

# The Supreme Court on The Great Indian Bustard: Environmental Contestation and Implications in Solar Projects in India



Authors

**Pradeep Ratnam** | pradeep.ratnam@kochhar.com

**Navolina Majumdar** | navolina.majumdar@kochhar.com

## Introduction

Recently, the Supreme Court of India ("Court"), in a writ petition, stayed the installation of overhead power lines and further construction of windmills and installation of solar infrastructure in priority and potential habitats identified by the Wildlife Institute of India (WII) as a last effort to save the great Indian bustard (GIB) from certain extinction. To protect the GIB from overhead power cables, the Court directed the 'undergrounding' of powerlines in the areas demarcated by the WII as the GIB's priority and potential habitat.

While the Court's order is laudable in its singular focus of protecting endangered wildlife, its financial implications for under-construction solar projects, both for the affected states (Rajasthan and Gujarat) and project developers, are likely to be catastrophic. The primary concern with replacing overhead powerlines with underground ones are:

- High cost of underground cabling;
- Right of way (ROW) issues, with farm land which undergrounding projects would need to cut through;
- Likely project delays, with financing cost implications;
- High downtime to repair failed cables;
- The requirement of high voltage transmission lines, which renders shifting of lines underground unviable;
- Non-availability of cables; and
- Increase in the number of joints with length of run.

While addressing the States' concern of lack of funds, the SC quoted the Centrally Sponsored Integrated Development of Wildlife Habitats Scheme, 2009 which provided for financial sharing between Centre and State. The Court further stated in its order that "*in the instant case the preservation is by undergrounding the powerlines and in that context if cost is incurred, it would also be permissible to pass on a portion of such expenses to the ultimate consumer subject to approval of the Competent Regulatory Authority.*"

The Court further suggested the following options to meet the increased expenses:

- The cost be a part of CSR of Companies under Section 135 of the Companies Act, 2013 (if the Company meets

the criteria of minimum net worth/turnover/net profit);

- Implementation of the Compensatory Afforestation Fund Act, 2016, sections 4, 5 and 6 of which provide for the utilization of the fund for measures to mitigate threats to wildlife. Further, the State of Rajasthan has already set up a Compensatory Afforestation Fund Management and Planning Authority (CAMPA) on 12.11.2009 which permit the use of the State Fund for the improvement of wildlife habitat.

The SC ruled that the undergrounding of high-voltage lines would need to be evaluated on a case-to-case basis by a special 3-member committee comprising of scientists from WII, Ministry of New and Renewable Energy and the deputy director of the Corbett Foundation ("**Special Committee**"). However, all low voltage power lines whether already laid or to be laid in the potential habitats of the GIB are to be made underground in all cases. Further, some high voltage power lines would have to be converted into underground power lines as well. The timeline for completion of undergrounding of the power lines is 12 months from the date of the Order. In all cases where it is feasible to convert the overhead power lines to underground power lines, the same shall be completed within one year.

## Analysis

At the outset, the renewable energy sector (solar and wind energy) faces the following roadblocks due to the SC Order:

- The cost of developing projects would increase by around 87% which would in turn result in a 10-15% hike in tariff if the developers have to bear this entire cost<sup>1</sup>. In utility scale projects where the offtaker is a state power distribution company (DISCOMs), the increase in tariffs could be as high as 10-20%. As per an estimate, more than 2,500 kilometres of cables, including both high and low-voltage, have to be laid underground as per the court ruling at a very high estimated cost;
- Right of way another major concern of the developers /power companies is acquiring the land on which undergrounding needs to be done. This would involve digging through large areas of land which may be difficult due to protest by landowners. This would delay the implementation of the projects as well. Further, in the 12-

<sup>1</sup><https://mercomindia.com/gib-renewable-energy-save-both/>

month timeline given by the SC for completing the undergrounding process, the acquisition of land itself might not be possible;

- In case land needs to be first acquired to start the undergrounding process, the land cost and compensation to the landowners would drastically increase the final cost of the project. This in turn would be a burden passed on to the end consumer by way of hiked tariffs;
- For investors who have negotiated or availed funding for their projects, the increased cost would throw the financial projections in a disarray and sourcing additional funding may prove difficult.

### Conclusion

As a result of the Supreme Court's ruling, two key questions emerge

- Would project companies be entitled to a change in law relief and pass-through of the increased costs of complying with the Court's order? It would appear that the Court's order is 'new' law entitling an affected party to seek an increase in costs for a change in law. However, a final view would depend on various factors such as the definition of Change in Law in the PPAs pertaining to the affected projects, and 'pre-existing' local laws on GIB.
- From an M&A perspective, prospective purchasers of existing power projects would need to evaluate whether

to discount the deal consideration for a possible disallowance of the pass-through of increased costs on account of the Court's order. If there is a possibility that change in law claims would be rejected, for instance, if a court or the appropriate tariff setting authority find that the environmental clearance for the project was inadequate, or that GIB was a "known risk", then the purchaser may need to negotiate an adjustment of consideration.

Further, if the project developers are of the opinion that the undergrounding is unviable, the Court has re-directed them to the Special Committee, which will then decide on the fate of the project. This Special Committee shall decide (on a case-to-case basis), whether undergrounding is feasible for the developer or not, thus creating further uncertainty regarding the future of the projects. This uncertainty shall prevail till the Court provides some clarification or some relief to the State and investors. Stakeholders should evaluate their options carefully.

Pradeep Ratnam is a Senior Partner in the New Delhi office of Kochhar & Co and co-chairs the Firm's Projects & Infrastructure and Banking & Finance Practice Groups.

Navolina Majumdar is an Associate in Kochhar & Co New Delhi office. She is a member of the Firm's Infrastructure, Banking and Project Finance Practice Groups.