

## Compensation concerns could be behind Indian government's challenge on 2G licenses



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Concern about the extent of possible compensation to foreign operators could be behind a potential plan by the Indian government to file a petition against the country's Supreme Court verdict cancelling a series of 2G mobile telephone licenses that was issued last week, sector lawyers said.

Local television channels on Wednesday (8 February) reported that the Prime Minister Manmohan Singh is seeking advice from G.E. Vahanvati, the attorney general of India, on filing a review petition asking the Supreme Court to "reconsider its verdict".

Last Thursday's Supreme Court verdict cancelling the 122 second-generation (2G) telecom licenses issued post January 2008 will see some affected companies invoking bilateral investment treaties (BITs) to seek justice and compensation against their investments in India, lawyers interviewed by this news service said.

Under diplomatic pressure, the Indian government could challenge the Supreme Court for interfering with its policy decisions, the lawyers pointed out. By virtue of Article 137 of the Constitution of India, the Supreme Court can review its judgment on grounds of error and also in unusual cases to avoid injustice.

"It is not yet clear which judgment the government seeks to review. It could be in relation to the judgment [in WP. 10662/2009] which pertains to certain government executives or it could be to seek a review with regards to the judgment [in W.P No. 423/2009], which squarely deals with the issuance of 2G licenses to telecom operators," Prateek Bagaria, a member of the International Disputes Team with Nishith Desai Associates, said.

In the case of the latter, it could send a positive message to foreign investors if the government seeks to embark on the issue of compensation to the affected investors, the lawyers said.

Given the potential for foreign investors to exercise investment arbitration rights under applicable BITs, the government, based on past investment arbitration experience, could be mindful of the fact that the compensation sought by international investors at such forums can be sizeable and not just limited to their actual investment into the country, Bagaria pointed out. The compensation could even include the loss of opportunity or future benefit, he added.

Competition lawyers agreed that the reported government plan to seek a review could be the result of diplomatic pressure from the Russian and Norwegian governments which have strongly stated that they will seek diplomatic settlement to protect their investors in India.

Following this diplomatic pressure, the Indian government could challenge the Supreme Court for interfering with its policy decisions especially when mala fide [knowingly buying stolen property] by policy makers has not yet been proven, pending a decision by the Central Bureau of Investigation (CBI).

**Telenor's** [TEL:NO] Indian arm **Uninor** proposes to file a review petition in the country's Supreme Court against the cancellation of its 2G licenses, the company has said. The Norwegian-based telephone company has a 67% majority stake in Uninor.

Similarly, Russian holding company **AFK Sistema** [AFKS:RM] and its Moscow telecom-subsiary **MTS** [MTSS:RM] could take legal action against the Indian government, following the cancelation of a series of its second-generation (2G) mobile licenses issued after January 2008 in India, this news service earlier reported.

Reiterating this sentiment, a spokesperson for the Indian joint venture, **Sistema Shyam TeleServices**, said the Russian-Indian JV would protect its interests using all available judicial remedies.

In the proposed review filing, the government could ask the Supreme Court to come out with some form of compensation for the affected investors, competition lawyers said.

However, it remains to be seen on what basis the compensation would be calculated - whether in terms of investment made or in terms of license fees paid, or by a certain relaxation in the new policy yet to be drawn by the Telecom Regulatory Authority of India (TRAI), the lawyers said.

Although the compensation would amount to a sizeable sum that the exchequer would end up paying, more importantly, a review of the verdict could restore India's image among foreign investors and reduce the possibility of losing future investors, industry players said.

The reported move by the government may be viewed positively in that it is trying to uphold investor interest and ensuring that the Supreme Court verdict does not set a precedent of foreign investors being punished retrospectively, Bagaria said.

In fact, the government's proposed plea may challenge the Supreme Court for interfering with its policy decision when the court's role, as the judiciary, is more in terms of interpreting policy decisions and not making them, which is the role of the executive, the lawyers pointed out.

If the government's motives in challenging the 2G revocations are politically-oriented due to the Supreme Court having come down heavily on the corrupt practices of some government officials, it could be a bigger fiasco than what the court has done by retrospectively punishing foreign investors, some lawyers argued.

Any politically oriented moves would be badly timed, given that India is in the midst of elections and the current ruling political party, Congress, does not seem to be on a strong footing, one of the lawyers said.

Many lawyers are in talks with some of the aggrieved parties and pointed out that if the Indian government does not take action, the Supreme Court's verdict could result in sizeable claims far exceeding the actual investment amounts. More importantly, though, some lawyers feel that the decision shows how hard the Supreme Court can come down on corrupt practices.

The Supreme Court's verdict follows an investigation into alleged corrupt practices during the granting of the 2G licenses, implicating some government officials, including former telecom minister Andimuthu Raja. Its verdict also overruled the previous government's "first come first serve" policy in the sale of 2G spectrum, as the ruling suggested that the Telecom Regulatory Authority of India (TRAI) issue regulations on the auctioning of the canceled licenses at fair market rates.

by Freny Patel in Mumbai

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