THE CAPITOL FORUM
Vol. 10 No. 179 April 19, 2022

Indian Deals Could Face Tougher CFIUS Reviews Following Country's Refusal to Support Sanctions Against Longtime Ally Russia

The Committee on Foreign Investment in the United States (CFIUS) will likely toughen its reviews of transactions involving companies based in India because the South Asian nation hasn't condemned Russia's war against Ukraine or supported sanctions, national security experts said.

Almost two months after Russia launched an all-out invasion of its southwestern neighbor, India continues to buy Russian oil and natural gas even though President Joe Biden has urged its prime minister, Narendra Modi, to refrain from doing so. India also abstained when the UN General Assembly voted this month to suspend Russia from the Human Rights Council following atrocities that eyewitnesses said the country's soldiers committed in the Ukrainian town Bucha.

CFIUS will view India's reluctance to act against Russia, a longtime ally, as contrary to U.S. interests and therefore a potential security threat that the interagency panel should consider when evaluating Indian companies' proposed acquisitions, the experts said. The heightened scrutiny will add more regulatory risk to Indian foreign direct investment in the U.S., which stood at $22 billion in 2020, led by spending on information technology, telecommunications, life sciences and pharmaceuticals, according to a survey by the Confederation of Indian Industry.

Indian deals aren't the only transactions that could face extended reviews in the wake of Russia's invasion on February 24, the experts said. Other countries refusing to support the sanctions—such as Saudi Arabia, South Africa and the United Arab Emirates—might find their deals under more CFIUS scrutiny, as well, they said.

"Foreign firms from, or connected with, countries whose governments declined to impose sanctions and continued to do business with Russia will, all other things equal, be seen as higher security risks as investment partners with U.S. parties," said Harry Broadman, a faculty member at Johns Hopkins University and chair of the CFIUS practice at Berkeley Research Group.

Any committee action against India would be particularly noteworthy because the U.S. has been trying for years to forge stronger ties with New Delhi, hoping to reduce the government's reliance on Russian military hardware and, more broadly, to help counter China's growing power in Asia.

Shifting sentiment. Historically, Indian investments in the U.S. haven't encountered significant hurdles in CFIUS reviews. Between 2018 and 2020, the committee didn't reject any of the 16 deals involving Indian companies that it reviewed, according to CFIUS.

That could change due to India's position on the war in Ukraine and its oil purchases, which effectively countervail economic and trade sanctions on Russia imposed by the U.S. and its Western allies. India purchased at least 13 million barrels of Russian oil between February 24 and the end of March—compared with some 16 million in all of 2021, according to Reuters. Experts expect India's oil purchases and neutral stance on the invasion to affect how CFIUS views investments from the country.

"Every country's track record of compliance with U.S. law and its general alignment or nonalignment with U.S. policy influences a CFIUS review," said John Kabealo, a founder of Kabealo Law, a firm specializing in national security reviews and sanctions regimes.

CFIUS reviews are based largely on the facts surrounding each transaction—the sensitivity of the industry involved, for example, or the target's involvement in U.S. government contracts. Even so, investors from countries deemed to be sympathetic to foreign adversaries such as Russia tend to draw closer scrutiny, experts said.

"There is no blanket answer to how CFIUS will look at investment from any country," Kabealo said. "But countries that hesitate in aligning with U.S. and European policy toward Russia should expect that their investors will have additional hurdles to overcome in CFIUS and other FDI reviews."

Since the February 24 invasion, CFIUS has increased its scrutiny of Russia-related deals that haven't notified to the panel, potentially snagging investments including real-estate purchases involving Russian oligarchs.

CFIUS, the Indian Chamber of Commerce in the U.S. and the Embassy of India in Washington, D.C., didn't respond to requests for comment.

Past acquisitions. In the past, Indian companies have been successful in securing approvals from the committee, even for sensitive targets.

In February 2019, CFIUS cleared Novelis (NVL), a unit of India's Hindalco Industries (NSE: HINDALCO), to acquire rival American aluminum roller and recycler Aleris for $2.8 billion. Later that year, the panel authorized Indian information-technology giant Wipro (WIT) to purchase U.S. digital engineering company International TechneGroup for $45 million.

The last time CFIUS ordered the divestiture of an Indian investment in the U.S. was in 2012, when the panel told Polaris Financial Technology of Chennai to exit its 85.3% stake in IdenTrust, a

California company providing digital identity authentication services to U.S. government agencies and commercial clients.

But the relatively smooth ride that Indian investors have enjoyed in the U.S. may now be set to get bumpy. According to six national security experts, CFIUS will likely harden its stance toward investments from countries that violate U.S. sanctions against Russia.

The shift comes as CFIUS is reviewing another buyout involving Wipro—a $230 million takeover of Edgile, a cybersecurity consulting company based in Austin, Texas.

Edgile's customer base includes some 30% of the companies in the Fortune 100 and 20% of the Fortune 500, according to its website. The company provides services related to cloud enterprise security and software authentication programs. Among its partners are Microsoft, Dell and Amazon.

Bengaluru, India-based Wipro was required to obtain clearance from CFIUS for the investment, but it's unclear whether New Delhi's stance on Ukraine will affect the review. The deal was announced in December, and the panel may already have determined that the buyout is benign, experts said.

Wipro and Edgile didn't respond to requests for comment. Experts interviewed for this article refused to discuss specific transactions to avoid potential conflict of interests.

Sanctions violations and CFIUS. The U.S. Treasury both chairs CFIUS and administers sanctions through its Office of Foreign Assets Control (OFAC), creating what security experts call "an overlap" between sanctions and foreign-investment reviews. The two agencies cooperate on global enforcement cases and share information relevant to each other's jurisdictions.

Under a 2018 law that ramped up its powers, CFIUS must state in its annual report to Congress whether countries subject to sanctions attempted to initiate investments in U.S. businesses. The committee is also required to report on U.S. investments affecting national security made from countries that boycott Israel.

The Treasury's official list of counties boycotting Israel includes Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria and Yemen. The Treasury removed the United Arab Emirates from the list in April 2021 after the country repealed a law requiring participation with the Arab League Boycott of Israel.

The Treasury list on Israel illustrates how intertwined CFIUS has become with U.S. foreign policy and sanctions.

In its 2020 report, CFIUS identified 101 M&A transactions with a combined value of $17.4 billion involving investors from countries boycotting Israel. According to the report, each of the 101 transactions was formally reviewed by CFIUS either through the non-notified or voluntary notification process. The document doesn't say whether any of those transactions were withdrawn, mitigated or blocked.

"The great middle." There is little doubt that the government could, hypothetically, use CFIUS to target Indian companies that violate U.S. laws or act contrary to U.S. national security goals, experts said.

"I don't think there's a lot of appetite to start treating lots of Indian companies like those from Russia or China" when it comes to export controls and CFIUS reviews, said Joshua Gruenspecht, a partner and national security adviser at law firm Wilson Sonsini Goodrich & Rosati.

But neither is India in the same camp as U.S. allies such as Canada, the UK and Australia, he said. India stands "in the great middle from a CFIUS perspective—and so Indian company investments need to be addressed case by case," said Gruenspecht.

"Could particular Indian companies that flout U.S. laws eventually get into trouble with CFIUS if they come before the committee? Sure, that's very possible," he said.