

Part II- DoJ & SEC v Adani: The U.S. Law Perspective

Key Takeaways

- The U.S. SEC and DoJ have alleged civil and criminal violations by Adani Group's Gautam Adani, Sagar Adani and Vneet Jain
- The allegations against them are in their capacity as key managerial personnels at Adani Green Energy Ltd.
- Adani Green raised money from U.S. investors via Rule 144A bonds. An entity can market and sell securities, including bonds, under this Rule through an underwriter to certain institutional buyers without registering them with SEC
- It's DoJ and SEC's case that these bonds were sold to U.S. investors basis false and misleading information, particularly compliance with anti-bribery laws whereas these individuals engaged in a bribery scheme to secure solar energy contracts in India
- We examine:
  - Next steps in the U.S. investigation.
  - The law on pleas and settlement in the U.S. Are settlements confidential and what could be the terms of such settlement?
  - If they case goes to trial, defenses Gautam Adani, Sagar Adani and Vneet Jain could take
  - Why was the company not indicted?

The Adani Group is in the line of regulatory fire yet again. This time, it's the U.S. Department of Justice and Securities Exchange Commission who have indicted the group's top executives for orchestrating an alleged bribery scheme to secure lucrative solar energy contracts in India. That's the story in short.

In Part 1 of our analysis, we examined[1] the potential violations by the company in India. In this Part 2, we spoke with U.S. law experts to find out what happens next.

Here's the longer version of what transpired before Nov. 20 when the SEC and DoJ unsealed the complaint[2] and indictment[3] respectively of Gautam Adani, chairman, Adani Group & Adani Green Energy Ltd. (Adani Green); Sagar Adani, executive director, Adani Green, and Vneet Jain, managing director, Adani Green[4].

The Backstory

Back in 2019, Adani Green, a listed entity in India, and Azure Power Global Ltd. (**Azure**) jointly won solar tender offered by the Solar Energy Corporation of India (**SECI**). At the time, Azure Global was listed on the New York Stock Exchange (**NYSE**) and had a subsidiary in India. Canadian pension fund CDPQ majority-owned Azure Global.

Adani Green-Azure won the tender but were soon faced with an economics problem- *as explained in the SEC complaint*.

To elaborate, the price for energy capacity that SECI had tentatively agreed to pay to them turned out to be too high. That meant SECI could not identify buyers at these prices. As per the *SEC complaint*, this prompted Gautam Adani and Sagar Adani to allegedly undertake a "massive bribery scheme" to incentivize Indian state government officials to enter into contracts with SECI to buy energy at above market rates.

As per the *U.S. enforcement agencies*, over $250 million in bribes were paid to state governments post which DISCOMS of Odisha, J&K, Tamil Nadu, Chhattisgarh, and Andhra Pradesh signed up to purchase power from SECI.

Then came the time to collect the alleged bribe-share from Azure.

---

[1] Read Part 1: The Adani Indictment: Untangling the Legal Web of Potential Violations in India: *https://the-adani indictment-untangling-the-legal-web-of-potential-violations-in-india/*
[2] Read the SEC Complaint here: *https://www.sec.gov/files/litigation/complaints/2024/comp-pr2024-181.pdf*
[3] Read the DoJ indictment here: *https://www.justice.gov/usao-edny/media/1377806/dl?inline*
[4] The DOJ indictment refers to the entity as the 'Indian Energy Company', hence our presumption. However, the SEC's complaint (2024-181) does name the company as Adani Green.

While various structures were considered, the *SEC complaint says*, Azure ultimately decided to repay at least a portion of its share of the bribes by ceding to Adani Green all of its rights to sell 2.3 GW of power to SECI related to Andhra Pradesh. Azure cited a portion of the projects being unviable as the reason for withdrawal but as the *SEC complaint points out*, "this was a pretext". The real reason that Azure returned a portion of the Power Purchase Agreements was so that it could later be awarded to Adani Green as payment for Azure's portion of the bribes, *the complaint notes*.

While this alleged bribery scheme was underway, Adani Green raised more than $175 million from U.S. investors, *SEC complaint says*. These funds, *it adds*, were raised basis materially false and misleading statements regarding the company's compliance with U.S. anti-bribery laws in the Offering Circulars.

The *SEC complaint notes*, Adani Green and its 3 executives mislead investors to believe that they were not involved in any bribery to government officials and falsely suggested that the company was a leader in anti-corruption and anti-bribery principles.

"The opposite was true. Defendants had been personally and intimately involved in paying or promising bribes worth hundreds of millions of dollars to secure undue influence with Indian state government officials and procure contracts between Indian state governments and SECI that benefitted Adani Green."- SEC Complaint

This, the *SEC has noted*, violated the federal securities law which bars knowingly or recklessly:

- Employing devices, schemes or artifices to defraud,
- Obtaining money or property by means of untrue statements of a material fact or omissions of a material fact necessary to make the statements made,
- Engaged in one or more transactions, practices, or courses of business which operated or would operate as a fraud or deceit upon the purchaser.

The DoJ has brought criminal charges for these alleged securities law violations. Specifically, *it states that*, the defendants caused the Indian Energy Company (Adani Green) and certain of its subsidiaries to raise capital on the basis of false and misleading statements in connection with (i) two U.S. dollar-denominated syndicate loans totaling more than $2 billion from lender groups comprised of international financial institutions and U.S.-based investors; and (ii) two Rule 144A bond offerings for more than $1 billion underwritten by international financial institutions, which were marketed and sold to investors in the U.S., among other places. Additionally, the *DoJ indictment says*, the defendants caused the company to make false statements in their consolidated financial statements and to the market and investors regarding the bribery scheme.

The Next Steps

An indictment is one of the early steps in a criminal proceeding. It's a formal written accusation originating with a prosecutor and issued by a grand jury against a party charged with a crime. A grand jury, consisting of individuals selected at random, determines whether or not there is

probable cause to believe that one or more persons committed a certain Federal offense within the venue of the district court. The grand jury normally hears only that evidence presented by a government attorney, which tends to show the commission of a crime. Basis this evidence, and usually without hearing evidence for the defense, the grand jury must determine whether an indictment can be issued.

Settlement & Pleas: What Could They Entail?

To be clear, the SEC and the DoJ have alleged securities fraud conspiracy against the Adani executives; and not the conspiracy to violate the Foreign Corrupt Practices Act (FCPA). One reason could be how the jurisprudence on FCPA's extra-territorial applicability has evolved. U.S. courts have held[5] that a non-resident foreign national cannot be held criminally liable under FCPA unless the individual is an agent of a domestic concern. An individual can violate the FCPA outside the U.S. only if he is an agent, employee, officer, director, or shareholder of a U.S. issuer or domestic concern.

That said, the securities fraud allegations could potentially result in

1. A settlement with the SEC and a non-prosecution/deferred prosecution agreement with the DoJ, or
2. The Adani executives can choose to defend and take the case to trial

74% of defendants settle with the DOJ, and the percentage is higher for the SEC at 92%, according to data compiled by Stanford University on FCPA cases.

Vikramaditya Khanna, a professor of law at Michigan Law School, sees the fate of the Adani case reflected in these statistics as well.

> *Most FCPA cases don't get to trial. And part of it is because there's a strong incentive to settle. The cases take lots of resources and involve a lot of risk. Also, because the defendants and other entities which are involved are not located in the U.S., from a pure enforcement perspective, that can complicate matters. And as a result, you often see a lot of settlements or plea bargains*
>
> *- **Vikramaditya Khanna***
> *Professor of law, Michigan Law School*

It might be safe to assume that the defendants will be able to settle the civil case with the SEC, concurred ***David Simon***, partner in the International Government Enforcement Defense & Investigations Team at Foley & Lardner. "Whatever happens will almost certainly be public".

---

[5] United States v. Hoskins, No. 20-842 (2d Cir. 2022)
https://law.justia.com/cases/federal/appellate-courts/ca2/20-842/20-842-2022-08-12.html

The agency's other asks (listed below) will be a matter of negotiations. Besides imposing fines, the SEC has sought to

- "Permanently enjoin Gautam Adani, Sagar Adani Vneet Jaain from violating the federal securities laws that they have allegedly violated.

- Permanently prohibiting them from serving as an officer or director of any company that has a class of securities registered under the U.S. Securities Exchange Act, 1934."

For criminal proceedings by the DoJ against individuals, a negotiated resolution will generally take the form of a plea agreement or a non-prosecution cooperation agreement (**NPA**).

Under a plea agreement, the defendant typically admits to the facts supporting the charges, admits guilt, and is convicted. The plea agreement may jointly recommend a sentence or fine. An NPA, on the other hand, gives the DoJ the right to file charges but it refrains from doing so to allow the individual to demonstrate good conduct during the term of the NPA, explains the DoJ's FCPA Resource Guide.

These are agreements that the parties enter into where the prosecution is often held in abeyance while the company puts in place changes to how it runs. And while the company agrees to pay fines, it may even agree to have an independent monitor appointed to the company to ensure that its compliance efforts and other parts of the agreement are actually followed, ***Khanna*** said. "You see that with certain cases. You may remember some years ago that Volkswagen got itself into trouble over its emissions scandal. They had an independent monitor appointed for several years. I would say many, many FCPA cases, if not the majority of them, end up in either plea bargains or deferred prosecution agreements. It is the less common case that leads to full trial and a judicial determination of guilt or liability", ***Khanna*** added.

What If The Case Goes To Trial?

If the case goes the trial route, on procedure, there are motions that may get filed, ***Simon*** pointed out.

> *Defendants can file a motion to dismiss the indictment as legally flawed. I could see a motion challenging U.S. jurisdiction. These pretrial dismissal motions are rarely successful. During the pretrial period, the defendants will get discovery/evidence from the DoJ. On merits, the tie between the alleged bribery and raising money from investors seems vulnerable to attack*
>
> *- **David Simon***
> *Partner, Foley & Lardner*

During trial, the prosecution has to convince the court that someone has engaged in the underlying violation, ***Khanna*** added.

In terms of defenses, to start with, the Adani executives could argue that it wasn't a bribe.

> *You can debate about whether the money was paid to an actual "foreign government official" under the FCPA. Or maybe the official did not receive the money directly, but it was some intermediary who was paid and there was little reason for the defendant to suspect it would reach a foreign government official's pocket. Perhaps the intended objective was to make a legal political donation or to build facilities in a state that somehow wound up in the foreign government official's pocket*
>
> *- **Vikramaditya Khanna***
> *Professor of law, Michigan Law School*

Why Is Adani Green Not Indicted?

That could just be a matter of time, both ***Simon*** and ***Khanna*** opined.

To elaborate, the DoJ's indictment speaks about the defendants as senior executives of an 'Indian renewable-energy company which was a portfolio company of an Indian conglomerate'. The SEC complaint is more specific and has named the company as Adani Green. Interestingly, it says at one place in para 8, that the defendants "aided and abetted Adani Green's violations of Securities Act Section 17(a)(2), and Exchange Act Section 10(b), and Rule 10b-5(b) thereunder."

Perhaps why both experts opined that the case against the company is in the offing.

"I would only place a little bit of weight on that because in various press releases and commentary, the government authorities in the U.S. have said that investigations are ongoing against the company too. So, it doesn't mean that the company will not be charged at some point", ***Khanna*** pointed out.

It could mean, he added, they're still gathering enough evidence to feel comfortable during an indictment; it could mean that they're in discussions with the company to get additional evidence from them so that they can charge other individuals. "You should not assume that these are the only individuals that might be charged. There could be others", ***Khanna*** opined.

Sometimes the company charges trail behind the individuals, ***Simon*** pointed out.

> *Sometimes they do the company first and then the individuals. It doesn't necessarily line up. In many of these cases, the interests of the company and the individuals end up diverging. The company says it's not in our interest to be associated with this individual, and it throws them under the bus and cooperates with DOJ. Here, the facts don't seem to allow for that. If an indictment is coming the company's way, since the Chairman and his family are involved, they'd find difficult to do that*
>
> *- **David Simon***
> *Partner, Foley & Lardner*

Conclusion

The case, as expected, has sparked polarized reactions. On one side, there are those who have sought to politicize the matter, already presuming guilt as a foregone conclusion. On the other, critics have pointed to the lack of substantial evidence in the indictment, especially given that the individuals involved have not yet had an opportunity to present their defense.

Both narratives, however, are premature. We'll leave the hyperboles to those who can indulge in them. What is clear, however, is that this case underscores the critical importance of unambiguous and transparent disclosures when raising capital in international markets, particularly in the U.S. It also highlights a crucial role for advisors, such as merchant bankers, who must ask tough, probing questions of issuers before presenting them to investors.

Author



Payaswini Upadhyay

payaswini.upadhyay@resolutpartners.com

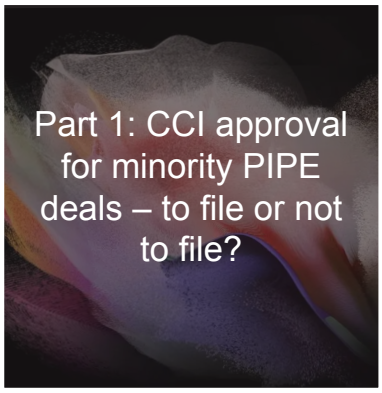
NewsWire

NewsWire is our latest initiative to deliver a rich array of perspectives on regulatory developments, landmark judicial decisions, governance, and policy matters. By harnessing the insights of advisors and stakeholders, NewsWire promises actionable and well-considered insights to keep you ahead of the curve.

Join our Whatsapp Community

*Please click **here** or scan the QR code to join the WhatsApp community of Resolüt Partners*

Recent Analyses







Recent Bottom Line

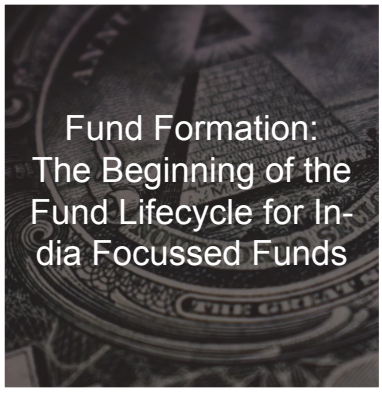






Recent Research








RESOLÜT
PARTNERS