to foreign loan investment. An industry with foreign investment can take loan from foreign financial institution by way of project loan agreement or project financing agreement. This is a restrictive regime and there is lack of clarity as to whether foreign loan also covers shareholder loan. Also, it lacks clarity on whether industries without foreign investment can take foreign loan.

3.2. *Foreign Loan:* The FITTA permits- (a) public company, or (b) corporate body (which is allowed to issue securities) to obtain loan by issuing its debentures, bond or other securities in foreign stock exchange market.

3.3. *Escrow Agreement:* A foreign investor for the purpose of their foreign investment can enter into a tripartite escrow agreement between their partner investor or another foreign investor and any commercial bank certified by NRB or Infrastructure Development Bank. As per the separate circular issued by NRB, the bank as a party to the escrow agreement acts as an agent for the parties and will also have right of enforcement. However, it appears that the bank has been treated as a trustee rather than agent with wider enforcement power under the FITTA.

3.4. *Self-help remedy*: A foreign investor providing loan to an industry or company against mortgage or collateral of movable or immovable property can auction such property for non-payment of loan for recovering the amount. However, such action can be exercised against an industry or company and not against a person.

4. Technology Transfer

4.1. *Coverage:* The definition of technology transfer is same as provided under the Previous Act which includes Patent, Design, Trademark, Goodwill, Technical know-how, Formula, Process, User's License, know-how sharing, etc.

4.2. *Requirements and approval:* A foreign investor can invest through technology transfer in any industry incorporated in Nepal. The terms of technology transfer are to be in accordance to agreement related Technology Transfer. Such agreement needs to be approved from the approving authority for foreign investment

4.3. *Cap on royalty:* The amount exceeding royalty as affixed in technology transfer agreement cannot be repatriated. Unlike the Previous Act, the FITTA provides that amount of royalty or net profit for use of trademark cannot be more than prescribed percentage except for 100% export liquor industry.

5. Approval based regime for foreign investment

5.1. *Automatic route:* The FITTA has introduced automatic route in relation to foreign investment approval. Even though the FITTA provides automatic route, approval based regime will be followed till provision on automatic route is given effect by making regulation.

5.2. *Monetary jurisdiction:* The FITTA provides that foreign investment amount up to NPR 6 billion is under the jurisdiction of Department of Industry (the "**DOI**") and above NPR 6 billion is under the jurisdiction of IBN. Projects that come under PPPI Act will be regulated under the PPPI Act.

5.3. *Approving agencies:* The table below provides for the type of foreign investment and approving authority for approval of foreign investment:

S.N.	Type of foreign investment	Approving Authority
1.	Share investment	DOI, NRB
2.	Lease finance	DOI, NRB
3.	Venture capital fund	Securities Board of Nepal (the "**SEBON**"), DOI, NRB
4.	Issuance of securities in foreign exchange	SEBON, NRB
5.	Foreign loan from foreign financial institution	Ministry of Industry, Commerce and Supply (Recommendation), NRB
6.	Technology Transfer	DOI, NRB

Even though the FITTA provides that NRB has to be notified once the approving authority has approved, an approval of NRB is still a requirement under FERA and NRB Circular. Thus, there is no clarity on whether notification in itself would suffice until the provisions of FERA and NRB Circular are amended. The provision of the FERA and NRB circular will need to be amended in the spirit of the FITTA.

5.4. *Change in ownership structure of company with foreign investment:* If any change occurs in the ownership structure of any company having foreign investment due to transfer of its shares, assets or financial instruments within or outside Nepal, such transaction has to be recorded in the concerned authority approving foreign investment, i.e. DOI or IBN. The FITTA requires such authority to record the transaction only after payment of the applicable tax arising out of such transaction.

5.5. *Information on change in ownership structure:* If there occurs change in ownership structure of a company in Nepal due to change in ownership structure of a holding company outside then such needs to be notified to the approving authority.

5.6. *Timeline for bringing foreign investment:* It is a requirement under FITTA that the foreign investment amount has to be brought in Nepal within the prescribed period or within the period of maximum 2 years. Failure to comply with such requirement without any specific reason can result into ineffectiveness of foreign investment approval.

6. Concession and facilities for industries with foreign investment

An industry with foreign investment is entitled to exemptions, facilities or concessions available under the IEA and other prevailing laws in additions to what has been provided under the FITTA. Moreover, industry with foreign investment is entitled to other facilities such as visa, repatriation, opening of a foreign currency account as well as national treatment, etc. Such provision was not provided under the Previous Act.

7. Prohibition on nationalization or acquisition

The FITTA prohibits nationalization of industry with foreign investment. Unless for public purpose, no industry can be acquired directly or indirectly. Constitution of Nepal permits nationalization only for public cause and by paying reasonable compensation.

8. National treatment

8.1. *Stabilization provision:* The FITTA provides that foreign investment is to be treated in same terms applicable on management, maintenance, utilization, transfer or sale of investment made by Nepalese person, until such investment is retained in Nepal. However, previous law is applicable for foreign investment approval obtained under the previous law and no change in law is to be made without the consent of foreign investor in a manner that is detrimental to any facilities enjoyed by the foreign investor under such law.

8.2. *Non- applicability of national treatment:* For certain matters, national treatment is not applicable such as compulsory licensing for intellectual property mentioned in agreement concluded under World Trade Organization (**"WTO"**), benefits enjoyed by domestic industry under public procurement law, government subsidy, on-commercial services provided by government, financial services adopted or managed by government for protection of investors, special treatment provided government as a party to any regional or multi-sectoral organization, terms prescribed by regulatory body under on repatriation of investment, payment of loan (including, principal, interest and fee) or payment of service fee outside Nepal as well as protection of public health, animals, plant or environment.

9. Provision on Visa

9.1. *Types of visa:* The FITTA clearly lays down eligibility for different types of visa such as non-tourist visa, business visa and residential visa for foreign citizens on foreign investment, which is consistent with the Immigration Laws.

9.2. *Residential visa:* Previously, only a foreign investor and family member of such person were eligible for residential visa. In contrast, under the FITTA, even the authorized representative of the foreign investor and his/her family members are eligible for residential visa.

9.3. *Business visa:* Under the Previous Act, a foreign investor and his/her dependent family or authorized representative of such investor and his/her dependent family were eligible for business visa. However, in terms of the number of authorized representatives, the FITTA has specifically restricted such privilege to the one authorized representative of the foreign investor. Nevertheless, FITTA provides such benefit to maximum two people in case the amount exceeds the prescribed investment amount.

9.4. *Non- tourist visa:* The FITTA also provides for non-tourist visa for foreign specialist, technician or managerial employee coming to work in an industry, which was not provided under Previous Act.

10. Repatriation

10.1. *Eligibility:* The FITTA provides that a foreign investor can repatriate all forms of investment in accordance to prevailing laws and after paying all the taxes. Moreover, residual amount after payment of all liabilities in case of dissolution or liquidation and amount of compensation or damages from final settlement of disputes. Foreign investor can repatriate the amount in the same currency of investment or in other convertible foreign currency with approval of NRB.

10.2. *Repatriation process:* Steps for repatriation of foreign investment is provided in the table below:

Steps	Description	Authority
1.	Application for repatriation	DOI/IBN
2.	Inquiry on fulfillment of terms and liabilities under the law	DOI/IBN
3.	Recommendation	DOI/IBN
4.	Application for facility of foreign currency exchange	NRB
5.	Approval for repatriation	NRB

11. One-Stop Service Mechanism

11.1. *Establishment of one-stop mechanism:* The FITTA has introduced One-Stop Service Mechanism, which is to be established as per the prevailing law on Industrial Enterprise. Such One-Stop Service Mechanism has already been set up under the IEA and such One-Stop Service Mechanism for the time being has been established within premises of DOI.

11.2. *Services of one-stop mechanism:* Government of Nepal can provide exemptions, facilities, concession or services to foreign investors through One-Stop Service Mechanism. Such services are registration of Industries, various approvals, labor permit, visa service, quality check and control of products produced by industries and others.

12. Complaint mechanism

Any complaint against actions of officials looking after matters of industry or One-point Center can be filed before DOI. Similarly, any complaint in relation to DOI or One-point Center can be filed to the Ministry of Industry, Commerce and Supply.

13. Use of Electronic medium

FITTA provides that an approving authority can use electronic medium for approval and other necessary activities. However, in practice, even though electronic medium is used, submission of physical copies is still required.

14. Sub- contract

Any industry can except for main activity of the industry, sub-contract other activities. However, FITTA fails to state what amounts to main activity of the industry.

15. Dispute Settlement Mechanism

15.1. *Freedom on dispute settlement mechanism:* The FITTA provides the freedom to parties to enter into an agreement for settlement of dispute. This means that investment agreement can be governed by foreign law and any dispute under such agreement can be submitted to the foreign courts or arbitration.

15.2. *Two major concerns on dispute settlement:* Even though the FITTA provides freedom to parties to enter into an agreement for dispute settlement, there two important concerns that needs to be kept in mind.

a) Arbitration Act, 1998 provides that a foreign arbitral award is enforced in Nepal only if (i) Nepal is party to a treaty related to enforcement of foreign arbitral award, and (ii) the award is rendered in the territory of the party to that treaty subject to the conditions set out at the time of being party to that treaty. Moreover, it is also crucial that the dispute between the parties amount to commercial dispute under laws of Nepal as well as there needs to be reciprocity between Nepal and the foreign country for enforcement of foreign arbitral award.

b) Mutual Legal Assistance Act, 2014 is the principle legislation governing enforcement of Foreign Judgement in Nepal. It requires bilateral treaty as a condition for enforcement of foreign judgment in Nepal. Nepal has not signed any such treaty with any foreign country.

15.3. *Notification to approving authority on settlement of dispute:* The FITTA does provide for requirement of providing information of settlement of dispute to the approving authority with 15 days of settlement of dispute as per the agreement between the parties, even though the parties are not obliged to provide information of terms agreed.

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ANNEXURE- I Negative List (Sectors restricted for foreign investment)

S.N.	Negative list under FITTA
1.	Cottage and Small industry
2.	Personal Service Business (Business such as Hair Cutting, Beauty Parlor, Tailoring, Driving Training etc.)
3.	Industries related to arms and ammunitions, nuclear, biological or chemical weapons
4.	Explosives, Gunpowder
5.	Industries related to radio-active materials
6.	Real estate business (Excluding Construction Industries.)
7.	Business of motion pictures, mass communication medium (Newspapers, radio, television and online news)
8.	Currencies, coin business, moneychanger and remittance
9.	Internal Courier Service
10.	Atomic Energy
11.	Sectors of primary agricultural production as well as poultry farming, fisheries and bee-keeping
12.	Restricts Consultancy Services having foreign investment over 51% and consultancy services such as Management, Accounting, Engineering, Legal Services as well as language training, Singing training and computer training
13.	Local Catering Service
14.	Rural Tourism and Travel Agency