

REVIVAL OF UNDERPERFORMING ENTERPRISES AND UNDERUTILIZED ASSETS ACT FREQUENTLY ASKED QUESTIONS



1. What is the new law and whom does it affect?

The Revival of Underperforming Enterprises and Underutilized Assets Act empowers the State to acquire the shares of one public listed company and the assets of 36 companies of which one is a public listed company. Each of the affected companies have either acquired land from the state (leasehold or freehold) within the past 20 years prior to the Act coming into force, or have received tax incentives or other concessions from the state. The Act would affect each of the 37 companies listed in its Schedules and their stakeholders.

2. Does the new law permit the State to "expropriate" any private assets and businesses?

The new law permits the State to expropriate named private assets and businesses as listed in the Schedules to the Act.

However, while the Government has publicly stated that no further companies or assets will be added to the Schedules, the mechanism exists to add to the list by way of legislative amendments.

The lands that have been expropriated by the new law comprise of:

- a) States lands that have been alienated by the government to private parties as freehold or leasehold within the past 20 years; or*
- b) Lands owned either by a BOI company or any other that has received tax incentives or any other guarantee from the State*

on the premise that the related operations would generate employment, foreign exchange earnings or savings or economic activities beneficial to the public, and where such benefits have not accrued, being prejudicial to the national economy and public interest.

3. Are all assets subject to expropriation under the Act or is it only land?

The Act provides for the expropriation of "Underperforming Enterprises" and "Underutilized Assets". In the case of the expropriation of an Underperforming Enterprise, all assets of the said enterprise/s are subject to expropriation, while the expropriation of an Underutilized Asset entails the expropriation of land.

4. Can this new law be repealed by judicial process?

A bill once passed as an Act of Parliament cannot be reviewed or repealed as Sri Lankan law does not recognize judicial review of legislation. A five bench decision of the Supreme Court has dismissed applications for Fundamental Rights of petitioners affected by the Act after it came into operation.

5. Do affected companies have a right to appeal to Courts at any stage?

There is no mechanism through which the affected companies may judicially review the vesting of assets as same is a legislative act which cannot be reviewed by a Court of law. However, the said Act provides the stakeholders concerned a right of appeal against the determination of the Compensation Tribunal.

6. How does the new law affect any future concessions granted by the BOI or land transfers by the Government to foreign investors?

As no clear objective criteria or process is set forth under the Act for the evaluation of an “underperforming enterprise” or an “underutilized asset” in terms of the Act, any company in future which may be granted a concession by the BOI, or any private entity which may obtain leasehold or freehold rights from the Government may potentially be at risk of “expropriation” by the Government.

However, when contracting with the BOI it would be advisable for a new investor to ensure the inclusion of a condition that either stated that the said enterprise or its assets would not be expropriated or a condition to state that terms relating to compensation in the event the asset/enterprise is expropriated. Although such a clause would not deter any future acts of expropriation by the State, such an undertaking by the BOI could give rise to a cause of action for damages based on a breach of contract in the event the enterprise/asset is expropriated.