THE CAPITOL FORUM
Vol. 12 No. 15 January 10, 2024

Nippon Steel/U.S. Steel: Japanese Bid Draws Opposition, Complicating CFIUS Review; Echoes of DP World Deal

Nippon Steel's (5401.T) proposed takeover of U.S. Steel (X), once a symbol of American industrial might, is generating serious political opposition that complicates the $14.9 billion deal's regulatory path.

Just days after the Japanese buyer unveiled the transaction on December 18, Democratic and Republican senators called on the administration to block the deal. Some of these senators represent Rust Belt states whose voters will play a key role in determining if President Joe Biden wins a second term this year and which party controls Congress in 2025.

The United Steelworkers union also has come out against the deal—which takes on particular significance as Biden seeks organized labor's support for his re-election bid.

An official at the White House, which usually stays mum about pending mergers, has said that the administration would closely scrutinize the purchase of the "iconic" U.S. company.

"This is probably the most politically charged inbound U.S. foreign investment deal that has come down the pipe in decades," said Harry Broadman, a former U.S. assistant trade representative who was a member of the Committee on Foreign Investment in the United States (CFIUS). The interagency panel will be investigating the Nippon Steel/U.S. Steel transaction for its national security implications.

"In an election year, it would be naïve to believe that politics won't enter into discussions," said Broadman, who also served as chief of staff on President George H. W. Bush's Council of Economic Advisors.

In a statement to *The Capitol Forum*, U.S. Steel confirmed that it was in touch with congressional supporters and opponents of the deal. "We have been and will remain in communication with congressional offices to discuss the deal and its benefits for the American steel industry, American jobs, America's national security and America's supply chain security," the statement said.

The furor kicked up by the deal's announcement has echoes of the political backlash against a state-owned Dubai company's plan in 2006 to take over operations at six U.S. ports. That opposition—based on post-9/11 U.S. fears of Arab control over critical infrastructure—eventually forced the company, DP World, to abandon the deal.

It's too early to say if Nippon Steel/U.S. Steel will suffer a similar fate. The 2006 ports transaction raised different security issues in a country still reeling from the 2001 terrorist attacks.

Also, Japan is one of the strongest U.S. allies, a partnership whose importance has only grown with the rise of China's industrial and military power. Nippon Steel could argue that the U.S. Steel acquisition would allow it to better compete with Chinese rivals.

The transaction does raise questions about the vulnerability of America's steel supply and prices and sensitive business information that could be shared with Nippon Steel's operations in China, national security experts said. These types of issues usually can be resolved with CFIUS-imposed mitigation that safeguards data and supply, the experts said.

The political outcry, though, makes it more difficult for the Biden administration to simply agree to such remedies and wave through the deal.

"The purchase of this iconic American-owned company by a foreign entity—even one from a close ally—appears to deserve serious scrutiny in terms of its potential impact on national security and supply chain reliability," said Lael Brainard, director of the White House's National Economic Council, in a statement on behalf of the president three days after the deal's announcement.

In the statement, Brainard singled out the United Steelworkers for praise, calling the union a "leader" in protecting the industry's viability against unfair foreign practices.

It's "rather rare for the president to make any statements on the national security consequences of a transaction that is currently under review by CFIUS," said Andrew Astuno, a former Treasury Department official who worked on the committee.

Nippon Steel didn't respond to a request for comment. CFIUS legally can't comment on its cases.

Symbol of American industry. U.S. Steel has a storied 123-year history. In March 1901, influential banker J.P. Morgan led the effort to consolidate Andrew Carnegie's Carnegie Steel with nine other companies, creating the world's largest corporation, United States Steel. Commonly referred to as U.S. Steel or simply Big Steel, it had a capitalization of $1.4 billion at the time of its founding.

For most of the 20th century, U.S. Steel maintained its position as one of the nation's premier companies. But its fortunes diminished as cheaper steel from Japan, China and other countries flooded the market, causing resentment in America's steel region toward the foreign companies.

United Steelworkers has voiced its disapproval of the agreement and instead pushed for a domestic deal with Cleveland-Cliffs, asserting that it would be more beneficial for the workers and the U.S. as a whole. However, Nippon outbid Cliffs by over $10 per share, agreeing to pay a premium of around 40% on the stock's closing price on December 15.

Nippon's bid immediately drew fire from Rust Belt politicians. Senator Sherrod Brown (D-OH), who's seeking re-election this year but trails Republicans State Senator Matt Dolan and Secretary of State Frank LaRose in polls, said he had "serious concerns" and urged "heavy" scrutiny of the transaction.

In Pennsylvania, Democratic Senator Bob Casey faces better prospects for re-election, leading hedge fund CEO David McCormick, his Republican opponent. But Casey must secure the support of steelworkers to ensure victory.

"The United States' marquee steel company should remain under American ownership," he said in a statement shortly after the deal's announcement. "From initial reports, this deal appears to be a bad deal for Pennsylvania and for Pennsylvania workers."

Nippon Steel has pledged to honor all union contracts.

Senator John Fetterman (D-PA) expressed opposition on the social media platform X hours after the announcement of Nippon's intent to acquire U.S. Steel.

Senator Joe Manchin (D-WV) has said the deal is detrimental to the American steel industry.

Some Republicans also have been openly critical. Senators J.D. Vance (R-OH) discouraged the sale in August, and in December, he and Senators Josh Hawley (R-MO) and Marco Rubio (R-FL) wrote to Treasury Secretary Janet Yellen, who chairs CFIUS, urging her to block the deal.

The deal also could have ramifications for this year's presidential contest. Both Biden and his likely Republican opponent, former President Donald Trump, are courting voters in Ohio, Pennsylvania and other parts of the Rust Belt.

Japanese investors and CFIUS reviews. The potential deal between the third-largest U.S. steel manufacturer and the world's fourth-largest steelmaker could establish a strong competitor against China, the experts said. In 2022, China's steel production reached 1,018 million tons, overshadowing the U.S., which produced only 80.5 million tons.

Historically, Japanese companies investing in the U.S. are perceived as low risk, primarily due to the robust alliance between the two countries, with collaboration in areas such as defense, cybersecurity in the Indo-Pacific region and technology and investment. In 2021, Japan became the largest foreign investor in the U.S., with investments tripling over a decade to reach $721 billion.

However, CFIUS is expected to carefully evaluate practical aspects of the deal related to industrial security and the resilience of the supply chain. This scrutiny is backed up by a 2022 executive order issued by the Biden administration directing the committee to look more closely at these factors when conducting its reviews.

When assessing deals, CFIUS examines three key factors to determine if a transaction raises national security concerns. These factors include the potential risks associated with a foreign buyer, the vulnerability of the target company and the national security implications arising from the combination of identified risks and vulnerabilities.

At the same time, the committee conducts a risk-oriented analysis, considering not only the identity of the investor but also placing significant emphasis on the threat profile presented by the investor. CFIUS decides to approve, mitigate or block the transaction based on this comprehensive assessment.

Overall, the deal also prompts considerations about the future landscape of the steel industry, the experts said. Its resolution may set the tone for the regulatory approach to mergers and acquisitions involving renowned and sensitive enterprises, reaching beyond the confines of U.S. Steel.

Addressing these issues, Broadman raised fundamental questions: “What should be the role of Washington in supporting the steel industry? Would the opposition to the deal be different if the buyer were from France or Australia instead of Japan? And should companies like U.S. Steel be foreign-owned in the first place?”

Nippon’s China units. The committee will be interested in Nippon Steel’s operations in China and whether those could create some dependencies that in the future could compromise U.S. Steel, the experts said. The company has at least two business units in China, according to Nippon Steel’s website.

One of those units, Shanghai-based Baosteel-Nippon Steel Automotive Steel Sheets (BNA), has 630 employees and boasts capital revenue exceeding 14.6 billion Chinese yuan ($2.06 billion). Another, WISCO-Nippon Steel Tinplate (WINSteel) in Wuhan City, employs around 500 people and generates revenue of 5.3 billion Chinese yuan ($746.8 million).

"Third-party connections to countries of concern, such as China, will undergo thorough scrutiny," said Antonia Tzinova, a partner at Holland & Knight who specializes in trade, foreign investment and industrial security. "This scrutiny aims to guarantee that Nippon Steel, as an example, isn't subjected to coercion that could jeopardize U.S. Steel's relationships with the U.S. defense industrial base and infrastructure clients."

Defense and infrastructure ties. The U.S. government's investment watchdog will consider U.S. Steel as crucial for maintaining a stable domestic supply, particularly for national security reasons, the experts said. The defense industry frequently uses steel in the construction of military equipment, vehicles and weapon systems. Additionally, steel plays a vital role in companies that provide critical infrastructure or are otherwise involved in homeland security.

U.S. Steel has maintained a long-standing partnership with the U.S. Defense Logistics Agency (DLA), an entity tasked with overseeing the management of supply chains vital to the country's defense. U.S. Steel and its affiliates have participated in more than 80 contract projects since 1974, according to the DLA-administered Commercial and Government Entity website. These projects include the supply of steel for bridges, cyclone fences and pipes.

"U.S. Steel stands as a major player in the American steel industry, with a few business units engaging in contracts with the U.S. government," Tzinova said. "This connection prompts CFIUS to seek assurances and proactively address potential risks to the domestic supply chain, regardless of the acquirer's nature."

Possible national security concerns that may trigger additional review are associated with U.S. Steel's supply chain connections, particularly with companies such as automaker General Motors (GM) and entities engaged in infrastructure and machinery construction, including Dupont (DD).

An illustrative case is Gary Works, the largest steel manufacturing plant owned by U.S. Steel, capable of producing up to 7.5 million net tons of raw steel per year. This significant output plays a pivotal role in supporting the U.S. automotive industry.

The committee is likely to conduct market research to test whether the acquisition of U.S. Steel and subsequent market consolidation could have a negative effect on steel prices in the country. A 2022 executive order directed CFIUS to analyze foreign investment in specific sectors as well as the cumulative effect of such transactions on supply chains irrespective of whether the U.S. business is involved in the defense industrial base.

Additionally, the CFIUS executive order directs the committee to focus on “advanced clean energy (such as battery storage and hydrogen)” and “climate adaptation technologies.” That could increase CFIUS scrutiny of the deal because of U.S. Steel’s involvement in these types of projects.

For instance, U.S. Steel is participating in research efforts aimed at achieving zero emissions, led by the Department of Energy’s National Energy Technology Laboratory. The company is set to conduct trials on an advanced membrane technology designed to capture carbon dioxide emissions produced during steelmaking at its Edgar Thomson Plant in Braddock, Pennsylvania.

Mitigation measures. Experts predict a lengthy deal review process that may lead to a withdrawal and resubmission if the parties can’t reach an agreement on mitigation. The companies will initiate the procedure by filing a preliminary notice, allowing CFIUS to request any supplementary information.

Typically, CFIUS takes up to 10 days to respond, and if the notification is approved, the primary review begins the following business day.

CFIUS is granted 45 days to assess the transaction, with an additional 45-day investigation period during which it gathers more information and participates in the risk-mitigation process. In instances where there is insufficient time to reach a resolution addressing national security concerns, CFIUS may ask the parties to pull and refile, thereby extending the review period by another 45 days.

Potential mitigation would likely entail supply assurances that U.S. Steel’s domestic steelmaking capacity wouldn’t decrease and even commitments to maintain a certain price cap on steel sold to the U.S. government, according to the experts.

Also, the committee will likely require a data-security plan to ensure that post-merger Nippon Steel’s foreign subsidiaries don’t get access to information on U.S. Steel clients, such as purchasing data and product specifications.

In recent years, CFIUS has dramatically increased the number of deals that are subject to remedies. In 2022 CFIUS implemented mitigation measures, or conditions, in 52 cases, marking a 68% year-over-year rise from the 31 instances recorded in 2021, according to the committee’s most recent annual report.

Also in 2022, the parties abandoned the transaction in 12 cases after CFIUS said it was unable to identify mitigation measures that would resolve its concerns, or after proposed measures were deemed unacceptable.

In anticipation of CFIUS requiring fixes before allowing the deal to proceed, the companies in the merger agreement pledged to take any necessary steps to close the deal, including "entering into a mitigation agreement, letter of assurance, national security agreement, proxy agreement, trust agreement or other similar arrangement or agreement, in relation to the business and assets."

If the parties fail to obtain the necessary regulatory clearances, Nippon Steel will play U.S. Steel a $565 million termination fee. The companies anticipate closing their deal in the second or third quarter.

"Clearing this deal might require more time than initially anticipated, given the heightened attention," said a former government official who previously worked on issues related to industrial security and foreign trade and asked for anonymity due to the sensitive nature of the topic.

"However, the approach to resolving it will involve implementing mitigation rather than imposing a complete block," the former government official said.

DP World comparison. But CFIUS might not have the final say on the deal. Several experts drew parallels between the political backlash against the Nippon Steel transaction and the circumstances surrounding the DP World deal.

When the earlier deal was under review, both Democrats and Republicans urged the cancellation of the transaction. Under political pressure, DP World abandoned the deal.

Bipartisan criticism of the current transaction has raised questions about whether it would experience the same fate.

Broadman, the former CFIUS official, said, "This [U.S. Steel] acquisition could potentially lead to an outcome reminiscent of the DP World deal years ago, where Nippon might opt to withdraw from the agreement if faced with sufficient opposition from Congress."

State-owned DP World, the product of the 2005 merger between DPI International and an international business unit of the Dubai Ports Authority, stirred controversy when it expressed interest in acquiring the London-based Peninsular and Oriental Steam Navigation Company (P&O) in 2005. In 2006, P&O, a significant port operator along the U.S. Atlantic and Gulf coasts, became the focus of a bidding war.

Competing against entities like the Port of Singapore Authority, DP World secured the deal by offering $6.8 billion for P&O's operations, which included terminals in crucial ports in New York and New Jersey, Philadelphia, Baltimore, New Orleans and Miami.

Beginning in October 2005, DP World engaged with the Department of the Treasury, coordinating with the Department of Homeland Security and seeking input from the Office of the Director of National Intelligence. CFIUS members convened on December 6, 2005, to address unresolved issues, leading to a formal 30-day review triggered by DP World's mid-December notification.

The review concluded on January 17, with CFIUS determining the deal posed no threats to national security, eliminating the need for an additional 45-day investigation.

Despite CFIUS approval, bipartisan opposition emerged, with lawmakers threatening legislation to block the deal. In February 2006, Senator Charles Schumer (D-NY) expressed concerns about giving control over U.S. ports to a country linked to terrorism, citing alleged connections between Dubai entities and funding for 9/11 hijackers.

Then-Senate Majority Leader Bill Frist (R-TN) proposed legislation for a 45-day investigation, which CFIUS declined to initiate. Still, the House Appropriations Committee voted 62-2 on March 8 to block the deal, and President George W. Bush, despite threatening a veto, faced political pressure as DP World withdrew from the deal and sold all of its assets in the U.S.

This case prompted a reassessment of the 1992 Byrd Amendment, which required CFIUS to initiate an investigation when a foreign state-owned entity sought to acquire a U.S. business. Lawmakers argued that the deal's 30-day clearance violated the Byrd Amendment, while CFIUS contended that, after a two-month informal review, it had complied with the amendment and had no grounds for an additional 45-day investigation.

The DP World case mainly demonstrated the committee's inability to follow a formal process and the lack of tools to mitigate certain risks presented by foreign government-owned entities to the U.S. critical infrastructure. The deal resulted in the passage of the Foreign Investment and National Security Act of 2007, which sought to expand the authority of CFIUS to review and regulate sensitive transactions.

Deals' differences. It's important to keep in mind the significant differences between the DP World and Nippon Steel deals, the experts said.

Lawmakers critical of the U.S. Steel takeover would probably find it difficult to block the deal with legislation because of a 2018 law that delegated more authority to CFIUS to conduct national security reviews of deals, said Astuno, who served as a policy adviser to the committee.

In the case of DP World, "The House Appropriations Committee had an independent basis to prohibit DP World from operating the U.S. ports because those ports were U.S. government-owned," he said.

U.S. Steel is a private business and ultimately it is for CFIUS, and not Congress, to recommend whether this deal should be blocked for reasons relating to national security, he added.

Thirteen national security experts, including former government officials, told *The Capitol Forum* that it's unlikely CFIUS would reject the deal.

But that doesn't mean Nippon Steel is home free.

"The executive branch has other tools beyond CFIUS to stop or frustrate this transaction from happening," said Astuno, referring to emergency powers, and environmental and antitrust enforcement actions.

The steel industry's importance in the U.S. ensures that the Biden administration will take a long look at the transaction, said a national security expert who has been involved in several deals involving Japanese investors and asked for anonymity to avoid potential conflicts of interest.

"With this deal in the heartland of America and headquartered in the 'Steel City' [Pittsburgh], you will have a lot of saber-rattling around national security, when the underlying issues relate to U.S. competitiveness, U.S. jobs, and how foreign ownership could impact what used to be a beacon of economic might in the country," the expert said.