

US Steel And Nippon's Lawsuit Seen As 'Hail Mary' Attempt

By **Al Barbarino**

Law360 (January 9, 2025, 4:45 PM EST) -- President Joe Biden may not have put forth an airtight national security argument for blocking Nippon Steel's planned acquisition of U.S. Steel, but the companies' subsequent lawsuit is still highly unlikely to earn them another chance at making the deal happen, according to legal experts.

In a Jan. 6 lawsuit, Nippon and U.S. Steel said Biden and the Committee on Foreign Investment in the United States violated the steelmakers' constitutional due process and statutory rights after the president officially blocked the deal Jan. 3.

The petition, filed in the U.S. Court of Appeals for the District of Columbia Circuit, asked the court to vacate and set aside Biden's order and make CFIUS conduct a fresh review, asking that the court "consider this matter on an expedited basis" given the June deadline for closing the transaction.

But attorneys told Law360 that the president has broad authority when it comes to executive decisions related to national security, giving the companies' suit nothing more than a "Hail Mary" chance of prevailing with the suit. Under a best-case scenario where the court orders CFIUS to re-review, the best that might do is help the parties rebut for the record certain aspects of the way the government review was handled, they said.

David Plotinsky, a Morgan Lewis & Bockius LLP partner and the former acting chief of the U.S. Department of Justice's Foreign Investment Review Section, was one of several attorneys who said the complainants face an "uphill battle" to get the case re-reviewed.

While the parties have done "a good job putting their best foot forward," he said the deference of the courts "always goes to the executive branch and to the president, in particular on national security cases ... which just makes the deck stacked in the government's favor."

In addition, "there's language in the statute that says the president's actions are not judicially reviewable," he said. "Anytime they can say there's a national security argument with a mostly straight face, they're probably in a decent position, and anybody challenging it is going to have an uphill battle."

The lawsuit comes after Nippon faced a storm of opposition from lawmakers on both sides of the aisle after winning a bidding battle for U.S. Steel in December 2023. Ultimately, Biden proclaimed that he intended to block the deal before a formal review had concluded, a key factor that the companies' lawsuit suggests tainted the "sham process."

"The president is empowered to act only after CFIUS has completed a bona fide investigation to identify credible national security risks," the petition read. "Here, the president turned this process on its head. He publicly announced his decision to block the merger before CFIUS's review even began."

Biden made his decision official after a six-month CFIUS review and a reported split recommendation from the agencies that make up CFIUS, issuing his Jan. 3 order prohibiting the transaction under Section 721 of the Defense Production Act of 1950, citing "credible evidence" leading him to believe it could threaten U.S. national security.

Jeffrey P. Bialos, an Eversheds Sutherland partner and co-head of the firm's global aerospace, defense and security group, told Law360 there's "no 'there there' for arguing there's a national security threat."

Bialos, who earlier in his career led defense mergers and acquisitions reviews as deputy undersecretary of defense for industrial affairs, noted that Japan is a close U.S. ally, Nippon has no track record of compromising U.S. national security and that U.S. Steel itself doesn't supply steel to the U.S. military.

Nippon had also offered a multitude of concessions to appease the U.S. government, and its pledges to inject money into U.S. Steel plants would have been good, not bad, for U.S. workers, he added.

Bialos, however, was one of several attorneys who said the chances of the deal ever closing are extremely slim.

In their petition, Nippon and U.S. Steel said CFIUS and the president's actions violated their rights under the due process clause.

"By making his decision before the CFIUS review process even began, the president denied petitioners their right to a fair and impartial process," the petition read.

But arguments for due process are based on bias, and "it's not really clear that the president's decision affected the CFIUS decision," Bialos explained, noting that a split decision from the agencies that make up CFIUS indicates that some parties were certainly not affected by the president's proclamations.

"The president has a lot of discretion on matters of foreign affairs," he said. "If you win on due process, you get a redo, but what's the point there?"

CFIUS, which is in charge of reviewing national security concerns of mergers, had warned prior to Biden's Jan. 3 decision that the deal could lead to a decline in domestic steel output, but the companies said in their petition that the committee failed to properly review the transaction on national security grounds.

After citing "credible evidence" related to U.S. national security, in a subsequent, roughly 400-word, five-paragraph statement later that day, the president outlined why he decided to block the deal, stating, "We need major U.S. companies representing the major share of U.S. steelmaking capacity to keep leading the fight on behalf of America's national interests."

"As a committee of national security and trade experts across the executive branch determined, this acquisition would place one of America's largest steel producers under foreign control and create risk for our national security and our critical supply chains," Biden said.

But there has been ongoing skepticism from attorneys who have spoken with Law360 about the validity of the national security arguments. Former Vice President Mike Pence is among those who have supported the deal, calling the national security arguments against it "bogus."

In a memo following Biden's block of the transaction, Freshfields Bruckhaus Deringer LLP attorneys said the president has not "offered compelling evidence that the transaction would have a negative impact on the U.S. steel industry, much less an impact so substantial as to threaten national security," adding that his decision "appears to be premised, at best, on flawed national security arguments and, at worst, on political motivations."

But regardless of whether there's a strong national security argument, and even though the review process was atypical, the president's power when it comes to national security will prevail, attorneys said.

Plotinsky of Morgan Lewis said he thinks the government could ultimately "tell the court that it should sort of disregard some of those unfavorable facts on the theory that they don't really matter if, ultimately, there's a national security basis for this, and the courts give deference to the executive branch in that matter."

In an emailed statement, Morgan Lewis partner Ken Nunnenkamp, who represents clients in international trade and national security matters, noted that Section 721(e) explicitly makes "actions taken" by the president "not subject to judicial review."

The 2014 D.C. federal appeals court's opinion in *Ralls Corp. v. CFIUS* also reaffirmed the principle that CFIUS national security decisions are generally nonjusticiable, he added.

Only constitutional due process challenges escape that limitation, Nunnenkamp noted. In *Ralls*, while the court ruled that the company's due process rights were violated by the CFIUS review, the court didn't overturn then-President Barack Obama's order requiring the sale of certain wind farms based on national security concerns.

Nunnenkamp said the assertion in *U.S. Steel and Nippon's* petition that the review process was a "sham ... because it was designed and conducted with the goal of providing support for the president's predetermined decision," is also unlikely to lead the court to act in the companies' favor.

"The D.C. Circuit is unlikely to overturn the blocking order based solely on allegations of pre-determination or the appearance of a sham process," Nunnenkamp wrote. "Substantial evidence of constitutional violations or procedural defects is normally required. In addition, there does not appear to be a process for taking evidence, so the sham argument cannot be developed beyond what is in the public record."

James Brower, a partner in Morrison Foerster LLP's litigation department, acknowledged that the way the review process played out, including with early proclamations from both Biden and President-elect Donald Trump that they would block the deal, was "very atypical, very odd."

"You had this political noise before the case appears to have begun in earnest," said Brower, a former Treasury Department official who led the review, assessment and investigation of over 100 transactions and led CFIUS's mitigation monitoring efforts.

It is also very rare for the CFIUS agencies not to reach a consensus on a matter, Brower said, attributing that as a likely part of the reason that Biden's order and subsequent statement were "relatively light."

But while Brower said there are circumstances in which a president's decision, or a committee decision are "legally vulnerable," they don't appear to be present in this case, and that the best the alleged due process violations would achieve would be a "process-based remedy."

"It's difficult to see the remedy being the parties being able to consummate this transaction. That's really hard to see," he said.

Plotinsky said that if one accepts the president's national security arguments, they still "fall comfortably in the realm of what should be able to be mitigated," noting that the parties had been "very forward leaning and offering pretty stringent mitigation that seems to address the government's concerns."

Among those efforts, Nippon had pledged to retain U.S. representation on U.S. Steel's board of directors, keep its headquarters in Pittsburgh, pump billions into U.S. Steel's existing facilities, retain existing jobs and follow U.S. trade regulations.

More recently, Nippon sent the White House a proposal giving the U.S. government veto power over any potential production declines. But none of that was enough.

Robert Shapiro, a partner at Thompson Coburn LLP and chair of the firm's international trade and transportation regulatory practice, said he had expected a last-ditch deal was going to be made to get the transaction done. But, ultimately, he said the "politics of this" won out, and that Biden acted largely on his pro-labor allegiance and his desire to block the deal instead of allowing Trump to do so.

"I find it unlikely that a court is going to find that the president acted outside of his authority," Shapiro said. "The national security judgment of the president is pretty much paramount, and Congress has delegated much of that power to the president ... [The companies] can throw the statements out there that the president made, but I don't think that's going to swing things. So I think this is a Hail Mary."

--Editing by Orlando Lorenzo and Dave Trumbore.