Has the CFIUS Process Become Political?

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On January 3, President Biden issued the *Order Regarding the Proposed Acquisition of United States Steel Corporation by Nippon Steel Corporation* (the "Order").[1] Under the Order, President Biden prohibited the proposed acquisition of United States Steel Corporation ("U.S. Steel") by Nippon Steel Corporation through its subsidiaries Nippon Steel North America, Inc. and 2023 Merger Subsidiary, Inc. (collectively, "Nippon Steel"). Consequently, U.S. Steel and Nippon Steel must take all steps necessary to fully and permanently abandon the proposed acquisition within 30 days unless an extension is granted by the Committee on Foreign Investment in the United States ("CFIUS"). President Biden's Order marks the first time that a transaction involving a Japanese investor has been blocked by Presidential order and represents a rare point of agreement by President Biden and former President Trump as they campaigned against one another in last year's Presidential race.[2]

In a statement released by Nippon Steel, the company indicated that it is "dismayed by President Biden's decision to block [the transaction], which reflects a clear violation of due process and the law governing CFIUS."[3] Nippon Steel went on to state that "[i]nstead of abiding by the law, the process was manipulated to advance President Biden's political agenda. The President's statement and Order do not present any credible evidence of a national security issue, making clear that this was a political decision."

Under Section 721 of the Defense Production Act of 1950, as amended ("Section 721"), the U.S. President may take such action as appropriate to suspend or prohibit foreign investments that threaten to impair U.S. national security where no other adequate and appropriate means are available to address the threat. Under Section 721, the President has vast power to investigate, prevent, amend, or even dissolve a foreign investment.

U.S. Steel believes that the transaction will enhance "U.S. national and economic security through investment in manufacturing and innovation – by a company based in one of the United States' closest allies" and that it would forge a key alliance "in steel to combat the competitive threat from China." As part of the proposed transaction, Nippon Steel was to make over $2,700,000,000 of investments in U.S. Steel's facilities in Western Pennsylvania and northwestern Indiana.

Nippon Steel argues that the transaction "would strengthen, not weaken, U.S. national security." In cases where CFIUS identifies a potential national threat to U.S. national security, it will consider various forms of mitigation such as Board member restrictions, access restrictions, and supply chain commitments. Nippon Steel's press release noted that it voluntarily committed to various mitigation measures. Nippon Steel indicated that "CFIUS did not give due consideration to a single mitigation proposal…as evidenced by the absence of any written feedback to the four robust national security agreements that the Parties proactively offered over 100 days."

Although CFIUS has long been critiqued as being a "black box" since it makes very little information about its review and investigation processes and its enforcement actions public, CFIUS generally has been regarded as an apolitical body. However, Nippon Steel made clear that it believes "the process was manipulated to advance President Biden's political agenda. The President's statement and Order do not present any credible evidence of a national security issue, making clear that this was a political decision." On January 6, Nippon Steel and U.S. Steel filed two lawsuits aimed at overturning President Biden's Order. Generally, decisions related to national security are not reviewable by U.S. courts, and it remains to be seen how the U.S. judicial system will react to the lawsuits.

President Biden's Nippon Steel Order appears to be an outliner compared to past Presidential prohibitions. However, as President-elect Trump prepares for his upcoming inauguration, all eyes will be on how the Trump Administration implements the CFIUS process. Voices undoubtedly will become louder that the CFIUS and Section 721 process has become a political tool that has strayed from its objectives of protecting national security if similar decisions continue.

[1] See Federal Register :: Regarding the Proposed Acquisition of United States Steel Corporation by Nippon Steel Corporation.

[2] See Biden says it's 'vital' US Steel remain American owned and operated | CNN Business and Nippon-US Steel Deal to Be Blocked by Trump If He Wins 2024 Election, He Says - Bloomberg.

[3] See Nippon Steel Corporation and U. S. Steel Condemn U.S. Government's Unlawful Decision to Block Proposed Acquisition of U. S. Steel :: United States Steel Corporation (X).