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ADANI–HOLCIM: Cementing the Future!

August 2022

Research

M&A Lab

ADANI–HOLCIM: Cementing the Future!

August 2022



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Second Most Innovative Firm: 2019
Most Innovative Indian Law Firm: 2019, 2017, 2016, 2015, 2014



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2020, 2019, 2018, 2017, 2014
Deal of the Year: Private Equity, 2020



Asia-Pacific
Tier 1 for Dispute, Tax, Investment Funds, Labour & Employment, TMT, Corporate M&A:
2021, 2020, 2019, 2018, 2017, 2016, 2015, 2014, 2013, 2012



Asia-Pacific
Tier 1 for Government & Regulatory, Tax: 2020, 2019, 2018



Ranked
'Outstanding' for Technology, Labour & Employment, Private Equity, Regulatory, Tax:
2021, 2020, 2019



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Thought Leaders, India — Nishith Desai, Vaibhav Parikh, Dr. Milind Antani
Arbitration Guide, 2021 — Vyapak Desai, Sahil Kanuga



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Asia Mena Counsel: In-House Community Firms Survey:
Only Indian Firm for Life Science Practice Sector: 2018

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Prologue

With a remarkable diversified portfolio of world-class businesses ranging from infrastructure to energy, the Adani group is now seeking to broaden its industrial horizons by foraying into the cement manufacturing industry. Holcim has signed a binding agreement for the Adani group to acquire Holcim's business in India and the sheer scale of this deal will establish Adani as the second largest player in the Indian cement industry.

The Indian cement industry is one with huge potential for growth given the exponential demand both at home and abroad. Having witnessed an overall cement production capacity of nearly 545 million tonnes¹ this year (98% of which rests with the private sector), it comes as no surprise that India is the second largest cement producer in the world. CRISIL's ratings indicate that the Indian cement industry exhibits no signs of slowing down and is likely to supply another 80 million tonnes by FY 24, the sharpest increase in the last decade.²

This colossal demand for cement on an international platform culminated in four of the largest cement companies in the world (Lafarge, Holcim, Italcementi and Heidelberg Cements) entering the Indian arena in 2005.³ The same year witnessed a slew of Mergers and Acquisitions (“M&A”), with Ambuja acquiring a 14% stake in ACC⁴ and, subsequently, ACC taking over DLF Cements, Modi Cement and IDCOL Cement⁵ respectively. These series of M&A deals reached its acme when Holcim acquired a 14.8% promoters' stake and 67% controlling stake in Ambuja.⁶ The swarm of acquisitions on an industry wide scale led to the emergence of two dominant groups in the cement market - Holcim (through ACC and Ambuja) and the Aditya Birla Group (through Grasim Industries and Ultratech Cement).

It comes as no surprise that Adani wants a slice of this mammoth pie and set its sights upon Holcim's Indian portfolio. Holcim holds a (i) 63.11% stake in Ambuja, which in turn owns a 50.05% stake in ACC; and (ii) 4.48% direct stake in ACC.⁷ The offer share price is INR 385 and INR 2,300 for Ambuja and ACC respectively, indicating a whopping 8-9% premium over their current market value, totaling to an approximate value of USD 6.5 billion.

The Deal has triggered the open offer obligations under the Takeover Code for Ambuja and ACC, resulting in the deal size increasing to USD 10.5 billion (assuming 100% acceptance ratio in the Open Offers). Upon successful completion of the Open Offers, Adani's stake in Ambuja and ACC will increase to an astronomic 89% and 81%⁸ respectively thereby catapulting the Adani group into second position in the cement industry in India.

While traditionally oligopolistic in nature, the cement industry has been dominated by formidable players such as the Aditya Birla Group and Dalmia Cement for nearly a decade. Given this backdrop, the Deal is a 'win' not only for Adani but the market at a holistic level as it will inevitably shake up the cement industry and stimulate unprecedented growth. In this M&A Lab, we probe deeper into the multibillion-dollar deal that is bound to revamp the Indian cement industry. We will analyse the legal, regulatory, tax, financing and other commercial dimensions of this intricate deal.

1 IBEF Cement Industry Report February 2022 <https://www.ibef.org/industry/cement-presentation#:~:text=Cement%20Industry%20Report&text=India%20is%20the%20second%20largest%20cement%20producer%20in%20the%20world,the%20rest%20with%20public%20sector.>

2 Ibid.

3 [https://www.financialexpress.com/archive/after-a-lull-ma-deals-in-cement-industry-set-to-swirl/639144/.](https://www.financialexpress.com/archive/after-a-lull-ma-deals-in-cement-industry-set-to-swirl/639144/)

4 [https://www.financialexpress.com/archive/boom-in-housing-and-road-sectors-will-cement-growth/142983/.](https://www.financialexpress.com/archive/boom-in-housing-and-road-sectors-will-cement-growth/142983/)

5 Ibid.

6 [https://www.hindustantimes.com/india/holcim-is-buying-gujarat-ambuja/story-WKDxlco6lruGOy2R0dZstL.html.](https://www.hindustantimes.com/india/holcim-is-buying-gujarat-ambuja/story-WKDxlco6lruGOy2R0dZstL.html)

7 <https://economictimes.indiatimes.com/markets/stocks/news/adani-group-holcim-10-bn-mega-deal-key-takeaways-analysts-take/articleshow/91586435.cms>

8 [https://www.financialexpress.com/industry/adani-family-makes-open-offer-for-ambuja-cements-acc-stakes/2526937/.](https://www.financialexpress.com/industry/adani-family-makes-open-offer-for-ambuja-cements-acc-stakes/2526937/)

Glossary of Terms

Abbreviation	Meaning / Full Form
ACC	ACC Limited
ACC Open Offer	Open offer being made by the Acquirer to the public shareholders of ACC to acquire up to 4,89,56,419 equity shares, representing 26% of the share capital
Acquirer	Endeavour Trade and Investment Ltd.
Adani	Adani Group
Ambuja	Ambuja Cements Limited
Ambuja Open Offer	Open offer being made by the Acquirer to the public shareholders of Ambuja to acquire up to 51,63,52,655 equity shares, representing 26% of the share capital
BSE	BSE Limited
CA 1956	Companies Act, 1956
CA 2013	Companies Act, 2013
CBDT	Central Board of Direct Taxes
CCI	Competition Commission of India
CHF	Swiss Francs
Competition Act	Competition Act, 2002
Deal	Proposed acquisition of Holcim's business in India (specifically, its stake in Ambuja and ACC respectively) by Adani i.e. including the Underlying Transaction and the Open Offers
DTAA	Double Taxation Avoidance Agreements
FDI	Foreign Direct Investment
FDI Policy	Consolidated Foreign Direct Investment Policy, Circular of 2020
FEMA	Foreign Exchange Management Act, 1999
FY	Financial Year
Holcim	Holcim Group
INR	Indian Rupees
ITA	Income Tax Act, 1961
ITR	Income Tax Rules, 1962
LODR	Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015
MLI	Multilateral Instrument
NDI Rules	Foreign Exchange Management (Non-debt Instruments) Rules, 2019
NSE	National Stock Exchange of India Limited
ODI	Overseas Direct Investment
Offshore Promoter	Holderind Investments Ltd.
Open Offers	Collectively the Ambuja Open Offer and the ACC Open Offer
PAN	Permanent Account Number
POEM	Place of Effective Management
RBI	Reserve Bank of India
SCRR	Securities Contracts (Regulation) Rules, 1957

1. Glossary of Terms

Abbreviation	Meaning / Full Form
SEBI	Securities and Exchange Board of India
Seller	Holderfin B.V.
SPA	Share purchase agreement dated May 15, 2022, executed between the Acquirer and the Seller for the sale and purchase of 100% of the shareholding and control of the Offshore Promoter
SPV	Special Purpose Vehicle
Stock Exchanges	Collectively, the BSE and the NSE
Takeover Code	Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011
Target Entities	Ambuja and ACC collectively
Underlying Transaction	The transaction set out in the SPA as a result of which the Acquirer will indirectly acquire 63.11% shareholding in Ambuja, 4.48% shareholding in ACC, and will indirectly control the Target Entities
USD	United States Dollars

Executive Summary

Adani, through its Mauritian SPV, i.e., the Acquirer, entered into a SPA with the Seller for the purchase of 100% of the shareholding and control of the Offshore Promoter for an aggregate consideration of approximately USD 6.5 billion. The Offshore Promoter is the promoter of Ambuja and directly holds 63.11% of the paid-up equity share capital of Ambuja. Further, Ambuja and the Offshore Promoter are the promoters of ACC and the Offshore Promoter directly holds 4.48% of the paid-up equity share capital of the ACC while Ambuja holds 50.05% of the paid-up equity share capital of ACC.

Accordingly, pursuant to execution of the SPA, the Acquirer will indirectly acquire the Offshore Promoter's shareholding in Ambuja and ACC, thereby triggering Regulations 3(1), 4 and 5(1) of the Takeover Code mandating an open offer to the public shareholders of Ambuja and ACC respectively. On May 15, 2022, the Acquirer issued the public announcement of the Open Offers, per the terms of the Takeover Code for the acquisition of shares constituting 26% of the issued and paid up equity share capital of Ambuja and ACC respectively. The open offer process is currently underway and should be completed by August 10, 2022.⁹

The Seller may be entitled to claim a relief under the India-Netherlands DTAA and accordingly, may not need to pay any taxes on the sale of the shares held in the Offshore Promoter to the Acquirer.

The Deal is valued at approximately USD 10.5 billion (assuming 100% acceptance ratio in the Open Offers). Upon successful completion of the Open Offers, Adani's stake in Ambuja and ACC will increase to 89% and 81%¹⁰ respectively. The Underlying Transaction shall be funded through a combination of promoter equity and debt financing by offshore banks. The consideration for the acquisition of the shares pursuant to the Open Offers will be payable in cash in accordance with the provisions of the Takeover Code.

9 https://www.sebi.gov.in/sebi_data/commdocs/may-2022/ACC%20Limited_DLOF_p.pdf; https://www.sebi.gov.in/sebi_data/commdocs/may-2022/Ambuja%20Cements_DLOF_p.pdf.

10 <https://www.thehindubusinessline.com/companies/adani-group-may-merge-ambuja-acc-to-drive-efficiency/article65419532.ece>.

Deal Details

Brief Snapshot

Acquirer	Endeavour Trade and Investment Limited (a company incorporated under the laws of the Republic of Mauritius) ¹
Seller	Holderfin B.V. (a company incorporated in the Netherlands) ²
Offshore Promoter	Holderind Investments Limited (a company incorporated in Mauritius)
Acquisition or the Deal	<p>From the Seller (Direct Acquisition):</p> <p>100% of the shareholding held by the Seller in the Offshore Promoter.</p> <p>Indirect Acquisition:</p> <ul style="list-style-type: none"> i. 63.11% shareholding in Ambuja; and ii. 54.53% shareholding in ACC. <p>From the public shareholders of Ambuja and ACC:</p> <ul style="list-style-type: none"> i. 51,63,52,655 fully paid-up equity shares of face value INR 2 each, at a price of INR 385 per equity share, representing 26% of the expanded voting share capital of Ambuja;³ and ii. 4,89,56,419 fully paid-up equity shares of the face value of INR 10 each, at a price of INR 2,300 per equity share, representing 26% of the expanded voting share capital of ACC.⁴
Mode of acquisition	Share Purchase Agreement dated May 15, 2022 executed between the Acquirer and the Seller for the sale and purchase of 100% shareholding and control of the Offshore Promoter. ⁵
Acquisition Price	INR 385 per equity share of Ambuja and INR 2300 per equity share for ACC. ⁶
Total Consideration	USD 10.50 billion (assuming full acceptance of the Open Offers).
Mode of Funding	Combination of promoter equity and debt financing by offshore banks. ⁷

1 https://www.sebi.gov.in/sebi_data/commondocs/may-2022/Ambuja%20Cements_DLOF_p.pdf

2 https://www.sebi.gov.in/sebi_data/commondocs/may-2022/ACC%20Limited_DLOF_p.pdf

3 Ibid.

4 https://www.sebi.gov.in/sebi_data/commondocs/may-2022/ACC%20Limited_DLOF_p.pdf

5 Ibid.

6 Ibid.

7 <https://www.livemint.com/companies/news/adanis-to-infuse-3-bn-in-equity-to-fund-holcim-deal-11652726184072.html>

2. Deal Details

Parties involved in the deal

Adani Group

The Adani Group is an Indian multinational conglomerate. It has a diverse portfolio ranging from electricity generation to food processing and infrastructure. Gautam Adani is the founder of the Adani group and is currently the richest person in Asia and fourth richest in the world.⁸

The Adani group is a diversified organisation with a market cap of over USD 209.94 billion (as on July 29, 2022),⁹ comprising seven publicly traded companies. It has created a utility and transport infrastructure portfolio that has a pan India presence. The headquarters of the Adani group is in Ahmedabad, Gujarat, India. The Adani group is a market leader in transport logistics and energy utility portfolio businesses focusing on large scale infrastructure development in India.¹⁰

The Acquirer (Endeavour Trade and Investment Ltd.)

The Acquirer is a company incorporated under the laws of the Republic of Mauritius on April 29, 2021. The Acquirer has its registered office at 6th Floor, Tower 1, Nexteracom Building, Ebene-72201, Mauritius.¹¹

The Acquirer is an SPV that is a part of the Adani Group. It operates in the investment holding industry and related activities and is not listed on any of the Stock Exchanges. The Acquirer is entirely held by the Mauritius-incorporated company Xcent Trade and Investment Ltd (“**Xcent**”). Acropolis Trade and Investment Ltd. (“**Acropolis**”), the parent company of Xcent, is the promoter of the Acquirer. Certain members of the Adani family have the ultimate beneficial ownership of Acropolis.¹²

The Seller (Holderfin B.V.)

The Seller is a company incorporated in the Netherlands.¹³

Holcim Group

The Holcim Group is a multinational company manufacturing varied building materials and innovating sustainable building solutions.¹⁴ It has a presence in around 70 countries and employs around 72,000 employees.¹⁵ Holcim operates four business segments i.e., cement, aggregates, ready-mix concrete and other products including precast concrete, asphalt, mortar and other building materials.¹⁶

The company was established in July 2015 as LafargeHolcim through the merger of Holcim and Lafarge, which had combined sales of CHF 26.7 billion in 2019. In the year 2020, it was ranked as the 280th largest public

8 <https://economictimes.indiatimes.com/news/company/corporate-trends/gautam-adani-surpasses-bill-gates-to-become-4th-richest-person-in-the-world/articleshow/93028546.cms?from=mdr>

9 <https://www.adani.com/About-us>

10 Ibid.

11 https://www.sebi.gov.in/sebi_data/commndocs/may-2022/ACC%20Limited_DLOF_p.pdf

12 <https://www.prnewswire.com/in/news-releases/adani-to-acquire-holcim-s-stake-in-ambuja-cements-and-acc-limited-870584662.html>

13 <https://www.kvk.nl/orderstraat/subproduct-kiezen/?kvknummer=331550250000&productgroep=Concernrelaties>

14 <https://www.holcim.com/who-we-are>

15 <https://pitchbook.com/profiles/company/100517-59#overview>.

16 Ibid.

2. Deal Details

company in the world. The Holcim Group had a 63.11% stake in Ambuja and 50.05% stake in ACC.¹⁷ On account of this transaction, the Adani group will be acquiring the aforesaid stake in Ambuja and ACC.

Ambuja Cements Limited

Ambuja is a public listed company, incorporated under the CA 1956 on October 20, 1981.¹⁸ Ambuja is engaged in the business of manufacturing and marketing cement and cement related products. Equity shares of Ambuja are listed on the Stock Exchanges.

Ambuja is known for its hassle-free, home-building solutions that are tailor-made for Indian climatic conditions and are sustainable in nature. It is part of Holcim Group.¹⁹ Currently, Ambuja has a cement capacity of 31 million tonnes with 6 integrated cement manufacturing plants and 8 cement grinding units across the country.²⁰

ACC Limited

ACC is a public listed company, incorporated under the (Indian) Companies Act, 1913, on August 1, 1936.²¹ ACC is engaged in the business of manufacturing and selling cement and ready-mix concrete. The equity shares of ACC are listed on the Stock Exchanges.

ACC is a leading player in the Indian building materials space, with a pan-India manufacturing and marketing presence. It has 17 cement manufacturing units, 85 ready mix concrete plants, nearly 6,643 employees, a vast distribution network of 56,000 channel partners sales offices across the country.²² In 2005, ACC became a part of Holcim Group.²³

17 <https://www.holcim.com/who-we-are>

18 <https://www.ambujacement.com/Upload/PDF/ACL---MOA-&-AOA-31.03.2017.pdf>

19 <https://www.ambujacement.com/about-ambuja/ambuja-at-a-glance>

20 Ibid.

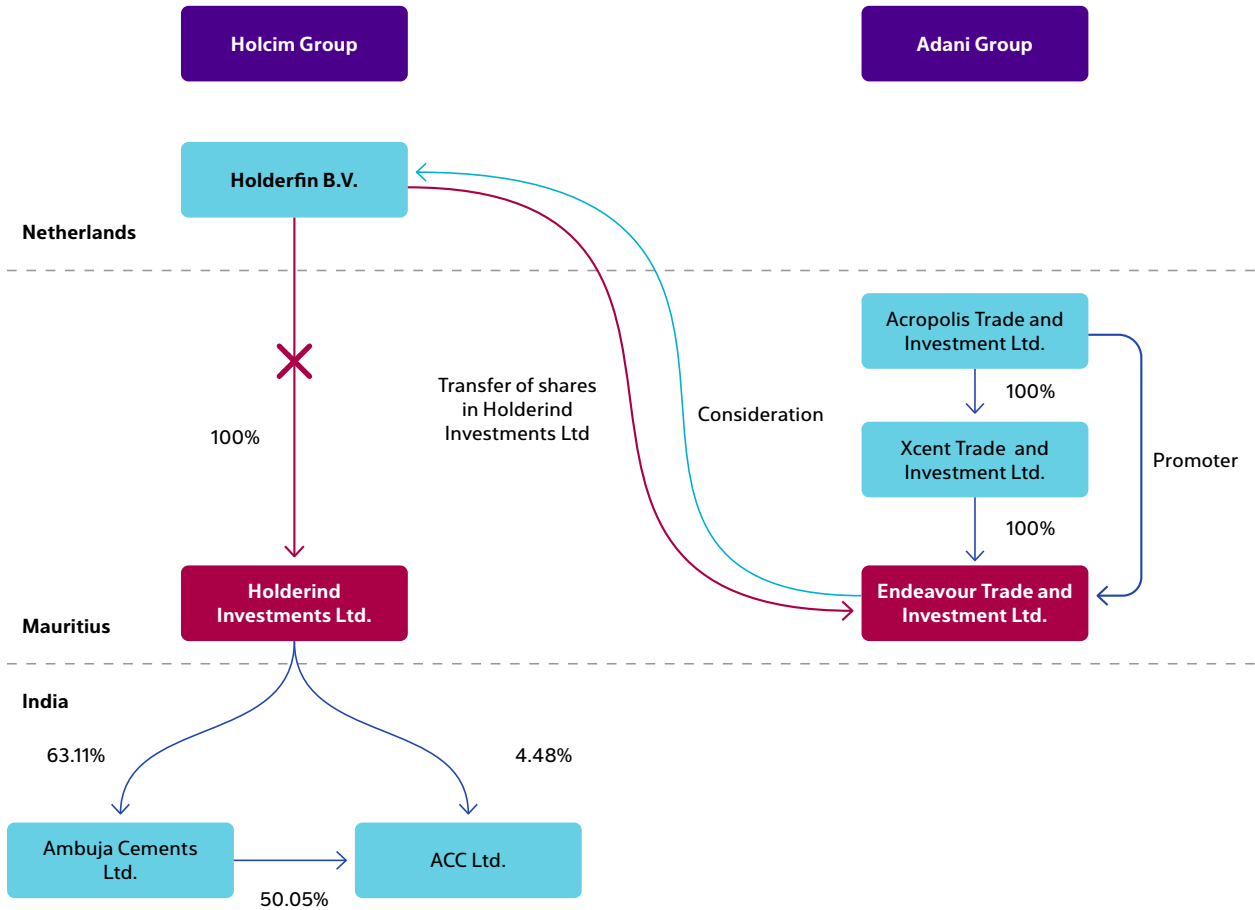
21 https://www.sebi.gov.in/sebi_data/commndocs/may-2022/ACC%20LIMITED_OpenDPS_p.pdf

22 <https://www.acclimited.com/about/acc-at-a-glance>

23 Ibid.

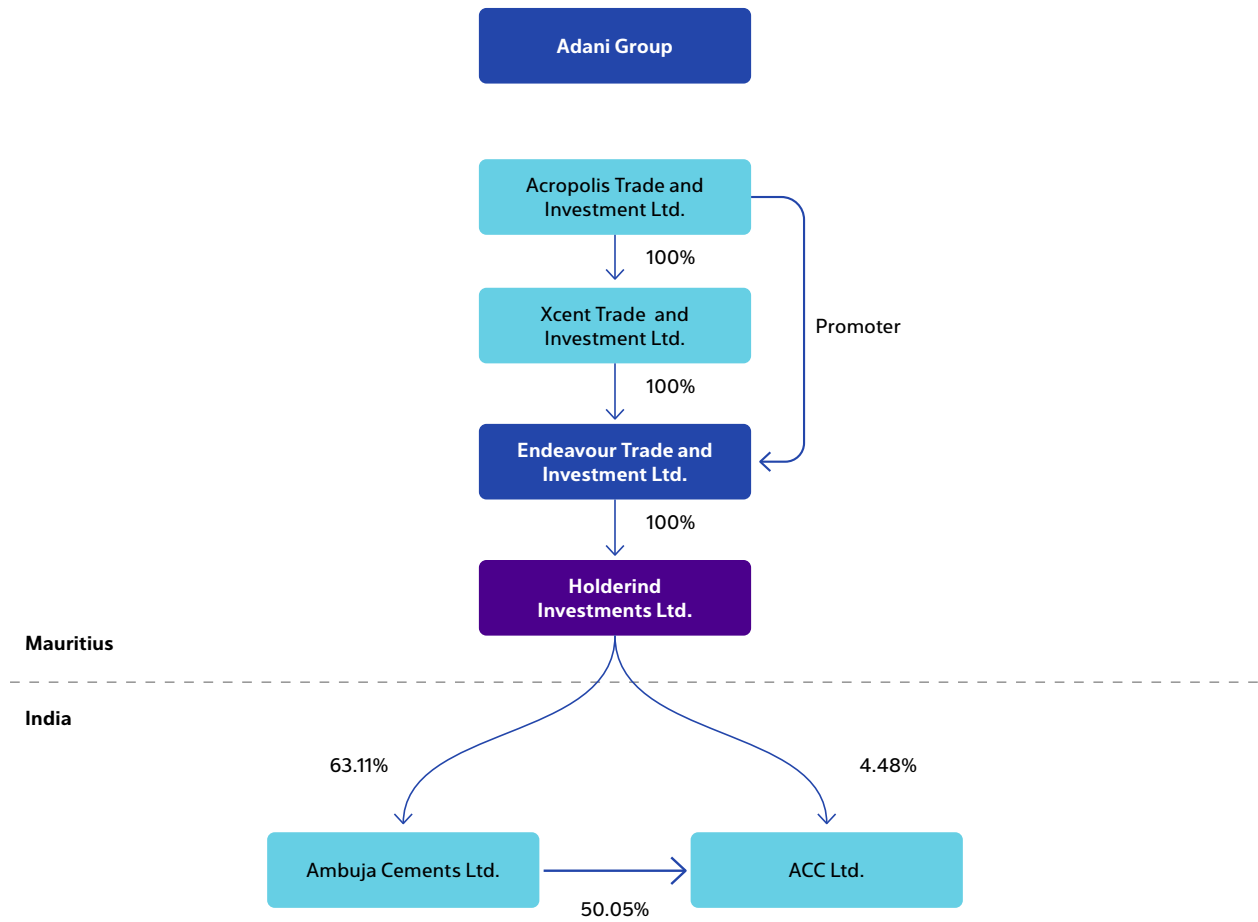
Deal Structure

Underlying Transaction



2. Deal Structure

Resultant Structure upon Consummation of the Underlying Transaction*



* This diagram only represents the resultant structure upon consummation of the Underlying Transaction.

Commercial and Financial Considerations

A. Overview of Bidding Process: How did Adani win the Bidding Process?

Bidding process

Holcim undertook a bidding process for the sale of its stake prior to finalization of the Deal with Adani. Owing to the strong branding and position of ACC and Ambuja in the market, top market players such as JSW Group, Arcelor Mittal Group and Ultratech Cement (Aditya Birla Group) had also expressed their interest through competing bids.

The following is a timeline of the bidding process and its outcome:

Date	Event
April 13, 2022	Media reports stating that Holcim is considering selling its business in India and is in talks with JSW Group and Adani. ¹
April 14, 2022	Initial stage negotiations of Holcim with JSW Group and Adani commence. ²
April 20, 2022	Subsequent brokerage reports released by JP Morgan maintaining a neutral rating on Ambuja Cement and noting that valuations are likely to remain expensive. ³
April 27, 2022	Negotiations with Adani reach an “advanced stage”. ⁴
May 3, 2022	A news outlet reported that Dalmia Bharat was also planning to submit a bid for purchase of Holcim’s Indian assets. ⁵ This was followed by a similar report on a bid by ArcelorMittal. ⁶
May 3, 2022	Reports of submission of non-binding bids by Adani and JSW Group in the past week emerge. ⁷
May 11, 2022	Submission of non-binding bids by Ultratech Cement. ⁸
May 15, 2022	Adani wins the bid to acquire Holcim’s India assets. ⁹
May 17, 2022	Commencement of procedures under the Takeover Code.

1 <https://www.bloomberg.com/news/articles/2022-04-13/holcim-said-to-weigh-sale-of-india-s-9-6-billion-ambuja-cements>

2 <https://economictimes.indiatimes.com/industry/indl-goods/svs/cement/ambuja-and-acc-cements-up-for-sale-jsw-adani-group-show-interest-as-holcim-may-exit-india/video/90844749.cms>

3 <https://www.timesnownews.com/business-economy/companies/holcim-plans-to-exit-india-cement-market-acc-ambuja-in-focus-reports-article-90910721>

4 https://www.business-standard.com/article/companies/adani-group-in-advanced-talks-to-acquire-holcim-businesses-in-india-122042600488_1.html

5 <https://www.livemint.com/companies/news/dalmia-may-join-race-for-holcim-s-india-biz-11651517115374.html>

6 <https://economictimes.indiatimes.com/industry/indl-goods/svs/cement/ultratech-makes-a-formal-bid-for-holcims-india-assets/articleshow/91499374.cms?from=mdr>

7 <https://www.outlookindia.com/business/why-indian-corporate-giants-are-lining-up-to-buy-holcim-s-stake-in-ambuja-cements-acc-news-194736>

8 <https://www.livemint.com/companies/news/ultratech-bids-for-holcim-units-as-bidders-look-for-more-access-11652294781879.html>

9 See press releases by both parties: <https://www.holcim.com/media/media-releases/holcim-india-business-acquired> (Adani); https://www.holcim.com/sites/holcim/files/2022-05/20220515_press_adani_holcim_en.pdf (Holcim)

3. Commercial and Financial Considerations

Competing Bids

While the non-binding bids submitted to Holcim are not publicly available, a news report provides some details about the offers made by JSW Group, Adani and Ultratech Cement respectively. The details about the offer made by ArcelorMittal and Dalmia Cement are not available in the public domain. The following are key points of the offers made to Holcim:

i. JSW Group

JSW Group reportedly made a USD 7 billion bid¹⁰ for Holcim's Indian stake, of which it was to offer USD 4.5 billion¹¹ as its own equity and USD 2.5 billion from private equity partners.¹² JSW Group also had assurances for up to USD 11 billion from Carlyle Group, Advent International and Apollo Private Equity Investment, coupled with institutional support from banks.¹³

ii. Ultratech Cement

While the details of the bid made by Ultratech Cement are not publicly available, they were considering voluntary divestiture of assets worth 15 million tonnes per annum to comply with competition law concerns that would arise as a result of them winning the bid.¹⁴

iii. Adani

The details of Adani's offer and funding have been discussed in detail below.

Reasons for Adani's win

Holcim's priority was a fast exit, fair price and minimal hurdles (regulatory and taxation specific) for the completion of the deal, in line with its strategy to quickly exit developing economies. Thus, a deal with Ultratech Cement was unlikely from the beginning, as it would entail obtaining a clearance from the CCI due to its existing market share in the cement industry.

Adani's offer was suitable because it offered an acquisition premium and reduced chances of regulatory approvals owing to limited presence in the cement industry and on account of the offshore funding structure for the deal.

10 <https://financialpost.com/pmn/business-pmn/indias-jsw-group-to-make-7-billion-bid-for-holcims-india-units-ft>

11 Ibid.

12 Ibid.

13 <https://www.financialexpress.com/industry/holcim-bid-jsw-offers-7-billion-adani-ultratech-in-the-race-too/2519276/>

14 <https://economictimes.indiatimes.com/industry/indl-goods/svs/cement/ultratech-secures-legal-view-set-to-bid-for-ambuja-acc/articleshow/91479578.cms?from=mdr>

3. Commercial and Financial Considerations

B. Is the Deal a Jackpot for Adani?

The Deal is a financial and strategic win for Adani. Upon its consummation, Adani will directly hold the second largest market share in the Indian cement industry.¹⁵ Currently, the market leader is Ultratech Cement (part of the Aditya Birla Group), having a capacity to produce nearly 120 million tonnes of cement annually.¹⁶ With the acquisition of Ambuja and ACC, Adani will have a combined production capacity of 70 million tonnes per annum.¹⁷ In addition, Adani will have access to Ambuja's 14 cement plants and 4,700 employees, along with 17 cement plants, 78 ready mix concrete factories and 6,000 employees of ACC spread across India.¹⁸

Even apart from these *prima facie* advantages of the Deal, Adani benefits indirectly in multiple ways:

i. The promising potential of the Indian Cement Industry

In a recent sector overview, the India Brand Equity Foundation notes that India is the second largest cement producer in the world, accounting for over 7%¹⁹ of the global installed capacity with an annual production capacity of around 545 million tonnes per annum.²⁰ It further highlighted that the recent infrastructure and rural housing boom in India indicates that the industry is expected to add nearly 80 million tonnes of capacity per annum by the end of the financial year 2024.²¹ At such a time, an entry into the cement industry with the type of capabilities being acquired by Adani will provide it with a natural advantage and a near-certain chance of earning profits in a growing sector.

While the sector has a promising potential, it is known for having two predominant entry barriers – time and capital. Generally, setting up a cement plant in India can prove to be a cumbersome process owing to the extensive monetary investment involved combined with the time spent in obtaining regulatory approvals prior to its operations. For players that are not a part of the industry, sourcing raw materials may also prove to be expensive. Additionally, the location of a cement plant is just as important as its production capacity – because proximity to the market reduces transportation and storage costs.

The acquisition provides Adani with exclusive access to high-producing cement plants at strategic locations across India, coupled with the goodwill of the Ambuja and ACC brand and their supply/distribution chains, all of which will guarantee faster execution of its future plans for the cement industry.

ii. Synergies of the Deal

For Adani, there are multiple synergies associated with this acquisition, making them the perfect partner for this Deal. The Adani portfolio is known to be infrastructure-heavy, with businesses relating to ports, transport and logistics, power and coal. With the addition of cement to the portfolio, Adani can increase efficiencies and cut costs immensely through backward integration.²² For instance, the fly ash generated by power plants can be used in the production of cement, which will not only reduce costs but also serve as a

15 <https://www.businesstoday.in/latest/deals/story/adani-to-acquire-holcim-india-cement-businesses-will-become-the-second-largest-player-333674-2022-05-15>

16 <https://www.adityabirla.com/businesses/companies/ultratech-cement-limited>

17 <https://www.hindustantimes.com/business/adani-to-become-india-s-second-biggest-cement-maker-with-10-5-bn-holcim-deal-101652659028889.html>

18 Ibid.

19 <https://www.ibef.org/industry/cement-presentation>

20 Ibid.

21 Ibid.

22 <https://www.businesstoday.in/latest/deals/story/heres-why-holcim-is-a-strategic-fit-for-adani-333754-2022-05-16>

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greener alternative to the current cement mix. They can also use rice husk as an alternative power source for production to reduce costs and make the overall production process greener.²³ In a world moving towards renewable energy and sustainable development, such products are likely to have an increased demand.

Even other raw materials such as coal can be sought from Adani power plants. The ports across Gujarat (and near Ambuja's plants) can be used to transport cement across long distances. Lastly, in terms of end-use, the cement produced can be sold to Adani's infrastructure, transport and port businesses – guaranteeing constant in-house demand for the cement business individually and increased business value for the Adani portfolio.²⁴ Given Adani's reach nationally and internationally, it will also not be difficult for the business to obtain new international clientele. This strategic integration of resources can give a boost to the business and market proliferation of Ambuja and ACC individually, and Adani in the cement industry.

iii. Opportunities of Consolidation

Apart from synergies, this Deal also provides great benefits for a potential consolidation of business operations. There are two ways in which such consolidation may occur:

- Adani may consolidate its existing cement business subsidiaries (namely, Adani Cementation Limited, and Adani Cement Limited), into either Ambuja or ACC's operations, since these entities were planning to set up two cement units at Dahej in Gujarat and Raigarh in Maharashtra. They have also acquired a few limestone reserves recently in this respect.
- Alternatively, Adani might merge Ambuja and ACC into one entity in the future to increase cost efficiency.

Since the overall presence of Adani in the cement sector is otherwise minimal, both combinations are unlikely to face regulatory hurdles. Given that Ultratech Cement is also currently facing regulatory issues with the CCI, the timing for the deal generally and such potential consolidations remains ripe.

C. Does Holcim benefit from the Deal?

For Holcim, there are two major benefits:

i. Demonstrates Holcim's commitment to sustainability

Holcim recently announced a "Strategy 2025 – Accelerating Green Growth", which indicated a commitment to move away from sectors and operations responsible for significant environmental pollution, such as cement production. The principle idea is to shift to innovative building solutions that are sustainable in the long term.²⁵ For instance, they plan to decarbonize cement for their future cement operations.²⁶ Holcim's press releases therefore seem to indicate that its Indian exit is as a result of this strategy.

In lieu of recent efforts by conglomerates worldwide to shift to more environmentally conscious initiatives, Holcim's divestment will boost investor confidence by demonstrating the company's commitment to its

²³ Ibid.

²⁴ <https://economictimes.indiatimes.com/markets/expert-view/holcim-deal-excellent-for-adani-a-great-opportunity-for-retail-shareholders-rakesh-arora/articleshow/91587239.cms?from=mdr>

²⁵ <https://www.holcim.com/media/media-releases/holcim-launches-strategy-2025>

²⁶ Ibid.

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goals and the planet. This step is in line with Holcim’s previous divestments in countries such as Indonesia under its “Strategy 2022 – Building for Growth” initiative.²⁷ Between 2019 and 2021, Holcim had already divested assets across the globe from countries like Brazil, Northern Ireland, Madagascar, Malawi and Zambia.²⁸

ii. Holcim’s Indian operations had lost market share

Holcim’s India operations had not been profitable for a few years preceding the Deal, mainly due to lesser efforts to expand their capacities. For instance, during the calendar years 2011-2016, Holcim lost 460 basis points market share,²⁹ while Shree Cement and UltraTech Cement added 220 basis points and 630 basis points respectively.³⁰

Thus, the exit from Indian operations prevents further losses for Holcim and is in line with Holcim’s strategy to divest from non-core assets to reduce debt and diversify through sustainable acquisitions in mature markets.

D. Why did Holcim propose to transfer through the Netherlands SPV?

The Deal has been structured in a way keeping in mind Holcim’s requirements of achieving a certain deal structure that would allow the parties to sign and close the Deal in a speedy manner with minimal regulatory compliance. Adani signed the SPA through its Mauritius SPV as the Acquirer, which led to no repatriation of money from India to the Seller for the purchase of the shares held by the Seller in the Offshore Promoter.³¹

At the outset, in case it was proposed that the shares held in the Target Entities by the Offshore Promoter were transferred directly to an Adani Group Indian resident entity, the transaction would then be a transfer of shares in Indian listed entities by a non-resident seller to a resident acquirer and the pricing requirements set out under the FEMA Regulations and SEBI regulations would need to be adhered to.

Additionally, assuming that the Offshore Promoter was directly transferring the shares held in the Target Entities, the risk of the Tax authorities delving deeper into the commercial rationale and substance of the Mauritius promoter entity could not have been ruled out. While no information is available in public domain, from an Indian tax perspective, presumably the Netherlands Seller entity may have better chances of demonstrating substance as compared to the Mauritius Offshore Promoter entity. This has been detailed under the ‘Tax Considerations’ section below.

²⁷ See generally, <https://www.holcim.com/media/media-releases/full-year-2021-results>.

²⁸ https://www.business-standard.com/podcast/companies/why-are-top-indian-companies-vying-for-holcim-s-india-assets-ambuja-and-acc-122051200078_1.html

²⁹ <https://www.livemint.com/market/mark-to-market/what-holcim-s-likely-exit-from-india-means-for-cement-sector-s-pricing-power-11650268693591.html>

³⁰ Ibid.

³¹ <https://www.moneycontrol.com/news/business/mc-exclusive-holcim-deal-clinchers-for-adani-deal-certainty-speed-skipping-fema-approvals-say-sources-8514321.html>

3. Commercial and Financial Considerations

E. How does Adani propose to fund the Acquisition?

Funding of acquisition

Part of the finances required by the Acquirer will be infused by Adani as equity, and the remaining will be financed through debt from foreign banks. The amount to be infused by Adani is speculated to be USD 1.25 billion – USD 1.5 billion.³² A similar amount (likely in the form of structured equity) could also be infused by the Middle East investor group the Adani family is engaged with, taking the total capitalization amount for the Acquirer up to USD 3 billion.³³

The funding obtained for this SPV shall act as equity for another drop-down SPV in which Deutsche Bank, Barclays and Standard Chartered Bank might fund nearly USD 4.5 billion³⁴ as acquisition financing through overseas instruments, with Adani providing a letter of comfort to banks depending on necessity. The proposed loan structure for obtaining USD 4.5 billion in funding includes mezzanine financing, stock-backed bridge loans to be repaid in cash, and a senior debt facility for 18 months.³⁵ With respect to the internal bifurcation of this loan structure, the senior debt facility is likely raise up to USD 3 billion, while the mezzanine financing may raise USD 1 billion³⁶. The stock-backed bridge loan (having 1-3 years maturity), will likely raise USD 500 million and be repaid in cash.³⁷ Additionally, the debt facility will be refinanced with a long-term bond or loan if required.³⁸

In due course, other banks are expected to join the financing consortium for additional funding.³⁹ Adani is currently looking for the capacity of other banks to lend, with each one lending anywhere between USD 200-500 million.⁴⁰ It is believed that the initial syndication will be limited only to 3 banks.⁴¹

Funding of the Open Offers

► Ambuja Open Offer

The total consideration for the Ambuja Open Offer, assuming full acceptance, is approximately USD 2.489 billion. The Acquirer has opened an escrow account with Barclays Bank PLC carrying on business in India pursuant to an Escrow Agreement dated May 15, 2022 and has made a cash deposit in such escrow account of approximately USD 258.39 million.⁴²

32 <https://mnacritique.mergersindia.com/news/gautam-adanis-biggest-ma-acquires-ambuja-cement-acc-from-holcim-for-10-5-bn/>

33 <https://economictimes.indiatimes.com/industry/indl-goods/svs/cement/gautam-adanis-biggest-ma-set-to-scalp-ambuja-cement-acc-from-holcim-for-10-bn/articleshow/91578591.cms?from=mdr>

34 <https://mnacritique.mergersindia.com/news/gautam-adanis-biggest-ma-acquires-ambuja-cement-acc-from-holcim-for-10-5-bn/>

35 Ibid.

36 <https://economictimes.indiatimes.com/markets/expert-view/who-are-the-frontrunners-for-buying-holcim-assets-in-india/articleshow/90972472.cms?from=mdr>

37 <https://www.timesnownews.com/business-economy/companies/adani-group-in-talks-with-foreign-banks-to-raise-4-5-billion-article-92165227>

38 Ibid.

39 Ibid.

40 Ibid.

41 Ibid.

42 Ibid.

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▶ ACC Open Offer

The total consideration for the ACC Open Offer, assuming full acceptance is approximately USD 1.41 billion.⁴³ The Acquirer has opened an escrow account with Barclays Bank PLC carrying on business in India pursuant to an escrow agreement dated May 15, 2022 and has made a cash deposit in such escrow account of approximately USD 150 million.⁴⁴

⁴³ https://www.sebi.gov.in/sebi_data/commndocs/may-2022/ACC%20Limited_DLOF_p.pdf

⁴⁴ Ibid.

Legal and Regulatory Considerations

A. Why did the Takeover Code trigger?

The obligations of the Acquirer under Regulations 3(1),¹ 4,² and 5(1)³ of the Takeover Code were triggered on account of the execution of the SPA between the Acquirer and the Seller for the purchase of 100% of the shareholding and control of the Offshore Promoter by the Acquirer from the Seller for an aggregate consideration of approximately USD 6.3 billion⁴. The Offshore Promoter is the promoter of Ambuja and directly holds 1,25,31,56,361 equity shares (representing 63.11% of the paid-up equity share capital of Ambuja). Further, Ambuja and the Offshore Promoter are the promoters of ACC with the Offshore Promoter directly holding 84,11,000 equity shares (representing 4.48% of the paid-up equity share capital of the ACC) and Ambuja holding 9,39,84,120 equity shares (representing 50.05% of the paid-up equity share capital of ACC).

Accordingly, as a result of the Underlying Transaction, the Acquirer will indirectly: (i) hold 63.11% of the paid-up equity share capital of Ambuja; (ii) hold 4.48% of the paid-up equity share capital of ACC; and (iii) control the Target Entities, thereby triggering the open offer obligations of the Acquirer under the Takeover Code.

B. Why are the Open Offers considered deemed Direct Open Offers?

An 'indirect acquisition' shall be deemed to be a 'direct acquisition' for the purposes of the Takeover Code if the proportionate net asset value or sales turnover or market capitalisation of the indirectly acquired target company, represented as a percentage respectively of the consolidated net asset value or sales turnover or enterprise value of the directly acquired entity is in excess of 80%, on the basis of the most recent audited annual financial statements. In such an event, such indirect acquisition shall be regarded as a direct acquisition of the target company for all purposes of the Takeover Code including the obligations of the Acquirer relating to timing, pricing and other compliance requirements for the open offer.⁵

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- 1 Regulation 3(1) of the Takeover Code: No acquirer shall acquire shares or voting rights in a target company which taken together with shares or voting rights, if any, held by him and by persons acting in concert with him in such target company, entitle them to exercise twenty-five per cent or more of the voting rights in such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.
 - 2 Regulation 4 of the Takeover Code: Irrespective of acquisition or holding of shares or voting rights in a target company, no acquirer shall acquire, directly or indirectly, control over such target company unless the acquirer makes a public announcement of an open offer for acquiring shares of such target company in accordance with these regulations.
 - 3 Regulation 5(1) of the Takeover Code: For the purposes of regulation 3 and regulation 4, acquisition of shares or voting rights in, or control over, any company or other entity, that would enable any person and persons acting in concert with him to exercise or direct the exercise of such percentage of voting rights in, or control over, a target company, the acquisition of which would otherwise attract the obligation to make a public announcement of an open offer for acquiring shares under these regulations, shall be considered as an indirect acquisition of shares or voting rights in, or control over the target company.
 - 4 <https://cfo.economictimes.indiatimes.com/news/how-holcims-6-4-bn-deal-with-adani-will-attract-zero-tax/91662450>
 - 5 Regulation 5(2) of the Takeover Code.

4. Legal and Regulatory Considerations

In relation to Ambuja, the thresholds⁶ specified under Regulation 5(2) of the Takeover Code are met and therefore the Ambuja Open Offer is deemed to be a direct open offer in terms of the Takeover Code. In relation to ACC, the thresholds specified under Regulation 5(2) of the Takeover Code are not met, however, the ACC Open Offer is being undertaken as a deemed direct open offer in terms of the Takeover Code.

C. How was the Offer Price derived? Is the Offer Price in Compliance with the Takeover Code?

The Ambuja Open Offer and the ACC Open Offer are intended to provide an exit opportunity to the public shareholders of the Target Entities, in light of the proposed change in control of the Target Entities. The price at which the Acquirer would acquire the shares tendered in the Open Offers (“**Offer Price**”) is determined in terms of the provisions of the Takeover Code. The public announcement for each of the Target Entities clarified that the Open Offers are being made at a price of INR 385 per share and INR 2,300 per share for Ambuja and ACC respectively.

a. Offer Price for the Ambuja Open Offer

As mentioned above, the Ambuja Open Offer is being made at a price of INR 385 per share. It must be noted here that the offer price for the Ambuja Open Offer will have to be analysed in terms of Regulation 8(2) of the Takeover Code, since the parameters as mentioned under Regulation 5(2) of the Takeover Code are being met for the purposes of the Ambuja Open Offer.

The equity shares of Ambuja are listed on the Stock Exchanges. The trading turnover in the equity shares of Ambuja, based on the trading volumes during the twelve calendar months prior to the calendar month in which the public announcement was made, i.e., May 1, 2021 to April 30, 2022 (“**Relevant Period**”) on the Stock Exchanges are:

Stock Exchanges	Total No. of Equity Shares of Ambuja traded during the Relevant Period (A)	Total No. of Equity Shares of Ambuja during the Relevant Period (B)	Traded turnover percentage (A/B)
BSE	57,485,221	1,98,56,45,229	2.90%
NSE	1,12,00,14,653	1,98,56,45,229	56.41%

Based on the above, in terms of Regulation 2(1)(j) of the Takeover Code⁷, the equity shares of Ambuja are frequently traded.

6 Regulation 5(2) of the Takeover Code: Notwithstanding anything contained in these regulations, in the case of an indirect acquisition attracting the provisions of sub-regulation (1) where –

- the proportionate net asset value of the target company as a percentage of the consolidated net asset value of the entity or business being acquired;
- the proportionate sales turnover of the target company as a percentage of the consolidated sales turnover of the entity or business being acquired; or
- the proportionate market capitalisation of the target company as a percentage of the enterprise value for the entity or business being acquired; is in excess of eighty per cent, on the basis of the most recent audited annual financial statements, such indirect acquisition shall be regarded as a direct acquisition of the target company for all purposes of these regulations including without limitation, the obligations relating to timing, pricing and other compliance requirements for the open offer.

7 Regulation 2(1)(j) of the Takeover Code: “frequently traded shares” means shares of a target company, in which the traded turnover on any stock exchange during the twelve calendar months preceding the calendar month in which the public announcement is required to be made under these regulations, is at least ten per cent of the total number of shares of such class of the target company.

4. Legal and Regulatory Considerations

In terms of Regulation 8(2) of the Takeover Code, the offer price shall be the highest of:

S. No.	Details	Price per share in INR
1.	The highest negotiated price per equity share for acquisition under the agreement attracting the obligation to make a public announcement of an open offer (i.e., the SPA)	INR 385 per equity share
2.	The volume-weighted average price paid or payable for acquisitions, whether by the Acquirer, during the fifty-two weeks immediately preceding the date of the public announcement	Not Applicable ⁸
3.	The highest price paid or payable for any acquisition, by the Acquirer, during the twenty- six weeks immediately preceding the date of the public announcement	Not Applicable ⁹
4.	The volume-weighted average market price of the equity shares for a period of sixty trading days immediately preceding the date of the public announcement as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded	INR 340.25 per equity share
5.	Where the equity shares are not frequently traded, the price determined by the Acquirer and the Managers to the open offer taking into account valuation parameters including, book value, comparable trading multiples, and such other parameters as are customary for valuation of shares of such companies	Not Applicable ¹⁰
6.	The per share value computed under Regulation 8(5) of the Takeover Code, if applicable	INR 385 ¹¹

The fundamental objective of the Takeover Code is to offer the highest possible exit price within the prescribed parameters to the public shareholders of any target company. In view of the parameters considered and presented in the table above, INR 385 per share is the highest of all the identified prices. Accordingly, the offer price of INR 385 per equity share is in compliance with the provisions of the Takeover Code.

b. Offer Price for the ACC Open Offer

The ACC Open Offer is being made at a price of INR 2,300 per share. The offer price for the ACC Open Offer will have to be analysed in terms of Regulation 8(3) of the Takeover Code, since the parameters as mentioned under Regulation 5(2) of the Takeover Code are not met for the purposes of the ACC Open Offer.

8 As of the date of the public announcement, the Acquirer did not hold any shares in Ambuja.

9 As of the date of the public announcement, the Acquirer did not hold any shares in Ambuja.

10 The equity shares are frequently traded on the NSE.

11 The per share value of Ambuja taken into account for the Underlying Transaction has been determined by Bansil S. Mehta & Co, Chartered Accountants as INR 385 per equity share based on the certificate dated May 15, 2022. The description of the methodology used for such computation is based on the negotiated price for Ambuja between the Acquirer and the Seller after considering its historical market trading price.

4. Legal and Regulatory Considerations

The equity shares of ACC are listed on the Stock Exchanges. The trading turnover in the equity shares of ACC is based on the trading volumes during the twelve calendar months prior to the calendar month in which the public announcement was made, i.e., May 1, 2021 to April 30, 2022 (“**Relevant Period**”) on the Stock Exchanges are:

Stock Exchanges	Total No. of Equity Shares of ACC traded during the Relevant Period (A)	Total No. of Equity Shares of Ambuja during the Relevant Period (B)	Traded turnover percentage (A/B)
BSE	55,70,390	18,77,87,263	2.97%
NSE	13,16,54,226	18,77,87,263	70.11%

Based on the above, in terms of Regulation 2(i)(j) of the Takeover Code¹², the equity shares of ACC are frequently traded.

In terms of Regulation 8(3) of the Takeover Code, the offer price shall be the highest of:

S. No.	Details	Price per share in INR
1.	The highest negotiated price per equity share for acquisition under the agreement attracting the obligation to make a public announcement of an open offer (i.e., the SPA)	INR 2,300 per equity share
2.	The volume-weighted average price paid or payable for acquisitions, whether by the Acquirer, during the fifty-two weeks immediately preceding the date of the public announcement	Not Applicable ¹³
3.	The highest price paid or payable for any acquisition, by the Acquirer, during the twenty- six weeks immediately preceding the date of the public announcement	Not Applicable ¹⁴
4.	The highest price paid or payable for any acquisition, by the Acquirer, between the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, and the date of the public announcement	Not Applicable ¹⁵
5.	The volume-weighted average market price of the equity shares for a period of sixty trading days immediately preceding the earlier of, the date on which the primary acquisition is contracted, and the date on which the intention or the decision to make the primary acquisition is announced in the public domain, as traded on the stock exchange where the maximum volume of trading in the shares of the target company are recorded during such period, provided such shares are frequently traded	INR 2,168.75 per equity share
6.	The per share value computed under Regulation 8(5) of the Takeover Code, if applicable	INR 2,300 ¹⁶

¹² supra note 50.

¹³ As of the date of the public announcement, the Acquirer did not hold any shares in ACC.

¹⁴ As of the date of the public announcement, the Acquirer did not hold any shares in ACC.

¹⁵ As of the date of the public announcement, the Acquirer did not hold any shares in ACC.

¹⁶ The per share value of ACC taken into account for the Underlying Transaction has been determined by Banshi S. Mehta & Co, Chartered Accountants as INR 2,300 per equity share based on the certificate dated May 15, 2022. The description of the methodology used for such computation is based on the negotiated price for ACC between the Acquirer and the Seller after considering its historical market trading price.

4. Legal and Regulatory Considerations

In view of the parameters considered and presented in the table above, INR 2,300 per share is the highest of all the identified prices. Accordingly, the offer price of INR 2,300 per equity share is in compliance with the provisions of the Takeover Code.

D. Will the Shares of Ambuja and ACC be delisted pursuant to the Open Offers?

Pursuant to the Underlying Transaction, the Acquirer will indirectly acquire 63.11% shareholding in Ambuja, 4.48% shareholding in ACC, and will indirectly control the Target Entities. Due to this, the Acquirer has made the Open Offers to acquire additional shares of the Target Entities from the public shareholders for up to 26% of the total issued and paid up equity share capital. Upon completion of the Open Offers and on the assumption that the equity shares held by the public shareholders are fully tendered and accepted by the Acquirer, the aggregate shareholding of the Acquirer in Ambuja will go up to 89.11% of the issued and paid up equity share capital on a fully diluted basis, and the aggregate shareholding of the Acquirer in ACC will go up to 80.53% of the issued and paid up equity share capital on a fully diluted basis.

Consequently, the public shareholding in the Target Entities will fall below the minimum public shareholding limit prescribed under Rule 19A (2) of SCRR, which is 25% of the total issued and subscribed equity share capital. For every public listed company, it is mandatory to have a minimum public float of 25%. If it is not complied with, such company shall be in breach of its obligations under the SCRR. Accordingly, it is pertinent for the Target Entities to always maintain a minimum public shareholding of 25% to continue to have its shares listed on the Stock Exchanges.

If the public shareholding in the Target Entities is reduced below such prescribed minimum level in pursuance of an open offer, Regulation 7(4)¹⁷ of the Takeover Code obligates an acquirer to take necessary steps to increase the public shareholding in the target company to the minimum limit of 25% within the time permitted under the SCRR. In terms of the SCRR, in the event the public shareholding in a listed company falls below 25% at any time, such company will be required to bring the public shareholding to 25% within a maximum period of 12 months from the date of such fall, through permitted routes and any other such routes as may be approved by SEBI from time to time. Accordingly, in the event the Open Offers are fully tendered and accepted, the Acquirer will have to increase the public shareholding in the Target Entities within a period of 12 months from the completion of the Open Offers.

Further, in terms of the Takeover Code, in the event the acquirer makes a public announcement of an open offer, the acquirer may seek the delisting of the target company by making a delisting offer, provided that the acquirer shall have declared his intention to so delist the target company at the time of making such public announcement of an open offer as well as at the time of making the detailed public statement. However, in the present case, the Acquirer has not made any such disclosures with respect to a delisting of the Target Entities in the respective public announcements and the detailed public statements.

Additionally, according to Regulation 7(5) of the Takeover Code, the Acquirer who breaches the minimum public shareholding requirement pursuant to an open offer, will not be eligible to make a voluntary delisting offer

¹⁷ Regulation 7(4) of the Takeover Code: In the event the shares accepted in the open offer were such that the shareholding of the acquirer taken together with persons acting in concert with him pursuant to completion of the open offer results in their shareholding exceeding the maximum permissible non-public shareholding, the acquirer shall be required to bring down the non-public shareholding to the level specified and within the time permitted under Securities Contract (Regulation) Rules, 1957.

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under the SEBI (Delisting of Equity Shares) Regulations, 2021, unless a period of twelve months has elapsed from the date of the completion of the offer period.

E. Were there any Anti-Trust Implications of the Transaction?

According to Section 6 of the Competition Act, any acquisition of shares that breaches the numerical thresholds prescribed under Section 5 of the Competition Act (as set out below) will require the approval of the CCI.

The current thresholds for filing a notice under Section 5 are:

Thresholds For Filing Notice

Enterprise Level	India	Assets >2000 INR Crore	OR	Turnover >6000 INR Crore
	Worldwide with India leg	>USD 1 Billion with at least >1000 INR Crore in India		>USD 3 Billion with at least >3000 INR Crore in India
OR				
Group Level	India	>8000 INR Crore	OR	>24000 INR Crore
	Worldwide with India leg	>USD 4 bn with atleast >1000 INR Crore in India		>USD 12 bn with atleast >3000 INR Crore in India

In the current Deal, the value of the net turnover of the Adani group (post-acquisition) would breach the thresholds prescribed under Section 5 and would necessitate the requirement to obtain CCI approval.

Relevant Market

The Acquirer applied for CCI approval on June 10, 2022 and defined the relevant market for the Deal as “*grey cement in the western region.*”¹⁸ The relevant market is essentially the area of effective competition.¹⁹ While establishing the contours of the relevant geographic and relevant product market, the CCI will give weightage to the conditions prescribed under Section 19(6) and 19(7) of the Competition Act respectively.

18 Paragraph 7, Page 3, Filing undertaken by Endeavour Trade and Investment Ltd., available at <https://www.cci.gov.in/combination/order/details/summary/1165/0>.

The Form I filing made by the Acquirer can be accessed on the CCI website in the following manner: Please visit <https://cci.gov.in/combination/notice-under-review> and enter ‘Endeavour Trade and Investment Ltd’ in the search text box. The web page will then reflect the Form I filing made by the Acquirer on June 10, 2022 having notice status as ‘Under Review’. Please click on the icon alongside the file size in the ‘Summary’ column to access a PDF version of the Form I filing.

19 Standard Oil Co. of California and Standard Station Inc. v. United States of America, 337 U.S. 293 (1949).

4. Legal and Regulatory Considerations

The relevant product market has been categorized as grey cement. Both the Target Entities only undertake the manufacture of grey cement. The prevalent cement alternative to grey cement available in the market is white cement. One of the key factors which needs to be weighed when assessing the relevant product market is the physical characteristics of the good and its substitutability with counterparts available in the market.²⁰ The primary usage of grey cement is for construction purposes, while white cement is used for concrete architectural decoration. Accordingly, if the CCI applies the test of substitutability and finds that grey cement and white cement are interchangeable in usage, it may expand the relevant product market to include white cement as well. An expanded product market will only reduce the possibility of the CCI concluding that there is an appreciable adverse effect to competition, given that the Target Entities do not manufacture white cement.²¹

Separately, in respect of the relevant geographic market, the definition submitted by the Acquirer may be deemed to be too ambiguous by the CCI as it has been simply defined as a “western region.” No clarity has been provided on whether reference to such western region is being made on a national or a broader international platform. The CCI may adopt a more microscopic view when defining the boundaries of such relevant geographic market. For instance, in Private *Entrepreneurs Godowns Association v. Punjab State Warehousing Corporation*,²² the CCI expounded that the conditions of competition for supply and provision of storage services were homogenous in the state of Punjab and could be distinguished from the conditions prevalent in other states and used this rationale to establish Punjab as the relevant geographic market.

In a similar vein, in the instant case, the CCI may opine that the definition provided by the Acquirer does not account for homogenous market conditions, local specification requirements, regional regulatory trade barriers and other conditions as prescribed under Section 19(6) of the Competition Act. Accordingly, the CCI may further curtail the ambit of the definition of ‘relevant geographic market’ as submitted by the Acquirer.

Form to be filed by the Parties

The definition of ‘relevant market’ becomes pertinent to establish the nature of filing required to be undertaken by Adani under the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (“**CCI Regulations**”). Parties to a combination will need to undertake filing of either Form I or Form II based on the market share held by the Acquirer post the consummation of the transaction.

The first step in such analysis would be to ascertain whether the parties to such combination operate in horizontally overlapping markets (thereby triggering Regulation 5(3)(a)) or operate at different stages or levels of the production chain (thereby triggering Regulation 5(3)(b)). Given the nature of the various business activities undertaken by the Adani group, the consummation of the Deal would result in backward vertical integration between the Adani group and the Target Entities owing to the fact that the Adani group operates in sectors such as real estate and infrastructure which would require cement as a bedrock for its functioning.²³ Therefore, the threshold under Regulation 5(3)(b) would be relevant for this Deal.

20 *Shamsher Singh Kataria v. Honda Siel Cars*, [2015] Comp. L.R. 753.

21 <https://www.ambujacement.com/product-and-services/products/ambuja-cement> (Ambuja); <https://www.acclimited.com/products/gold-and-silver-range-of-cement> (ACC)

22 *Private Entrepreneurs Godowns Association v. Punjab State Warehousing Corporation*, (2022 SCC OnLine CCI 35).

23 <https://www.businessinsider.in/business/corporates/news/adani-group-companies-will-benefit-through-backward-integration-with-buyout-of-ambuja-and-acc-cement-companies/articleshow/91591119.cms>.

4. Legal and Regulatory Considerations

Accordingly, as per Regulation 5(3)(b) of the CCI Regulations, Adani will need to undertake filing of Form II if the consummation of the Deal results in Adani having a total market share of 25% in the relevant market. Alternatively, if the total market share of Adani in the relevant market falls below this threshold, then the filing will need to be undertaken in Form I.

We note that Adani will have a market share of roughly 13-14%²⁴ in the cement market post the consummation of the Deal, which would not trigger the requirement to file Form II. Accordingly, Adani has filed Form I.

F. If the Anti-Trust Approval is rejected, or the SPA is rescinded, can the Open Offers be withdrawn?

In the event the CCI approval for the Deal is refused for any reason, the SPA may be terminated in accordance with its terms and the Acquirer shall have the right to withdraw the Open Offers. In terms of Regulation 23(1)(a) of the Takeover Code, if statutory approvals required for the open offer or for effecting the acquisitions attracting the obligation to make an open offer have been refused, the Acquirer shall have the right to withdraw such open offers.

Separately, the procurement of CCI approval has been provided as an explicit condition precedent to the Underlying Transaction.²⁵ Accordingly, the Underlying Transaction will not close in the event such CCI approval is refused for any reason. Additionally, the respective draft letter of offers for Ambuja and ACC categorically prescribe that the consummation of the Underlying Transaction and Open Offers would be subject to the receipt of the required statutory approval. In terms of Regulation 23(1)(c) of the Takeover Code, if any condition stipulated in the agreement for acquisition attracting the obligation to make the open offer is not met and such agreement is rescinded (i.e. failure to procure CCI approval resulting in rescinding of the SPA), then the Acquirer will have the right to withdraw the Open Offers in terms of Regulation 23 of the Takeover Code.

Further, if the SPA is rescinded and the Open Offers are consequently withdrawn, the Acquirer will have an obligation to make a public announcement within two working days of such withdrawal,²⁶ in the same newspapers in which the public announcement of the open offer was published and simultaneously the Acquirer will have to inform the Stock Exchanges, SEBI and the Target Company about such withdrawal of Open Offers.

G. What are the Foreign Exchange Implications in the Hands of Adani for the Proposed Transaction? Will the Transaction have any Round Tripping Issue?

The Acquirer is an SPV incorporated in Mauritius and is held by a company incorporated in Mauritius. On the other hand, the Seller is an entity incorporated in Netherlands selling 100% of its shareholding in Holderind Investments Ltd. (entity incorporated in Mauritius) to the Acquirer.

²⁴ https://www.adaniwatch.org/how_adani_became_india_s_second_largest_cement_producer_overnight_wheels_within_wheels.

²⁵ https://www.business-standard.com/article/companies/ultratech-jsw-lost-ambuja-race-due-to-cci-concerns-holcim-ceo-122051701495_1.html.

²⁶ Regulation 23(2) of the Takeover Code.

4. Legal and Regulatory Considerations

Regarding the financial arrangements for the Deal, 30% of the finances required by the Acquirer will be infused by Adani as equity and such infusion is likely to be through the non-resident shareholders of the Adani group. The amount to be infused by Adani is speculated to be USD 1.25 billion – USD 1.5 billion. A similar amount (likely in the form of structured equity) could also be infused by the Middle East investor group the Adani family is engaged with, taking the total capitalization amount for the Acquirer up to USD 3 billion.²⁷ The balance 70% funds will be financed through debt from foreign banks i.e., through Deutsche Bank, Barclays and Standard Chartered Bank, who might fund nearly USD 4.5 billion as acquisition financing through overseas instruments, with Adani providing a letter of comfort to the banks depending on necessity.²⁸ The proposed loan structure for obtaining USD 4.5 billion in funding includes mezzanine financing, stock-backed bridge loans to be repaid in cash, and a senior debt facility for 18 months.²⁹ With respect to the internal bifurcation of this loan structure, the senior debt facility is likely raise up to USD 3 billion, while the mezzanine financing may raise USD 1 billion. The stock-backed bridge loan (having 1-3 years maturity), will likely raise USD 500 million and be repaid in cash.³⁰ The debt facility will be refinanced with a long-term bond or loan if required.³¹

In due course, other banks are expected to join the financing consortium as the funding lines underwritten earlier are being split to include more banks.³² Adani is currently looking for the capacity of other banks to lend, with each one lending anywhere between USD 200-500 million.³³ It is believed that the initial syndication will be limited only to 3 banks.³⁴

Based on the limited details available publicly and on the assumption that the entire funding for the Underlying Transaction is being arranged outside India, the foreign exchange regulations will not be applicable. Accordingly, there shall not be any issues pertaining to round tripping, FEMA or ODI for the purposes of the Deal.

27 <https://economictimes.indiatimes.com/industry/indl-goods/svs/cement/gautam-adanis-biggest-ma-set-to-scalp-ambuja-cement-acc-from-holcim-for-10-bn/articleshow/91578591.cms?from=mdr>

28 <https://mnacritique.mergersindia.com/news/gautam-adanis-biggest-ma-acquires-ambuja-cement-acc-from-holcim-for-10-5-bn/>

29 Ibid.

30 <https://www.timesnownews.com/business-economy/companies/adani-group-in-talks-with-foreign-banks-to-raise-4-5-billion-article-92165227>

31 Ibid.

32 Ibid.

33 Ibid.

34 Ibid.

Tax Considerations

A. Will this Amount to An ‘Indirect Transfer’ under the ITA?

As per Section 9(1)(i)¹ of the ITA, all income accruing or arising, whether directly or indirectly through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situated in India shall be income deemed to accrue or arise in India and accordingly, shall be taxable in India.

Explanation 5 to Section 9(1)(i) provides that a capital asset being a share of a foreign company or entity shall be deemed to have situs in India if it substantially derives its value (directly or indirectly) from assets situated in India.

A share or interest of a foreign company or entity shall be deemed to derive its value substantially from assets (whether tangible or intangible) located in India, if on the ‘specified date’, the value of Indian assets (i) exceeds INR 100 million (“**threshold**”); **and** (ii) represents at least 50% of the value of all the assets owned by the foreign company or entity. Specified Date shall mean (i) the end of the accounting period of the foreign company or entity preceding the date of transfer or (ii) the date of transfer if the book value of the assets on the date of transfer exceeds by at least 15% the book value of the assets as on the last balance sheet date preceding the date of transfer².

Indirect transfer provisions shall not be applicable in case: (A) if the transferor of shares of or interest in a foreign company or entity, along with its related parties does not hold a right of control or management and a voting power/share capital/interest exceeding 5% of the total voting power/total share capital in the foreign company or entity directly holding the Indian assets (“**Holding Co**”); (B) where the transfer is of shares or interest in a foreign entity which does not hold the Indian assets directly, then the exemption shall be available to the transferor if it, along with related parties, does not hold (i) the right of management or control in relation to such company or entity; and (ii) any rights in such company which would entitle it to either exercise control or management of the Holding Co or entitle it to voting power exceeding 5% in the Holding Co.³, (C) in case of certain business reorganization in the form of demergers and amalgamations, exemptions that have been provided under Section 47 of the ITA.

In the context of the Underlying Transaction, the Seller is transferring 100% of the shares held in the Offshore Promoter to the Acquirer. The Offshore Promoter derives its value substantially from assets held in India (i.e., shares in Ambuja Cements and ACC) and the value of the assets (i.e. shares held in the Target Entities) exceed the threshold. Further, no exceptions as set out in Explanation 7 to Section 9(1)(i) of the IT Act, apply to the Seller.

Accordingly, the transfer of shares held by the Seller in the Offshore Promoter to the Acquirer will be considered an ‘indirect transfer’ as per Section 9(1)(i) of the ITA.

1 **Income deemed to accrue or arise in India.**

9. (1) The following incomes shall be deemed to accrue or arise in India:—

(i) all income accruing or arising, whether directly or indirectly, through or from any business connection in India, or through or from any property in India, or through or from any asset or source of income in India, or through the transfer of a capital asset situate in India.

2 Explanation 6 to Section 9(1)(i) of the ITA.

3 Explanation 7 to Section 9(1)(i) of the ITA.

5. Tax Considerations

B. Will Holcim be required to pay any Taxes in India on the Sale?

Explanation 5 read with Explanation 7 to Section 9(1)(i) of the ITA provides that the gains arising on transfer of a share or interest deriving, directly or indirectly, its value substantially from assets located in India will be taxed on a proportional basis based on the assets located in India vis-à-vis global assets. The ITR prescribes the method of computation of the fair market value of the assets (Rule 11UB), computation of income attributable to such assets in India (Rule 11UC) and reporting requirements under the indirect transfer provisions (Rule 114DB). The Seller will be required to compute the capital gains as per Section 48 of the ITA⁴ on the income calculated in the aforesaid manner.

As per Section 90(2) of the ITA, in case the Central Government has entered into a DTAA with the Government of any other country or specified territory outside India, as the case may be, for granting relief of tax or avoidance of double taxation, then, in relation to a non-resident to whom the DTAA applies, the provisions of the DTAA or the ITA, whichever shall be more beneficial, shall apply to such non-resident.

India has entered into a DTAA with Netherlands (“**India-Netherlands DTAA**”). Article 13 of the India-Netherlands DTAA deals with the taxation of Capital Gains. Further, Article 13(1) to Article 13(4) deal with assets/properties being (i) immovable property, (ii) movable property forming a part of a permanent establishment which an enterprise of one of the contracting states (i.e. India or Netherlands) has in the other state or of movable property pertaining to a fixed base available to a resident of one of the states in the other state for the purpose of performing independent personal services, including such gains from the transfer of such permanent establishment (alone or with the whole enterprise) or of such fixed base, (iii) ships or aircrafts, and (iv) unlisted shares held in a contracting state which derives its value from immovable property in the other contracting state. The asset/property involved in respect of the Underlying Transaction i.e. the shares held in the Offshore Promoter (a resident of Mauritius), does not fall under any of aforesaid categories.

Article 13(5)⁵ of the India-Netherlands DTAA is a residuary clause which states that any gains from transfer of a property (other than those covered under Article 13(1) to Article 13(4) of the India-Netherlands DTAA) shall be taxable only in the country where the transferor is a resident. Accordingly, the capital gains arising from the sale of shares held by the Seller (a resident of Netherlands) in the Offshore Promoter shall be taxable only in Netherlands.

Considering that the provisions of the India-Netherlands DTAA are more beneficial to the Seller as compared to the ITA and assuming that the Seller is entitled to avail the relief under the India-Netherlands DTAA (i.e. satisfies the conditions in Question III under the Section - Tax Considerations, below), the Seller shall not be required to pay taxes in India on the income earned under Section 9(1)(i) of the ITA.

However, it is noteworthy that the availability of DTAA benefits for indirect transfers is a litigated issue. The risk of scrutiny by the income-tax authorities cannot be ruled out. Please refer to our research paper titled ‘Tax Issues in M&A Transactions’ available [here](#) for a detailed analysis on the current situation and the prevailing issues in respect of ‘indirect transfers.’

4 Please refer to our research paper titled ‘Tax Issues in M&A Transactions’ published in May 2022 for further details on the mode of computation of capital gains and the applicable rates. The paper is available at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Tax_Issues_in_M_A.pdf

5 Article 13(5): Gains from the alienation of any property other than that referred to in paragraphs 1, 2, 3 and 4 shall be taxable only in the State of which the alienator is a resident.

However, gains from the alienation of shares issued by a company resident in the other State which shares form part of at least a 10 per cent interest in the capital stock of that company, may be taxed in that other State if the alienation takes place to a resident of that other State. However, such gains shall remain taxable only in the State of which the alienator is a resident if such gains are realised in the course of a corporate organisation, reorganization, amalgamation, division or similar transaction, and the buyer or the seller owns at least 10 per cent of the capital of the other.

C. What are the Conditions for Holcim to avail the DTAA Benefits?

a. As per the ITA

A non-resident person shall be entitled to claim a relief under a DTAA so long as it meets the requirements stated in Section 90(4) and 90(5) of the ITA.

As per Section 90(4) of the ITA, a non-resident person shall obtain a Tax Residency Certificate (“TRC”) from the Government of a country or specified territory evidencing that he/she/it is a resident in such country outside India / specified territory outside India, as the case may be.

Section 90(5) of the ITA read with Rule 21AF of the ITR also requires such non-resident persons to provide certain additional documents and details in Form 10F⁶ such as (i) status i.e., individual, company, firm etc.; (ii) PAN or Aadhaar Number, if allotted (iii) nationality or country of incorporation; (iv) the tax identification number in the country of residence; (v) period for which the residential status as mentioned in the TRC is applicable; (vi) address of the person in the country or territory outside India during the period of the TRC.

Please refer to the section ‘Claiming Treaty Benefits: Requirements and Procedure’ of our research paper titled ‘Tax Issues in M&A Transactions’ available [here](#) for a detailed analysis on the conditions to avail the relief under a DTAA.

b. As per the India-Netherlands DTAA

As per the India-Netherlands DTAA, relief should normally be available if a person is a resident of one of the countries and is liable to tax under the respective taxation laws⁷.

Some of the provisions of the India-Netherlands DTAA, such as the ones dealing with dividends, interest, royalty and fees for technical services, have an additional requirement of the entity claiming the treaty relief, to be the ‘beneficial owner’ of the income in respect of which treaty relief has to be claimed. While there is no such requirement under the provisions dealing with capital gains tax relief, Indian courts have been increasingly evaluating the beneficial ownership requirement even for claiming capital gains relief, as part of a substance-based approach. Beneficial ownership is an anti-avoidance requirement to prevent entities which are mere conduits and do not have commercial substance for availing tax treaty benefits.

Further, both India and Netherlands are a signatory to the MLI, a multilateral instrument to implement the Base Erosion and Profit Shifting (BEPS) Action Plans, launched by the Organisation for Economic Co-operative and Development (OECD) to counter tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no tax jurisdictions where there is little or no economic activity, resulting in little or no overall tax being paid.

India has ratified the MLI on June 25, 2019 and Netherlands on March 29, 2019. Accordingly, the India-Netherlands DTAA is considered a Covered Tax Agreement (“CTA”). The CTA has come into

6 Form 10F <https://www.incometaxindia.gov.in/Forms/Income-Tax%20Rules/10312000000007197.pdf>.

7 Article 1 (Personal Scope) - This Convention shall apply to persons who are residents of one or both the States.

Article 3 (General Definition) - the term “person” includes an individual, a company, any other body of persons and any other entity which is treated as a taxable unit, under the taxation laws in force in the respective States.

5. Tax Considerations

effect in India from April 1, 2020 and in Netherlands from April 1, 2020 (or January 1, 2020 in respect of withholding taxes at source on amounts paid or credited to non-residents).

Accordingly, Article 6 of the MLI which provides for a preamble for prevention of treaty abuse, has been added to the existing preamble of the India- Netherlands DTAA. The Article 6 MLI preamble reads as follows:

Intending to eliminate double taxation with respect to the taxes covered by this Convention without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the Convention for the indirect benefit of residents of third jurisdictions).

Further, Article 7⁸ of the MLI in respect of the ‘Principal Purpose Test (“PPT”)’ is added to the provisions in the India-Netherlands DTAA. The PPT essentially states that if it can be reasonably concluded (after considering all relevant facts and circumstances), that obtaining benefits under India-Netherlands DTAA was one of the principal purposes of any arrangement or transaction, benefits under the India-Netherlands DTAA would be denied unless it is established that granting of such benefits is in accordance with the object and purpose of the provisions of the India-Netherlands DTAA. In ascertaining the object and purpose of the provisions of the India-Netherlands DTAA, regard must be had to the Article 6 MLI preamble, discussed above.

Accordingly, the Seller may be required to demonstrate a commercial rationale and substance to obtain benefits under India-Netherlands DTAA i.e. the Seller may be required to demonstrate that obtaining the benefit under India-Netherlands DTAA was not one of the principal purposes of the Underlying Transaction.

On the assumption that the Seller satisfies all the aforesaid conditions (including the PPT), it will be eligible to claim relief on the capital gains earned from the sale of shares held in the Offshore Promoter to the Acquirer under the India-Netherlands DTAA.

D. Will Adani be liable to withhold any taxes on the Acquisition?

Under Section 195⁹ of the ITA, any person who is responsible for paying any amount that is chargeable to tax under the ITA to a non-resident would be required to withhold taxes on such sum at the appropriate rate. The withholding obligations will be required to be undertaken by the payor at the earlier of (i) the time of payment or (ii) the time of credit of income to the account of the non-resident. This Section applies to all persons i.e. resident

8 Article 7 of the MLI – Prevention of Treaty Abuse. Notwithstanding any provisions of the Convention, a benefit under the Convention shall not be granted in respect of an item of income or capital if it is reasonable to conclude, having regard to all relevant facts and circumstances, that obtaining that benefit was one of the principal purposes of any arrangement or transaction that resulted directly or indirectly in that benefit, unless it is established that granting that benefit in these circumstances would be in accordance with the object and purpose of the relevant provisions of the Convention.

9 Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in section 194LB or section 194LC) or section 194LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head “Salaries”) shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force.

5. Tax Considerations

or non-resident making a payment to India, whether or not the non-resident person has any (i) a residence or place of business or business connection in India; or (ii) any other presence in any manner whatsoever in India.

In case the sum paid to a non-resident is not taxable in India as per the ITA, there is no requirement to withhold tax on such payments. Accordingly, if the amount paid has an element of income that is taxable in India, then even a non-resident who makes such remittance is obligated to withhold tax as per the ITA.

Typically, in relation to the Underlying Transaction, the transfer of shares held by the Seller in the Offshore Promoter to the Acquirer meets the conditions in respect of ‘indirect transfer’ as stated in Section 9(1)(i) of the ITA and accordingly, is taxable in India under the ITA. Accordingly, considering that a sum is being paid to a non-resident entity i.e. the Seller and such amount is chargeable to tax in India under the ITA, the provisions of Section 195 of the ITA will be triggered and the Acquirer should be required to undertake the withholding obligations set out in Section 195 read with the relevant ITRs.

However, as per Section 90(2) of the ITA, in case the Central Government has entered into a DTAA with the Government of any other country or specified territory outside India, as the case may be, for granting relief of tax or avoidance of double taxation, then, in relation to a non-resident to whom the DTAA applies, the provisions of the DTAA or the ITA, whichever shall be more beneficial, shall apply such non-resident.

Assuming that the Seller is entitled to claim the relief under the Article 13(5) of the India-Netherlands DTAA, the Acquirer shall not be required to withhold any taxes under the ITA.

E. Will this Transaction entail POEM for Adani in India?

As per the ITA¹⁰, a company may be considered to be a resident in India if (i) it is an Indian Company or (ii) POEM, in that year, is in India. POEM shall mean a place where key management and commercial decisions that are necessary for the conduct of business of an entity as a whole are, in substance, made. The CBDT has issued the guidelines for determination of POEM of a foreign company (“**POEM Guidelines**”)¹¹, which shall need to be determined on an annual basis.

POEM shall primarily be based on whether such company is engaged in active business outside India. The POEM Guidelines state that a company shall be said to be engaged in “active business outside India (“**ABOI**”)” if passive income is not more than 50% of its total income **and** less than 50% of the total assets and employees are situated in India and the payroll expenses incurred on the Indian employees is less than 50% of its total payroll expenditure. Passive income shall be the aggregate of any income from sale or purchase between the company and an associated enterprise of the company and any royalty, dividend, capital gains, interest or rental income. The POEM Guidelines set out the conditions and manner for computation of the aforesaid.

Typically, the POEM in case of a company engaged in ABOI shall be presumed to be outside India if majority meetings of the board of directors of the company are held outside India.

¹⁰ Section 6(3) of the ITA.

¹¹ CBDT Circular no. 6 of 2017 dated January 24, 2017 https://www.incometaxindia.gov.in/news/circular06_2017.pdf.

5. Tax Considerations

For companies other than those that are engaged in ABOI, the determination of POEM would be a two-stage process, being —

- i. Identification / Ascertainment of the person(s) who actually make the key management and commercial decisions for conduct of the company's business as a whole.
- ii. Determination of the place where these decisions are in fact being made.

The POEM Guidelines also provide an inclusive list of principles which may be considered for determining POEM such as the place where the board of directors, in substance, make the key management and commercial decisions or the place where the authority to make the key management and commercial decisions have been delegated (either *de jure* or *de facto*). Further, the presence of a head office will be an important factor in the determination of a company's POEM because it typically, represents the place where the key company decisions are made.

Further, CBDT has also clarified that the POEM guidelines shall not apply to a company having turnover or gross receipts of INR 50 crores or less in a financial year¹².

Upon the acquisition of the Offshore Promoter, the tests set out under the POEM Guidelines will have to be undertaken on a year-on-year basis in the manner set out in the POEM Guidelines, to ensure that the Offshore Promoter does not have a POEM in India for the purpose of Section 6 of the ITA.

¹² CBDT Circular no. 8 of 2017 dated February 23, 2017 <https://www.incometaxindia.gov.in/News/circular-8-2017-clarification-on-place-of-effective-management.pdf>.

Epilogue

The Indian cement industry has witnessed a massive transformation this past decade due to multiple M&As and aggressive expansion undertaken by key players, prompting increased production at record speed. This Deal is a landmark development within this backdrop due to its sheer value, synergies involved, and speedy execution. For Adani, the acquisition of Ambuja and ACC is a strategic back-door entry into the booming cement industry, with ready access to goodwill and facilities spread across suitable locations in India. For Holcim, the Deal provides a respectable exit in line with its long-term strategy to pivot into the production of sustainable building materials.

While it remains to be seen whether Adani consolidates the businesses of Ambuja and ACC in the future, given their track record, it is evident that Adani will take the market by storm and deliver maximum business value whilst attempting to expand market share. Thus, it will also be interesting to witness the strategies deployed by competitors like Ultratech Cement, Shree Cement and Dalmia Cement as a response to this Deal.

We have always taken initiatives to provide updates and analysis on the latest legal developments. M&A Lab is one such initiative which provides insight and analysis of the latest M&A deals. We believe in knowledge sharing and hence would appreciate any feedback or comment. Feel free to direct your comments/views on this Lab to conciierge@nishithdesai.com.

About NDA

At Nishith Desai Associates, we have earned the reputation of being Asia's most Innovative Law Firm – and the go-to specialists for companies around the world, looking to conduct businesses in India and for Indian companies considering business expansion abroad. In fact, we have conceptualized and created a state-of-the-art Blue Sky Thinking and Research Campus, Imaginarium Aligunjan, an international institution dedicated to designing a premeditated future with an embedded strategic foresight capability.

We are a research and strategy driven international firm with offices in Mumbai, Palo Alto (Silicon Valley), Bangalore, Singapore, New Delhi, Munich, and New York. Our team comprises of specialists who provide strategic advice on legal, regulatory, and tax related matters in an integrated manner basis key insights carefully culled from the allied industries.

As an active participant in shaping India's regulatory environment, we at NDA, have the expertise and more importantly – the VISION – to navigate its complexities. Our ongoing endeavors in conducting and facilitating original research in emerging areas of law has helped us develop unparalleled proficiency to anticipate legal obstacles, mitigate potential risks and identify new opportunities for our clients on a global scale. Simply put, for conglomerates looking to conduct business in the subcontinent, NDA takes the uncertainty out of new frontiers.

As a firm of doyens, we pride ourselves in working with select clients within select verticals on complex matters. Our forte lies in providing innovative and strategic advice in futuristic areas of law such as those relating to Blockchain and virtual currencies, Internet of Things (IOT), Aviation, Artificial Intelligence, Privatization of Outer Space, Drones, Robotics, Virtual Reality, Ed-Tech, Med-Tech and Medical Devices and Nanotechnology with our key clientele comprising of marquee Fortune 500 corporations.

The firm has been consistently ranked as one of the Most Innovative Law Firms, across the globe. In fact, NDA has been the proud recipient of the Financial Times – RSG award 4 times in a row, (2014-2017) as the Most Innovative Indian Law Firm.

We are a trust based, non-hierarchical, democratic organization that leverages research and knowledge to deliver extraordinary value to our clients. Datum, our unique employer proposition has been developed into a global case study, aptly titled 'Management by Trust in a Democratic Enterprise,' published by John Wiley & Sons, USA.

Research@NDA

Research is the DNA of NDA. In early 1980s, our firm emerged from an extensive, and then pioneering, research by Nishith M. Desai on the taxation of cross-border transactions. The research book written by him provided the foundation for our international tax practice. Since then, we have relied upon research to be the cornerstone of our practice development. Today, research is fully ingrained in the firm's culture.

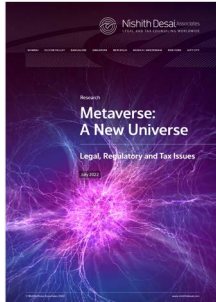
Over the years, we have produced some outstanding research papers, reports and articles. Almost on a daily basis, we analyze and offer our perspective on latest legal developments through our "Hotlines". These Hotlines provide immediate awareness and quick reference, and have been eagerly received. We also provide expanded commentary on issues through detailed articles for publication in newspapers and periodicals for dissemination to wider audience. Our NDA Labs dissect and analyze a published, distinctive legal transaction using multiple lenses and offer various perspectives, including some even overlooked by the executors of the transaction. We regularly write extensive research papers and disseminate them through our website. Our ThinkTank discourses on Taxation of eCommerce, Arbitration, and Direct Tax Code have been widely acknowledged.

As we continue to grow through our research-based approach, we now have established an exclusive four-acre, state-of-the-art research center, just a 45-minute ferry ride from Mumbai but in the middle of verdant hills of reclusive Alibaug-Raigadh district. Imaginarium AliGunjan is a platform for creative thinking; an apolitical ecosystem that connects multi-disciplinary threads of ideas, innovation and imagination. Designed to inspire 'blue sky' thinking, research, exploration and synthesis, reflections and communication, it aims to bring in wholeness – that leads to answers to the biggest challenges of our time and beyond. It seeks to be a bridge that connects the futuristic advancements of diverse disciplines. It offers a space, both virtually and literally, for integration and synthesis of knowhow and innovation from various streams and serves as a dais to internationally renowned professionals to share their expertise and experience with our associates and select clients.

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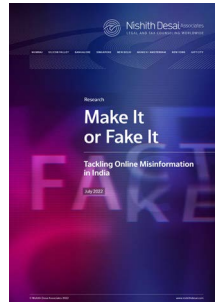
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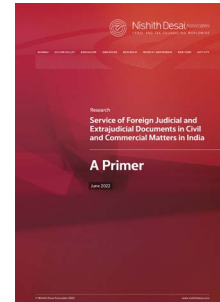
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Metaverse: A New Universe
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