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Japan's Response to the Trade Conflict Between the United States and China

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JAPAN'S RESPONSE TO THE TRADE CONFLICT BETWEEN THE UNITED STATES AND CHINA

Rikako Watai*

Abstract: Decoupling refers to the strategy of separating and disconnecting economies and markets between different nations. However, in the contest of the ongoing trade conflict between the United States and China, decoupling primarily refers to determining economic dependence on a specific nation as a national security risk, thereby reinforcing vulnerabilities in one's supply chain. Japan views the United States as its primary partner in national security policy and China as a significant market because of its geographic proximity. As a result, ensuring economic security became a pressing concern for Japan.

Japan refers to the United States' idea of economic statecraft to shape its economic security policy. Since 2007, Japan strengthened foreign direct investment regulations by making amendments to the Foreign Exchange and Foreign Trade Act. Some interpret these changes as an endorsement of the United States' efforts to prevent technology leakage. One example of this technological policy is the Economic Security Promotion Act of 2022, which was enacted to ensure the stability of economic activity by establishing essential procedures and regulations.

As no nation can independently complete the supply chain, it is necessary for Japan to foster collaboration among allies and to have the engagement of the United States. Whether or not the United States approves the acquisition of United States Steel Corporation by Nippon Steel may influence the future relationship between the two nations.

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I. EVOLUTION OF DECOUPLING

A. *Decoupling within the Historical Framework*

Decoupling refers to the separation of economies and markets across countries to prevent the economic downturn of one country from affecting another. Decoupling was first proposed at the time of the collapse of Lehman Brothers in 2008.¹ At the G20 summit held immediately after the incident, there was an idea to decouple the BRIC economies, which had seen significant economic development during the 2000s, from those of industrialized countries. The end goal was to maintain global growth.²

Decoupling, previously employed as a method to safeguard regional economic growth by preventing the interconnection of investment and trade between countries, apparently transformed into a regulation that obstructs a country with different economic and social systems from participating in another's supply chain.³ The change in objective directly resulted from the trade conflict between the United States and China. Decoupling encompasses

¹ Vanessa Rossi, *Decoupling Debate Will Return: Emergers Dominate in Long Run*, CHATHAM HOUSE Briefing Note: IEP 08/01, 5 (Oct. 2008), <https://www.chathamhouse.org/sites/default/files/public/Research/International%20Economics/iepbn0801.pdf>. The concept of decoupling, which entails the separation of emerging countries' growth from the stagnation of industrialized economies while enhancing the global economy via developing markets, was established as a governance philosophy in 2008. Henry T. C. Hu, *Financial Innovation and Governance Mechanisms: The Evolution of Decoupling and Transparency*, 70 *BUS. LAW.* 347, 354 (2015).

² Summit on Financial Markets and the World Economy, *Declaration of the Summit on Financial Markets and the World Economy* (Washington DC, November 15, 2008), https://www.mofa.go.jp/policy/economy/g20_summit/2008/declaration.pdf.

³ See Ming Du, *International Economic Law in the Era of Great Power Rivalry*, 57 *VAND. J. TRANSNAT'L L.* 723, 745–46 (2024).

several aspects,⁴ but the decoupling specifically mentioned in reference to China is primarily concerned with national security.

The origin of decoupling between the United States and China dates back to the 1990s. The East-West conflict began to decline with the fall of the Berlin Wall in 1989, the dissolution of the Union of Soviet Socialist Republics, and the establishment of Russia in 1991. The Coordinating Committee for Multilateral Export Controls during the Cold War was abolished in 1994, and the Wassenaar Arrangement on export control of conventional arms was established in 1996. These moves marked a shift from export controls aimed at maintaining Western dominance to export controls aimed at controlling conventional weapons. The goal of this shift was to keep an eye toward regional conflicts and terrorist activities, which were national security concerns at that time.

The period following the shift may be seen as a period in which the United States and other Western nations attempted to establish ties with countries they had previously been in conflict with, as symbolized by China's entrance to the World Trade Organization (WTO) in 2001. However, China, along with Russia, maintained its political and economic framework and initiated a series of new industrial strategies. For example, China implemented its "One Belt, One Road" initiative in 2013 as part of its industrial strategy.⁵ This initiative aimed to establish an economic zone focused on infrastructure investments. In 2015, China introduced "Made in China 2025" to further reinforce its commitment to enhancing its national strength.⁶ In other words, China and Russia can engage in economic activities without embracing Western values, making these countries free from the restrictions they faced during the Cold War.⁷

Trade disputes between the United States and China became more evident, as China established its position as an industrialized country. The 2016 United States-China Economic and Security Review Commission report to Congress recommended stronger investment regulation, and reevaluation of

⁴ Raj Bhala, *Decoupling Defined: Four Theories and Four Illustrations from the Sino-American Trade War*, WASH. INT. L. J. (forthcoming 2024) (discussing forms of decoupling).

⁵ Spencer Feingold, *China's Belt and Road Initiative turns 10. Here's what to know*, WORLD ECON. F. (Nov 20, 2023), <https://www.weforum.org/agenda/2023/11/china-belt-road-initiative-trade-bri-silk-road/>.

⁶ Made in China 2025, STATE COUNCIL OF THE PEOPLE'S REPUBLIC OF CHINA, <https://english.www.gov.cn/2016special/madeinchina2025/> (last visited Aug. 1, 2024).

⁷ See e.g., Vice President Mike Pence, *Remarks by Vice President Pence on the Administration's Policy Toward China*, WHITE HOUSE (October 4, 2018) <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-vice-president-pence-administrations-policy-toward-china/> ("Previous administrations made this choice in the hope that freedom in China would expand in all of its forms — not just economically, but politically, with a newfound respect for classical liberal principles, private property, personal liberty, religious freedom — the entire family of human rights. But that hope has gone unfulfilled.").

export control legislation stating China violated international obligations through import substitution and forced technology transfers.⁸ The Senate and the House initiated amending legislation on foreign direct investment and export control owing to increasing concerns over China.⁹ The policy move represented a departure from the accommodating attitude previously employed during the post-Cold War period.

According to the United States Census Bureau and the Bureau of Economic Analysis, the trade deficit between the United States and China amounted to \$375.2 billion in 2017, making it the largest between any countries.¹⁰ By the end of 2017, the National Security Strategy emphasized the need to reevaluate policies implemented in the preceding two decades.¹¹ At the 19th National Congress of the Communist Party in October 2017, China's Supreme Leader Xi Jinping emphasized the importance of accelerating efforts to improve the socialist market economy and to make Chinese companies world-class by reforming state-owned enterprises.¹² Thus, China's state-owned enterprises grew with the support of the government to promote national policies.

The regulation of state-owned enterprises was not a priority during the formation of the General Agreement on Tariffs and Trade (GATT) and WTO because its main objective was to promote free movement of capital and trade. As a consequence, the international regulations were insufficient in regulating state-owned enterprises, and no modifications to the rules were ever implemented, leading to an increased trade deficit between the United States and China.¹³

The National Defense Authorization Act of 2019 (NDAA), which sets the Department of Defense budget, included the Foreign Investment Risk Review

⁸ U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMM'N, 2016 ANNUAL REPORT TO CONGRESS iii, 29, 31 (2016).

⁹ Kate O'Keefe, *Schumer Urges Trump to Block China Deals Over North Korea*, WALL ST. J. (ONLINE), Aug. 1, 2017, <https://www.wsj.com/articles/schumer-urges-trump-to-block-china-deals-over-north-korea-1501585202> (discussing how Senator Chuck Schumer (D-NY) of the Democratic Party, which was not the governing party at the time, proposed a ban on all Chinese investment).

¹⁰ U.S. Census Bureau & U.S. Bureau of Economic Analysis, News Release CB 18-15 | BEA 18-06 | FT-900 (17-12), U.S. International Trade in Goods and Services, December 2017 3 (Feb. 6, 2018) 3, 16, <https://www.bea.gov/index.php/system/files/2018-02/trad1217.pdf>.

¹¹ WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 3 (2017), <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

¹² Xi Jinping, *Secure a Decisive Victory in Building a Moderately Prosperous Society in All Respects and Strive for the Great Success of Socialism with Chinese Characteristics for a New Era*, Remarks at the 19th National Congress of the Communist Party of China 29 (October 18, 2017), http://www.xinhuanet.com/english/download/Xi_Jinping's_report_at_19th_CPC_National_Congress.pdf.

¹³ Petros C. Mavroidis, *THE REGULATION OF INTERNATIONAL TRADE VOL. 1: GATT 402, 406-07* (2016). GATT Article XVII, pertaining to state trading enterprises, allows for measures based on commercial considerations, but the specific details of this article remain ambiguous and have not been defined in practice.

Modernization Act of 2017¹⁴ (FIRRMA) and the Export Control Reform Act of 2018¹⁵ (ECRA). The former focused on strengthening the regulation of investments directed toward technology, infrastructure, and data. Meanwhile, the latter focused on regulating emerging technologies. The 2019 NDAA further prohibited the government procurement of telecommunications equipment and services from companies associated with the Chinese government.¹⁶

The Biden administration followed the Trump administration by maintaining a consistent position on economic and security policies. This consistency was evident in the National Security Strategy released in October 2022, which prioritized competing with China while restraining Russia.¹⁷ Given current global issues, particularly Russia's actions in Ukraine, it was reasonable to expect the government to maintain an engaged stance on economic and national security while considering the presidential election in 2024. The fact that bipartisan efforts were made on economic and national security matters, regardless of which party is in power, demonstrated a shared awareness of the significance and importance of taking action.

B. Economic Statecraft, Decoupling and De-risking

Economic statecraft is the use of economic means to achieve a country's diplomatic and strategic objectives.¹⁸ It encompasses the strategies of the United States against China, such as the implementation of supplementary tariffs on steel and aluminium goods under Section 301 of the Trade Expansion Act.¹⁹ Decoupling in the United States is one form of economic

¹⁴ John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. No. 115–232, 132 Stat. 1636, 2173–2207 (2018) (codified at 10 U.S.C. § 2358).

¹⁵ John S. McCain National Defense Authorization Act for Fiscal Year 2019, 132 Stat. 2208–2234 (codified at 10 U.S.C. § 2358),

¹⁶ John S. McCain National Defense Authorization Act for Fiscal Year 2019, 132 Stat. 1917–1918 (section 899 (a)(1)(B), (f)(2)(3)) (codified at 10 U.S.C. § 2358).

¹⁷ WHITE HOUSE, NATIONAL SECURITY STRATEGY 23-27 (2021), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Biden-Harris-Administrations-National-Security-Strategy-10.2022.pdf>.

¹⁸ See Kazuto Suzuki, *Economic Security in the Free Trade Regime*, SOCIETY OF SECURITY AND DIPLOMATIC POLICY STUDIES, <http://ssdpaki.la.coocan.jp/en/proposals/102.html> (last visited Aug. 1, 2024) (defining economic statecraft “certain country “enforces upon other countries its own political will and values employing economic measures;” it overlaps with “economic coercion” in many ways with no distinct difference.”).

¹⁹ FACT SHEET: Biden-Harris Administration Announces New Actions to Protect U.S. Steel and Shipbuilding Industry from China's Unfair Practices, WHITE HOUSE, (Apr. 17, 2024), <https://www.whitehouse.gov/briefing-room/statements-releases/2024/04/17/fact-sheet-biden-harris-administration-announces-new-actions-to-protect-u-s-steel-and-shipbuilding-industry-from-chinas-unfair-practices/> (last visited Aug. 1, 2024).

statecraft, as it uses regulation to disconnect or de-link economic relations with China.

Jake Sullivan, the national security advisor for the Biden administration, made a remark on new industrial strategy in 2023.²⁰ Sullivan highlighted four challenges confronting the United States: the decline of its industrial base, the need to adapt to a new environment of geopolitical and security competition, the need to accelerate the transition to a just and efficient energy system in response to the climate crisis, and the need to address inequality and its impact on democracy.²¹ The solutions to these challenges include five steps: (1) laying a new foundation with a modern American industrial strategy; (2) working with partners to ensure building capacity, resilience, and inclusiveness; (3) establishing innovative new international economic partnerships beyond traditional trade deals; (4) investing in emerging economies; (5) protecting America's foundational technologies under a policy of "small yard and high fence."²²

Additionally, pertaining to relations with China, the concept of de-risking was introduced as an alternative to decoupling.²³ Unlike decoupling, which focuses on separation, de-risking involves "diversifying" and allows substantial trade and investment engagement with China while keeping foundational technologies behind the high fence.²⁴ Possible methods of constructing a high fence or de-risking are export controls and foreign direct investment regulations. If these measures are not adequately executed, there is a danger of technology leakage and supply chain vulnerability. In particular, for emerging technologies, the key is to fill the gaps in export controls with foreign direct investment regulations to prevent undesirable foreign controls because export controls may be implemented too late to mitigate the risks effectively. Furthermore, foreign direct investment regulations on national security matters should be more significant compared to export controls on individual transactions, since lack of foreign direct investment regulations may result in the permanent transfer of specific technologies to other nations and the whole supply chain.

While there is no specific organization equivalent to the WTO for investment, there is the Organisation for Economic Co-operation and

²⁰ Jake Sullivan, National Security Advisor, Renewing American Economic Leadership, Remarks at the Brookings Institution (April 27, 2023), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/04/27/remarks-by-national-security-advisor-jake-sullivan-on-renewing-american-economic-leadership-at-the-brookings-institution/> (last visited Aug. 1, 2024).

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

Development (OECD), which aims to foster economic progress by promoting investment liberalization. The United States and Japan are both members of the OECD. The regulations on foreign direct investment by member countries must align with the 1961 OECD Code of Liberalisation of Capital Movements (OECD Code).²⁵ Article 2 of the Code allows member countries to reserve industries for liberalization,²⁶ while Article 3 allows member countries to regulate foreign direct investment for the purposes of maintaining public order, protecting public health, morals, and safety, protecting essential security interests, and fulfilling their obligations to international peace and security. Member states have taken measures to mitigate the effect of foreign capital by establishing national laws under Article 3. Consequently, the member countries' foreign direct investment regulations are positioned as a national security exception to the fundamental principles of international norms that guarantee the free flow of capital. In the present day, national security is no longer an exception but a mainstream concern as a result of either by decoupling or de-risking.

C. *Where the United States Stands*

The United States was the pioneer in implementing regulations on foreign direct investment with a specific focus on national security concerns.²⁷ This initial implementation was prompted by a Japanese company's proposal to acquire a California semiconductor manufacturer in 1987.²⁸ Although this was not a hostile takeover, the fact that the United States would become dependent on Japan for defense technology and that Japan traded technology with the nations of the Warsaw Pact Organization caused opposition in the

²⁵ OECD Code of Liberalisation of Capital Movements 2024, <https://www.oecd.org/content/dam/oecd/en/topics/policy-issues/investment/Code-capital-movements-EN.pdf>.

²⁶ OECD, Decision of the Council Adopting the Code of Liberalisation of Capital Movements, OECD/LEGAL/0002 71 (2023), <https://legalinstruments.oecd.org/public/doc/249/249.en.pdf>.

Japan reserves investment in (1) primary industry related to agriculture, forestry and fisheries, mining, oil, leather and leather products manufacturing; (2) air transport; (3) maritime transport; (4) foreign capital participation, direct and/or indirect, in Nipon Telegraph and Telephone Corporation must be less than one-third.

²⁷ W. Robert Shearer, *The Exon-Florio Amendment: Protectionist Legislation Susceptible to Abuse*, 30 HOUS. L. REV. 1729, 1730-1732 (1993).

²⁸ See Jose E. Alvarez, *Political Protectionism and United States International Investments Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1, 56-63 (1989) (discussing the course of the deal).

United States.²⁹ Consequently, the parties voluntarily cancelled its acquisition plans.³⁰

After this cancellation, the Exon-Florio Amendment was enacted in 1988.³¹ This foreign direct investment regulation was introduced to address the potential recurrence of such a circumstance. Through this Amendment, the President has the power to order the cancellation of foreign direct investment that impacts the national security of the United States.³² The responsibility for conducting the actual review was delegated to the Committee on Foreign Investment in the United States.³³ The scope of the regulation was broad because the regulation is applicable not just to the acquisition of American businesses by foreign investors, but also to acquisitions between foreign businesses if they impact the national security of the United States.³⁴

The Exon-Florio Amendment does not provide a definition of national security, but the factors considered in the review suggest that national security pertains to matters relating to defense and the military.³⁵ This basic definition received multiple additions. In 2007, the passage of Foreign Investment and National Security Act³⁶ (FIRNSA) added the concept of homeland security.³⁷ Finally, FIRMA incorporated “TID U.S. Business” which stands for Technology, Infrastructure, and Sensitive Personal Data, within the concept of national security.³⁸ Foreign direct investment regulations from a national security perspective expanded from national defense to homeland security and data concerns.

²⁹ Marc Greidinger, *The Exon-Florio Amendment: A Solution in Search of a Problem*, 6 AM. U.J. INT’L L. & POL’Y 111, 113 (1991).

³⁰ David E. Sanger, *Japanese Purchase of Chip Maker Canceled After Objections in U.S.: Fujitsu’s Purchase of Chip Maker Called Off*, N.Y. TIMES, Mar. 17, 1987 at 1, D11.

³¹ Omnibus Trade and Competitiveness Act of 1988 § 5021, Pub. L. No. 100–418, 102 Stat. 1107, 1425–26 (codified as amended at 50 U.S.C. § 4565).

³² 50 U.S.C. § 4565(d)(4)(A)(B).

³³ Exec. Order No. 12661 of Dec. 27, 1988, Implementing the Omnibus Trade and Competitiveness Act of 1988 and related international trade matters, 54 Fed. Reg. 779, 780 (Jan. 9, 1989).

³⁴ Press Release, LIXIL Group Corporation, LIXIL and Grandland Agree to Terminate Planned Permasteelisa Transaction (Nov. 27, 2018), https://www.lixil.com/en/news/pdf/181127_pisa_E.pdf. The Japanese corporation LIXIL attempted to sell its Italian subsidiary to a Chinese company in 2018, but the transaction was terminated after failing to secure clearance from the Committee on Foreign Investment in the United States. The Italian subsidiary participated in many projects in major cities in the United States, and its takeover by a Chinese corporation was seen unfavorably.

³⁵ 50 U.S.C. app. § 2170 (f)(1)–(5), transferred to 50 U.S.C. § 4565(f)(1)–(5).

³⁶ Foreign Investment and National Security Act of 2007, Pub. L. No. 110–49, 121 Stat. 246 (codified as amended at 50 U.S.C. § 4565).

³⁷ 50 U.S.C. app. § 2170 (a)(5), transferred to 50 U.S.C. § 4565(a)(1); Rikako Watai, *Regulation of Foreign Direct Investment in United States*, in THE COMPARATIVE LAW YEARBOOK OF INTERNATIONAL BUSINESS VOL. 38 147, 155–56 (Dennis Campbell ed., 2016).

³⁸ 50 U.S.C. § 4565 (a)(4)(B)(iii); 31 C.F.R. § 800.248.

Past Presidential Orders

Year	President	Investor Nationality	Summary
1990	Bush	China	Acquisition of American aircraft parts manufacturer MAMCO by Aero-Technology Import and Export Corporation (CATIC) ³⁹
2012	Obama	China	Acquisition of four American wind power companies by Ralls, an affiliate of SANY Group ⁴⁰
2016	Obama	China	Acquisition of German semiconductor company AIXTRON by investment fund Fujian Grand Chip Investment Fund ⁴¹
2017	Trump	China	Acquisition of the American semiconductor company Lattice by the investment fund Canyon Bridge ⁴²
2018	Trump	Singapore	Takeover of the American semiconductor company Qualcomm by the semiconductor company Broadcom ⁴³
2020	Trump	China	Takeover of the American cloud service company for hotels StayNTouch by software developer Beijing Shiji ⁴⁴
2020	Trump	China	Acquisition of American social media service Musical.ly by platform operator ByteDance ⁴⁵
2024	Biden	China	Acquisition of Certain Real Property of Cheyenne Leads by MineOne Cloud Computing Investment I L.P. ⁴⁶

³⁹ Order Pursuant to Section 721 of the Defense Production Act of 1950, 55 Fed. Reg. 3935 (Feb. 6, 1990).

⁴⁰ Regarding the Acquisition of Four U.S. Wind Farm Project Companies by Ralls Corporation, 77 Fed. Reg. 60281 (Oct. 3, 2012).

⁴¹ Regarding the Proposed Acquisition of a Controlling Interest in Aixtron SE by Grand Chip Investment GmbH, 81 Fed. Reg. 88607 (Dec. 7, 2016).

⁴² Regarding the Proposed Acquisition of Lattice Semiconductor Corporation by China Venture Capital Fund Corporation Limited, 82 Fed. Reg. 43665 (Sept. 18, 2017).

⁴³ Regarding the Proposed Takeover of Qualcomm Incorporated by Broadcom Limited, 83 Fed. Reg. 11631 (Mar. 15, 2018).

⁴⁴ Regarding the Acquisition of StayNTouch, Inc. by Beijing Shiji Information Technology Co., Ltd., 85 Fed. Reg. 13719 (Mar. 10, 2020).

⁴⁵ Regarding the Acquisition of Musical.ly by ByteDance Ltd., 85 Fed. Reg. 51297 (Aug. 19, 2020).

⁴⁶ Regarding the Acquisition of Certain Real Property of Cheyenne Leads by MineOne Cloud Computing Investment I L.P., 89 Fed. Reg. 43301 (May 16, 2024).

* Created by the author. Between the enactment of the Exon-Florio Amendment and FIRRMA, a total of eight Presidential Orders have been issued. China was engaged in seven of these investments.

II. EVOLUTION OF ECONOMIC SECURITY

A. *Economic Security within the Historical Framework*

The impact of the trend toward decoupling between the United States and China is becoming evident in other nations. Japan considers the United States its primary ally, particularly in national security policy, even though China is a significant geographically proximate market. The exclusion of China, renowned as a global manufacturing hub, from the supply chain would eventually result in consumers bearing the consequences. Given the pre-existing interconnectivity of economies worldwide, it is difficult to decouple or eliminate China from the global economy.⁴⁷ Moreover, Japanese businesses that comply with the United States sanctions on China face retaliatory measures from China, potentially placing Japan in a precarious position between the two nations.

Keizai Anzenhoshou or economic security is a Japanese term that is comparable to economic statecraft. In Japan, economic security has become a topic of discussion to ensure a steady supply of resources. The Committee for Economic Security of the Ministry of International Trade and Industry defined economic security as “a state of economy in which it is shielded primarily through economic means from grave threats to its security posed by international factors” in 1982.⁴⁸ During that period, Japan’s national security strategy revolved around the principle of “comprehensive security,” which entailed a wide-ranging approach that includes the economic, political, diplomatic, cultural, and educational dimensions of national security.⁴⁹ This concept came from national security concerns beyond simple military threats

⁴⁷ Du, *supra* note 3 at 786. As an example, the WTO now has 164 member countries, making it a global organization that includes the majority of countries worldwide. *Members and Observers*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Aug. 1, 2024). Furthermore, the relationship between political freedom and GDP in 1995, the year the WTO was established, and in 2015, two decades later, shows that an increase in GDP does not always lead to changes in political freedom. Akihiko Tanaka, *Changes to the International System due to the Rise of China—from Trade Wars to* *a* *“New Cold War”*, 50 JAPAN FOREIGN POL’Y F. (Jan. 14, 2019), https://www.japanpolicyforum.jp/pdf/2019/no51/DJweb_51_dip_01.pdf.

⁴⁸ MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, ECONOMIC SECURITY OF JAPAN 1982 3 (1982).

⁴⁹ Robert S. Ozaki, *Introduction: The Political Economy of Japan’s Foreign Relations*, in JAPAN’S FOREIGN RELATIONS: A GLOBAL SEARCH FOR ECONOMIC SECURITY 1, 11 (Robert S. Ozaki & Walter Arnold eds., 1984).

after the oil crises of the late 1970s.⁵⁰ Contrary to economic statecraft, which is an “offensive” strategy, Japan’s approach to economic security first started as a “defensive” strategy. In other words, economic security was considered an effort to eliminate threats to Japan, consisting of operating and maintaining a system of interdependence, fostering friendly relations with countries crucial to the Japanese economy, and other self-reliant strategies to deal with threats, such as stockpiling.⁵¹ From the Plaza Accord of 1985 until the early 1990s, Japan experienced a period of economic growth characterized by inflated asset prices, more commonly known as a bubble economy. The rapid economic growth during this period led to a decrease in discussions on economic security policies. That period of silence did not last forever.

B. Where Japan Stands

In December 2020, the Strategic Headquarters on the Creation of a New International Order, the policy research council of Japan’s ruling Liberal Democratic Party, issued a recommendation for a new national strategy.⁵² This strategy focused on economic security and considered the changes in the international order following the COVID-19 pandemic. The recommendation defined economic security as “ensuring Japan’s independence, survival, and prosperity from an economic perspective.”⁵³ This recommendation emphasized that evaluating strategy should consider strategic autonomy and strategic indispensability. Strategic autonomy refers to “ensuring the livelihoods of Japanese people and the normal functioning of our economy without depending excessively on other countries, under any circumstances.”⁵⁴ Conversely, strategic indispensability refers to “ensuring Japan’s long-term, sustainable prosperity and national security by strategically increasing the number of sectors within the entire global industrial structure where Japan is indispensable to the international community.”⁵⁵ While strategic autonomy is a “defensive” posture that replaces the traditional concept of comprehensive national security, strategic

⁵⁰ MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, *supra* note 48, at 1.

⁵¹ FOUNDATION FOR ADVANCED INFORMATION AND RESEARCH, JAPAN, MASAYOSHI OHIRA’S PROPOSAL: TO EVOLVE GLOBAL SOCIETY 228-32 (Yuichiro Nagatomi ed., 1988).

⁵² STRATEGIC HEADQUARTERS ON THE CREATION OF A NEW INTERNATIONAL ORDER POLICY RESEARCH COUNCIL, LIBERAL DEMOCRATIC PARTY OF JAPAN, RECOMMENDATIONS: TOWARD DEVELOPING JAPAN’S ECONOMIC SECURITY STRATEGY, *in* RECOMMENDATIONS BY THE WORKING TEAM ON GOVERNANCE OF INTERNATIONAL ORGANIZATIONS WITHIN THE PARLIAMENTARY ASSOCIATION ON RULE-MAKING STRATEGY (Provisional Translation, December 16, 2020), https://storage2.jimin.jp/pdf/news/policy/201021_5.pdf.

⁵³ *Id.* at 4.

⁵⁴ *Id.*

⁵⁵ *Id.*

indispensability is an “offensive” posture and is on the outer edge of economic statecraft. Therefore, it became evident that Japan’s economic security legislation will include an “offensive” component.

Japan’s economic security legislation aims to address the issue of technology leakage. Decoupling is often invoked in connection with advanced technologies, particularly semiconductors. The rationale for this invocation is that possessing technical superiority is a crucial element that directly correlates with preserving a nation’s security. Technology management is a subject of export control based on the Foreign Exchange and Foreign Trade Act (FEFTA),⁵⁶ a statute that focuses on whether technology is intended for military or civilian use. Nevertheless, the differentiation between military and civilian use has become ambiguous. This is due to the emergence of spin-offs, which convert military technology for civilian purposes, and spin-ons, which incorporate civilian technology into military applications. Hence, the administration and management of dual-use technology has emerged as a pressing concern for economic security.⁵⁷ In addition, owing to the dramatic increase in the speed of technological development, it is conceivable that security export control has not kept pace with sensitive technologies in cutting-edge areas such as those represented by specific critical technologies. Therefore, in addition to export control, measures must be taken in conjunction with the foreign direct investment regulation, another tool based on FEFTA.

⁵⁶ Article 1 of FEFTA establishes the goal, “that peace and security are maintained in Japan and the international community.” Foreign Exchange and Foreign Trade Act, JAPANESE LAW TRANSLATION, Act No 228 of 1949, art. 1, <https://www.japaneselawtranslation.go.jp/ja/laws/view/4412> (last visited Aug. 1, 2024) (Regulation applies to both the outflow of goods and the movement of capital through transactions).

⁵⁷ The technologies subject to export control are specified in the Appendix of the Foreign Exchange Order. Foreign Exchange Order, JAPANESE LAW TRANSLATION, Cabinet Order No. 260 of 1980, <https://www.japaneselawtranslation.go.jp/en/laws/view/4102> (last visited Aug. 1, 2024).

Foreign nationals who have been in Japan for a period of six or more months are not subject to deemed export control because they are treated as residents of Japan under FEFTA Article 6(1)(v)(vi) in accordance with the tax regulations and are not subject to deemed export control. However, if the provision of technology to such a resident is no different in substance from the provision of technology to a non-resident, there is a high probability of technology leakage to a foreign country. Consequently, effective May 2022, technology transfer to a resident under the significant influence of a non-resident categorized as (1) provision to a person who concludes an employment contract with a foreign government or foreign corporation, and is subject to the instructions and orders of the foreign government or foreign corporation, or has a duty of care to them; (2) provision to a person under the effective control of a foreign government, based on economic interest; (3) provision to a person who acts under the instructions of a foreign government, are subject to export control. Ministry of Economy, Trade and Industry, *Request for your Cooperation for Compliance with the Regulations of Deemed Export Controls* 4 (November, 2021), https://www.meti.go.jp/policy/anpo/law_document/minashi/en_daigaku_.pdf.

III. THE FOREIGN EXCHANGE AND FOREIGN TRADE ACT OF JAPAN

Japan established a review mechanism for foreign direct investment in accordance with Article 3 of the OECD code under FEFTA.

A. *Foreign Direct Investment Screening Process*

Japan had a stringent policy towards foreign capital after World War II to promote its economic recovery.⁵⁸ Investing in Japan was subject to a permit system, which meant that even if the involved parties agreed on an investment plan, it could not be implemented without obtaining clearance from the Japanese government.⁵⁹ This policy was gradually relaxed as Japan progressed through the stages of membership in the International Monetary Fund in 1952,⁶⁰ GATT in 1955,⁶¹ the United Nations in 1956,⁶² which the White Paper on the Economy described as “No longer are we in the ‘postwar’ age,”⁶³ and OECD in 1964.⁶⁴ The “Declaration Concerning Openness to Foreign Direct Investment” was issued in 1990 as the outcome of the Japan-United States Structural Impediments Initiative, which led to adopting a policy that permitted foreign direct investment.⁶⁵ In 1991, a shift was made from a principle of prior screening of foreign direct investment to a principle of after-the-fact reporting.⁶⁶

⁵⁸ NIKKEI RESEARCH INC., REPORT OF STUDY CONCERNING JAPAN'S EXPERIENCE WITH THE LIBERALIZATION OF FOREIGN DIRECT INVESTMENT IN JAPAN AND THE CURRENT SITUATION ABOUT JAPAN'S FOREIGN DIRECT INVESTMENT IN FOREIGN COUNTRIES 4 (2005), https://www.mof.go.jp/policy/international_policy/research/fy2005tyousa/1705tyokusetu_1.pdf.

⁵⁹ Tomoko Ishikawa, *Investment Screening on National Security Grounds and International Law: The Case of Japan*, 7 J. INT'L & COMPAR. L. 71, 79 (2020).

⁶⁰ *Japan*, INTERNATIONAL MONETARY FUND, <https://www.imf.org/en/Countries/JPN> (last visited Aug. 1, 2024).

⁶¹ *The 128 countries that had signed GATT by 1994*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/gattmem_e.htm (last visited Aug. 1, 2024).

⁶² *Member States*, UNITED NATIONS, <https://www.un.org/en/about-us/member-states#gotoJ> (last visited Aug. 1, 2024).

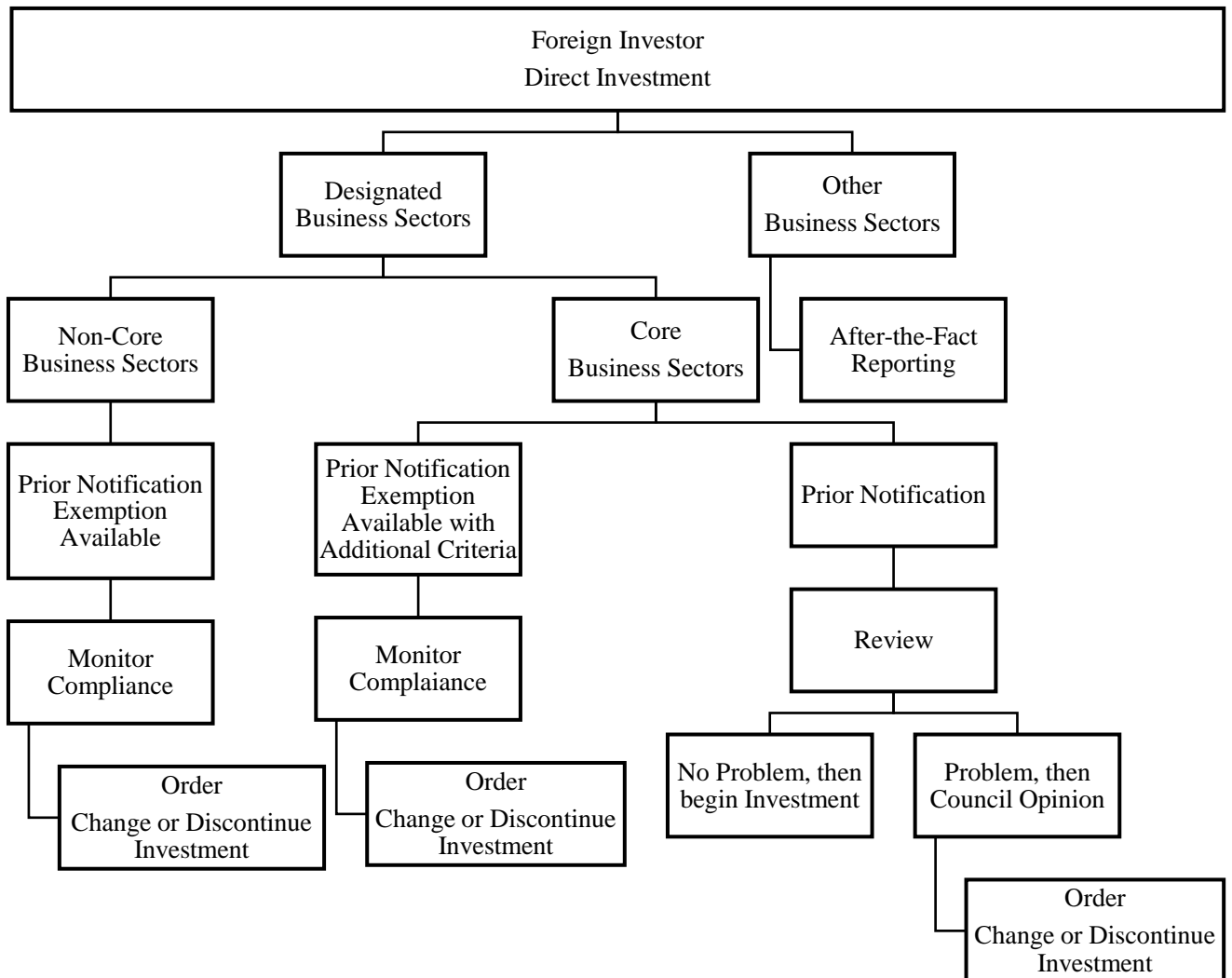
⁶³ ECONOMIC PLANNING BOARD, ECONOMIC SURVEY OF JAPAN (1955-1956) 24 (1956).

⁶⁴ OECD member Japan, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, <https://www.oecd.org/en/countries/japan.html> (last visited Aug. 1, 2024).

⁶⁵ Maiko Wada, THE PROMOTION OF FOREIGN DIRECT INVESTMENT INTO JAPAN - THE MEASURES' IMPACT ON FDI SERIES, BANK OF JAPAN WORKING PAPER SERIES No.05-E-2, 4 (2005) https://www.boj.or.jp/en/research/wps_rev/wps_2005/data/wp05e02.pdf; Japan Structural Impediments Initiative Joint Report, https://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005583.asp (last visited Aug. 1, 2024). See also Mitsuo Matsushita, *The Structural Impediments Initiative: An Example of Bilateral Trade Negotiation*, 12 MICHIGAN J. OF INT'L L. 436 (1990).

⁶⁶ Ishikawa, *supra* note 59, at 80.

Japan's Foreign Direct Investment Screening Process



* Created by the author

The Minister of Finance and the minister that has jurisdiction over the specific business are responsible for undertaking a review upon receiving prior notification of investment plans.⁶⁷ Investment execution is prohibited for a duration of 30 days while the plan is under review, and the review period may extend up to four months.⁶⁸ There are two factors the ministers review. The first factor, as specified in FEFTA, is whether or not the investment plan poses a threat to “national security,” “maintenance of public order,” and

⁶⁷ FEFTA, Article 27 (1).

⁶⁸ FEFTA, Article 27 (2)(3).

“protection of public safety.”⁶⁹ These standards are implemented in line with the OECD Code.⁷⁰ The second factor is whether or not the investment plan will have a significant negative impact on the efficient management of the Japanese economy.⁷¹

If the Minister of Finance and the minister having jurisdiction over the business conclude that the plan is problematic for at least one of the above reviewing factors, they have the authority to give guidance to the parties, after consulting with the Council on Customs, Tariff, Foreign Exchange and other Transactions, that the investment be modified or stopped.⁷² If this guidance is rejected, they have the discretion to subsequently issue an order to modify or halt the investment.⁷³ The Ministry of Finance does not classify the review criteria into national security, maintenance of public order, and protection of public safety.⁷⁴ Instead, these characteristics are considered integrated issues in national security.

Foreign direct investment subject to prior notification refers to investments specified in the public notice⁷⁵ and is classified as designated business sectors. The designated business sectors are categorized under national security, maintenance of public order, and protection of public safety. The business sectors associated with national security include arms, aircraft, space-related sectors, nuclear power, general-purpose goods that can be adapted for military purposes, and cybersecurity-related industries.⁷⁶ The business sectors related to maintaining public order include electricity, gas, communication, water, and railroads.⁷⁷ Finally, business sectors involved in producing biological and chemical products that may impede public safety are also of concern.⁷⁸ Non-

⁶⁹ FEFTA, Article 27 (3)(i)(a).

⁷⁰ OECD Code Article 3 (i)(ii).

⁷¹ FEFTA, Article 27 (3)(i)(b).

⁷² FEFTA, Article 27 (5).

⁷³ FEFTA, Article 27 (10).

⁷⁴ Ministry of Finance, Press Release, Factors to be considered in authorities' screening of prior-notification for Inward Direct Investment and Specified Acquisition under the Foreign Exchange and Foreign Trade Act (May 8, 2020), https://www.mof.go.jp/english/policy/international_policy/fdi/gaitamehou_20200508.htm (last visited Aug. 1, 2024).

⁷⁵ Public Notice, Public Notice Specifying Business Types to Be Specified by the Minister of Finance and the Competent Minister for the Business Pursuant to the Provisions of Article 3, Paragraph (3) of the Order on Inward Direct Investment (Public Notice Specifying Designated Business Sectors pertaining to Inward Direct Investment, etc.), JAPANESE LAW TRANSLATION, (Tentative Translation), <https://www.japaneselawtranslation.go.jp/ja/notices/view/149> (last visited Aug. 1, 2024).

⁷⁶ Public Notice, Appended Table 1.

⁷⁷ Public Notice, Appended Table 2.

⁷⁸ *Id.*

compliance with the requirement to provide prior notifications may result in fines.⁷⁹

B. Economic Security and Foreign Direct Investment Regulation

1. 2007 Amendment

A subsequent review of the rules regarding foreign direct investment occurred in 2007 and correspond to the implementation of FINSA in the United States. The Ministry of Economy, Trade and Industry (METI), which is responsible for overseeing this review task, carried out a public comment procedure.⁸⁰ METI addressed the shifts in Japan's national security landscape. This shift involved evaluating which business sectors should be informed about foreign investments to prevent unauthorized technology transfer and safeguard the nation's defense production and technological capabilities.⁸¹ Therefore, the 2007 regulation was the first motivated by national security concerns.⁸²

2. 2017 Amendment

Provisions to address technology transfer and data security as matters of national security were a challenge that the United States could not tackle alone. That need for cooperation is why Japan take FIRRMA's primary interest into account. Therefore, FEFTA was updated in 2017, a decade after the 2007 revision, to strengthen rules on foreign direct investment.

The revision required that the acquisition of unlisted shares of Japanese businesses by a foreign investor from another foreign investor need prior notification.⁸³ The Minister of Finance and the minister that has jurisdiction over the specific business were given authority to issue orders, such as share divestiture, to foreign investors who engaged in transactions without prior

⁷⁹ FEFTA, Article 70 (1)(xxii).

⁸⁰ Administrative Procedure Act, Article 39 (1), JAPANESE LAW TRANSLATION, Act No. 88 of 1993 (Tentative Translation), art. 39(1), <https://www.japaneselawtranslation.go.jp/ja/laws/view/4556> (last visited Aug. 1, 2024); E-GOV, JAPAN, *Public Comments on the Draft Revision of the Ministerial Ordinances and Notifications Concerning Foreign Direct Investment Regulations under the Foreign Exchange and Foreign Trade Act*, <https://public-comment.egov.go.jp/servlet/Public?CLASSNAME=PCMMSTDETAIL&Mode=0&bMode=2&bScreen=Pcm1040&id=595107050> (last visited Aug. 1, 2024) (Website in Japanese, English Translation by the Author).

⁸¹ U.S. GOV'T ACCOUNTABILITY OFF., GAO-08-320, FOREIGN INVESTMENT: LAWS AND POLICIES REGULATING FOREIGN INVESTMENT IN 10 COUNTRIES 76 (Feb. 2008).

⁸² For a brief comparison of U.S. and Japanese foreign direct investment during this period, see also Rikako Watai, *US and Japanese National Security Regulation on Foreign Direct Investment*, 219 Asia Pacific Bulletin (July 2, 2013), <https://www.eastwestcenter.org/sites/default/files/private/apb219.pdf>.

⁸³ FEFTA Article 26 (3), 28 (1).

notification.⁸⁴ It is possible to argue that the purpose of implementing the new regulations was to prevent foreign direct investment that could potentially undermine Japan's national security.

Foreign direct investment contributes to the nation's growth by introducing new knowledge and improved technology. The Japanese government, under the slogan "Invest Japan," had established a goal of boosting foreign direct investment in Japan to 35 trillion yen by 2020 in order to establish Japan as a global hub.⁸⁵ Nevertheless, the FEFTA revision serves as evidence that national security is a critical legal interest that must be protected simultaneously. Japan's implementation of FEFTA underwent a substantial transformation in the year that President Trump assumed office.

3. 2019 Amendment

In 2019, there were significant changes in the practices surrounding the FEFTA.⁸⁶ First, the public notice was amended to strengthen regulations specific to the information technology sector, and semiconductors and software development were newly added to the scope of prior notification.⁸⁷ Second, the Cabinet Order was amended to establish that 10% of the voting rights, rather than the total number of shares issued, would be the threshold.⁸⁸ Previously, 10% or more of the total number of shares issued by a listed

⁸⁴ FEFTA, Article 29 (1).

⁸⁵ The aim was accomplished by the end of 2020, when inward foreign direct investment stocks reached 39.7

trillion yen. *Invest Japan!*, MINISTRY OF FOREIGN AFFAIRS, <https://www.mofa.go.jp/policy/economy/japan/invest/index.html> (last visited Aug. 1, 2024).

⁸⁶ C.D.A. Evans & Aviel Menter, *Taking National Security Seriously: Navigating Japan's Expanded Restrictions in Global Trade and Investment*, 15 J. OF BUSINESS, ENTREPRENEURSHIP & L. 81, 119 (2022).

⁸⁷ MINISTRY OF INTERNAL AFFAIRS AND COMMUNICATIONS, MINISTRY OF FINANCE, MINISTRY OF ECONOMY, TRADE AND INDUSTRY, Tainaichokusetsutoushitou ni kakaru Jizentodokede Taishou Gyoushu no Tsuika [Addition of business sectors subject to prior notification for foreign direct investment, etc.], (Website in Japanese, English Translation by the Author) (May 27, 2019), https://www.soumu.go.jp/menu_news/s-news/01tsushin08_02000105.html (last visited Aug. 1, 2024); *Pre-transaction Notification Requirements under the Japanese FDI Regulations Expanded, and Further Expansion Anticipated*, CORPORATE NEWSLETTER (Mori Hamada & Matsumoto, Tokyo, Japan) Oct. 2019, at 1, 3, [https://www.mhmjapan.com/content/files/00037423/CORPORATE%20NEWSLETTER%20October%202019%20\(E_Vol.1\).pdf](https://www.mhmjapan.com/content/files/00037423/CORPORATE%20NEWSLETTER%20October%202019%20(E_Vol.1).pdf).

⁸⁸ MINISTRY OF FINANCE, Saikin no Gaitamehou Kaisei [Recent Amendments to the Foreign Exchange and Foreign Trade Act], (Website in Japanese, English Translation by the Author), https://www.mof.go.jp/policy/international_policy/gaitame_kawase/gaitame/recent_revised/index.html (last visited Aug. 1, 2024); MINISTRY OF FINANCE, The Objective of the Amendment to the Foreign Exchange and Foreign Trade Act, https://www.mof.go.jp/english/policy/international_policy/fdi/Overview/rules-and-regulations-FEFTA.pdf; *Reform of Foreign Direct Investment Regulations in Japan: Expansion of Pre-Transaction Approval Regime*, Clifford Chance (Nov. 2019), at 2 <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/11/Reform-of-Foreign-Direct-Investment-Regulations-in-Japan.pdf>.

company constituted a foreign direct investment. Nevertheless, given the diversification of investment patterns and increase in the number of class shares, a minority shareholder can hold more than 10% of the total voting rights of a listed company, even if it is a minority shareholder in terms of the total number of shares issued and outstanding.

Third, an amendment was made to FEFTA which mandates that foreign investors must provide prior notification when acquiring 1% or more of the outstanding shares of listed companies.⁸⁹ The reason for the 1% threshold was that shareholders with 1% or more voting rights had the right to propose an agenda item at a general shareholder meeting, as stated in the Companies Act.⁹⁰ The 1% criterion is likely to deter investment in Japan, thus, a new provision was added to exempt investments that do not pose any national security risks from requiring prior notification, even if they exceed 1%.⁹¹

Within those designated business sectors that require prior notification, there are two categories: core business sectors and non-core business sectors. For non-core business sectors, prior notification is exempted for the total number of shares or voting rights up to 10% of the total number of shares or voting rights.⁹² For core business sectors, additional criteria for exemption include abstaining from personal involvement in committees that possess substantial decision-making power, and refraining from submitting written recommendations to the board of directors that need a response or action within a certain timeframe.⁹³ The Ministry of Finance devised a plan to compile and publish a list of listed companies, distinguishing those that do not require prior notification, those that may be excused from prior notification, and those that must meet weighted requirements to qualify for exemption from prior notification.⁹⁴

Investments in which the foreign investor lacks control over the investee are excluded from the need of prior notification, as indicated by the exemption rules.⁹⁵ The fact that the criterion is whether the company's autonomy is

⁸⁹ FEFTA, Article 26(2)(iii). Clifford Chance, *supra* note 88, at 2.

⁹⁰ Companies Act Article 303 (2), JAPANESE LAW TRANSLATION, Act No. 86 of 2005, art. 303(2), <https://www.japaneselawtranslation.go.jp/ja/laws/view/4481> (last visited Aug. 1, 2024).

⁹¹ FEFTA Article 27-2.

⁹² *Id.*

⁹³ Public Notice Specifying Conditions for Exemption pertaining to Inward Direct Investment, etc., (Apr. 30, 2020), https://www.mof.go.jp/english/policy/international_policy/fdi/Laws_and_Regulations/exemption_condition_s_fdi.pdf.

⁹⁴ *MOF Released Draft Rules and Regulations to Implement New Japanese FDI Regulations*, CORPORATE NEWSLETTER, (Mori Hamada & Matsumoto, Tokyo, Japan) (Mar. 2020), at 1, [https://www.mhmjapan.com/content/files/00041589/CORPORATE%20NEWSLETTER%20\(E_Vol.3\).pdf](https://www.mhmjapan.com/content/files/00041589/CORPORATE%20NEWSLETTER%20(E_Vol.3).pdf).

⁹⁵ *Id.* at 3.

preserved by excluding foreign influence suggests that foreign control is being questioned in Japan in similar fashion to the United States.

4. 2020 onwards

In April 2020, the National Security Agency of the Cabinet Secretariat created a new division. This division aimed to implement a comprehensive strategy for economic security policies in collaboration with the relevant ministries and agencies.⁹⁶ In short, Japan adopted a comprehensive organizational approach to economic security.

In May 2020, the Ministry of Finance released a list of 518 listed companies that are core business sectors.⁹⁷ The Securities Identification Code Committee⁹⁸ assigns a securities code to listed companies in Japan. The codes are assigned based on industry and range from 1000 to 9000, facilitating the identification of each company. The codes assigned to companies categorized as core business sectors largely fall within the range of 6000s, which specifically refers to machinery and electrical equipment.⁹⁹ Core business sectors may be defined as those producing and developing dual-use and critical technologies. In June, the Ministry of Finance updated the public notice to include the production of medicines for infectious diseases and highly controlled medical equipment as core business sectors.¹⁰⁰ The regulation required foreign investors to submit prior notification before acquiring 1% or more shares of certain Japanese companies that manufacture pharmaceuticals and medications to treat infectious diseases. Securing pharmaceuticals and medical equipment has been identified as a challenge in the spread of the COVID-19 pandemic.

⁹⁶ Brad Glosserman, *NSC change prepares Japan for new global realities*, JAPAN TIMES, Apr. 2, 2020, at 8.

⁹⁷ Tetsuji Kajimoto & Daniel Leussink, *Japan tightens rules on foreign stakes in 518 firms, citing national security*, REUTERS, (May 8, 2020), <https://jp.reuters.com/article/idUSKBN22K0Z4/> (last visited Aug. 1, 2024).

⁹⁸ Securities Identification Code Committee FAQ Page, JAPAN EXCHANGE GROUP, <https://www.jpx.co.jp/english/sicc/securities-code/02.html> (last updated Oct. 2, 2023).

⁹⁹ *Update of the List of Classifications of Listed Companies regarding the Prior-notification Requirements on Inward Direct Investment*, MINISTRY OF FINANCE, (May 19, 2023), https://www.mof.go.jp/english/policy/international_policy/fdi/Related_Guidance_and_Documents/20230519.html.

¹⁰⁰ *Japan – Foreign investment in activities related to 34 rare-earth metals now subject to screening*, UNITED NATIONS TRADE AND DEVELOPMENT, (Oct. 5, 2021), <https://investmentpolicy.unctad.org/investment-policy-monitor/measures/3760/japan-foreign-investment-in-activities-related-to-34-rare-earth-metals-now-subject-to-screening>.

C. *Japan's Approach*

The regulatory approaches of the United States and Japan are significantly different. The absence of specific industry identification in the United States' regulation results in a lack of predictability for investors. Nevertheless, this method has the advantage of ensuring the national security of the United States. The challenge for Japan is to strike an adequate balance between regulations and national security.

Japan was led by Prime Minister Shinzo Abe at the time the Trump administration explicitly formulated its policy toward China. The Abe administration lasted from 2012 to 2020 and established a solid foundation for addressing critical policy issues. While Japan did not emphasize economic security until decoupling was developed, the two countries could collaborate through foreign direct investment, particularly in technology and data security, which the United States could not accomplish independently. This is partially attributed to the close connection between President Trump and Prime Minister Abe.¹⁰¹ It can be concluded that implementing economic security legislation in Japan was already in progress throughout the Abe administration.¹⁰²

IV. THE ECONOMIC SECURITY PROMOTION ACT OF JAPAN

A. *Background of the Act*

The Basic Policy on Economic and Fiscal Management and Reform 2021, which was approved by the Cabinet in June 2021, the year before the enactment of the Act on the Promotion of Security Assurance through Integrated Economic Measures (“Economic Security Promotion Act” or “The Act”), stated that “as a strategic direction for economic security, the Government will expand and deepen cooperation with like-minded countries under the international order based on fundamental values and rules, and will seek to ensure Japan’s self-determination and acquire advantage of our country.”¹⁰³ Although the Act does not explicitly address friend-shoring, which refers to narrowing the supply chain to nations with strong relationships,

¹⁰¹ Michael J. Green and Jeffrey W. Hornung, *Are U.S.-Japan Relations on the Rocks?*, THE RAND BLOG (Jul. 20, 2020), <https://www.rand.org/pubs/commentary/2020/07/are-us-japan-relations-on-the-rocks.html>.

¹⁰² The Act on the Review and Regulation of the Use of Real Estate Surrounding Important Facilities and on Remote Territorial Islands, JAPANESE LAW TRANSLATION, Act No. 84 of 2021, <https://www.japaneselawtranslation.go.jp/ja/laws/view/3966> (last visited Aug. 1, 2024).

¹⁰³ CABINET OFFICE, JAPAN, Cabinet Decision, Basic Policy on Economic and Fiscal Management and Reform 2021 (Provisional Translation), 28 (Jun. 18, 2021), https://www5.cao.go.jp/keizai-shimon/kaigi/cabinet/honebuto/2021/2021_basicpolicies_en.pdf.

such as allies, it is possible that this will be considered throughout the Act's implementation.

Economic security is not defined in the Act, nor is it the term employed in any of the text's provisions. It can be inferred that the decision not to include a definition at this time aimed to prevent obstacles from including future required measures.¹⁰⁴ While enacting the Act, the definition was questioned during deliberations in both Diet houses. The first minister in charge of economic security, Takayuki Kobayashi, responded, "I would venture to say that, in simple terms, it can be called ensuring the security of the nation and its people from an economic perspective."¹⁰⁵ He stated that economic security was a diverse concept.¹⁰⁶ Japan's approach to economic security may be compared to the United States Supreme Court case, in which Justice Hugo Black said in his concurring opinion that national security is a "broad, vague generality."¹⁰⁷ Given that the concept of economic security is not fixed, it is possible to start with a "small yard and high fence," as in the United States, and eventually change to a broader yard. The means to achieve economic security may range from decoupling to exclude certain countries from the supply chain to de-risking, which aims to strengthen the supply chain through collaboration with allied countries.

The December 2022 National Security Strategy defined economic security as a way "to ensure Japan's national interests, such as peace, security, and economic prosperity, by carrying out economic measures."¹⁰⁸ In addition, during the G7 Hiroshima Summit in May 2023, economic security concerns were discussed separately in leaders' communiqués for the first time.¹⁰⁹ This included recognizing the importance of enhancing global economic resilience which is based on "de-risking, not on decoupling."¹¹⁰ The Act will effectively function as initial legislation to address the issue.

¹⁰⁴ Japan's governing Liberal Democratic Party has developed a proposal to eliminate restrictions on foreign investment in Nippon Telegraph and Telephone Corporation, the country's primary telecommunications carrier. Kazuaki Nagata, *The NTT Law: Good or Bad for Business?*, JAPAN TIMES, Nov. 21, 2023, at 1–2. However, it also advocates for the adoption of alternative regulations.

¹⁰⁵ HOUSE OF REPRESENTATIVES, JAPAN, *208th Diet Session, Committee of the Cabinet, No. 11* (Mar. 23, 2022), https://www.shugiin.go.jp/internet/itdb_kaigiroku.nsf/html/kaigiroku/000220820220323011.htm (Website in Japanese, English Translation by the Author).

¹⁰⁶ *Id.*

¹⁰⁷ *New York Times v. U.S.*, 403 U.S. 713, 719 (1971) (Black, J., concurring); Watai, *supra* note 82.

¹⁰⁸ CABINET SECRETARIAT, JAPAN, NATIONAL SECURITY STRATEGY OF JAPAN 30 (2022), <https://www.cas.go.jp/jp/siryou/221216anzenhoshou/nss-e.pdf> (Provisional Translation).

¹⁰⁹ G7 HIROSHIMA LEADERS' COMMUNIQUÉ 18, PARAGRAPH 28 (2023).

¹¹⁰ *Id.* at para. 1.

B. *Strategic Autonomy and Strategic Indispensability*

The Act was passed in May 2022.¹¹¹ The Act includes provisions for: (1) ensuring stable supply of specified critical products,¹¹² (2) ensuring the stable provision of specified essential infrastructure services,¹¹³ (3) support for development of specified critical technologies,¹¹⁴ and (4) non-disclosure of patent applications.¹¹⁵ Foreign direct investment in companies that engage in the production of critical commodities under the Act became subject to prior notification requirements outlined in the FEFTA.¹¹⁶ This measure was possibly seen as a policy of harmonizing domestic legislation under the umbrella of economic security.

Strategic autonomy encompasses supply chain and essential infrastructure, whereas strategic indispensability pertains to developing critical technologies and secret patents. Furthermore, in terms of the implemented measures, incentivization will be employed to enhance supply chain resilience and develop critical technologies, while regulations will be employed to ensure essential infrastructure and establish secret patents. The use of supporting measures rather than regulatory measures for supply chain issues suggests that the Act does not seek to force Japanese firms to return to the domestic market.

At first glance, the four issues outlined in the Act regarding Japan's economic security, namely strengthening the supply chain of critical products, ensuring essential infrastructure, enhancing critical technologies, and introducing secret patents, may appear distinct and unrelated to one another. Nevertheless, the underlying factor shared by all the domains is technology. The Act's enforcement order identifies certain essential products as antibiotics, fertilizers, permanent magnets, machine tools and industrial robots, aircraft parts, semiconductor devices and integrated circuits, batteries,

¹¹¹ Act on the Promotion of Ensuring National Security through Integrated Implementation of Economic Measures, JAPANESE LAW TRANSLATION, Act No. 43 of 2022 (Tentative Translation), <https://www.japaneselawtranslation.go.jp/en/laws/view/4523> (last visited Aug. 1, 2024).

¹¹² Measures to strengthen supply chains, Economic Security Promotion Act Articles 6–48.

¹¹³ Regulations to ensure safety and dependability of essential infrastructure functions, Economic Security Promotion Act Articles 49–59.

¹¹⁴ Support measures for collaboration between public and private sectors, Economic Security Promotion Act Articles 60–64.

¹¹⁵ Regulations for secret patents Economic Security Promotion Act, Economic Security Promotion Act Articles 65–85; Rikako Watai, *Digital Trade and Economic Security*, in DAVID COLLINS & MICHAEL GEIST EDS, RESEARCH HANDBOOK ON DIGITAL TRADE 439, 449–53 (2023) (providing an outline of the Act).

¹¹⁶ MINISTRY OF FINANCE, Publication of the amendment to the Public Notices adding the core business sectors of the Foreign Exchange and Foreign Trade Act to secure stable supply chains (April 24, 2023), https://www.mof.go.jp/english/policy/international_policy/fdi/20230424.html; MINISTRY OF FINANCE, Addition to the Core Business Sectors of the FEFTA to Secure Stable Supply Chains https://www.mof.go.jp/english/policy/international_policy/fdi/relateddocument_20230424.pdf.

computer programs, combustible natural gas, metallic mineral products, and marine equipment.¹¹⁷ Manufacturing facilities responsible for producing these products should be regarded as integral components of the supply chain and acknowledged as critical infrastructure. The Act designates energy, transportation, telecommunications, and financial sectors as critical infrastructure.¹¹⁸ Cyberattacks are the most likely approach to interrupting the consistent supply of services in these industries that preparedness requires advanced technologies.

The development of a specific critical technology system resembles that of the Defense Advanced Research Projects Agency in the United States. It is indisputable that technical dominance safeguards a nation from other nations. Key and Advanced Technology R&D through Cross Community Collaboration Program (K Program) was established in Japan under the Act to provide government funding for R&D focusing on critical technologies.¹¹⁹ In September 2022, the government formulated its first R&D strategy and allocated a total of 250 billion yen to assist certain fields.¹²⁰ Subsequently, in August 2023, the government established a second R&D strategy and allocated an additional 250 billion yen to support additional fields.¹²¹

The provisions establishing non-disclosure of secret patents took effect on May 1, 2024, making them the most recent of the four categories in the Act.¹²² This relative lateness was ascribed to the deployment of a regulatory approach rather than a reliance on incentive measures, and it represented the introduction of a completely new system. Patent applications in Japan must

¹¹⁷ Enforcement Order of the Act on [sic] the Promotion of Ensuring National Security through Integrated Implementation of Economic Measures Article 1. JAPANESE LAW TRANSLATION, (Tentative Translation), art. 1, <https://www.japaneselawtranslation.go.jp/ja/laws/view/4524> (last visited Aug. 1, 2024).

¹¹⁸ Economic Security Promotion Act Article 50.

¹¹⁹ Key and Advanced Technology R&D through Cross Community Collaboration Program, CABINET OFFICE, JAPAN, https://www8.cao.go.jp/cstp/anzen_anshin/kprogram.html (website in Japanese, last visited Aug. 1, 2024).

¹²⁰ White Paper on International Economy and Trade 2023, MINISTRY OF ECONOMY, TRADE AND INDUSTRY, 213 n. 223 (June 2023), <https://www.meti.go.jp/english/report/data/wp2023/wp2023.html> (last visited Aug. 1, 2024); Section 2 Japan's Economic Security Strategies and Challenges for Businesses <https://www.meti.go.jp/english/report/data/wp2023/pdf/2-1-2.pdf>; see Yoshiyuki Sagara, *Japan has plenty to offer in the field of detecting threats*, JAPAN TIMES, Sept 8, 2023, at 4; *The Cabinet Office's K Program adds 23 various and advanced projects in its "2nd Vision" based on reports from JST/CRDS*, JAPAN SCIENCE AND TECHNOLOGY AGENCY, (Sept. 12 2023), <https://sj.jst.go.jp/news/202309/n0912-01k.html>.

¹²¹ *Id.*

¹²² *Revision of Examination Guidelines for Patent and Utility Model in Japan in accordance with "commencement of operation of the System for Non-disclosure of Patent Applications" and other updates*, JAPAN PATENT OFFICE, (May 1, 2024), https://www.jpo.go.jp/e/system/laws/rule/guideline/patent/kaitei/rev_202405.html (last visited Aug. 1, 2024).

be published one year and six months after filing.¹²³ However, secret patents have secrecy in filing while restricting implementation of inventions, or applications in other countries, if necessary for national security concerns.¹²⁴ The number of applications that would be submitted under the Act remains uncertain. However, it is highly desirable to actively employ the system to safeguard technology in relation to economic security.

Technological superiority is essential for maintaining national security, and decoupling is predominantly concerned with the supply chain in relation to technology. Effectively overseeing technology across numerous institutions poses a substantial obstacle owing to its extensive scope, which includes not only technology owned by the government but also that possessed by private companies and research organizations. Nevertheless, a technology leakage might result in more than a financial detriment, such as losing a competitive edge, but could also jeopardize Japan's national security and reputation. Therefore, it is crucial to prioritize the prevention of the unauthorized disclosure of certain vital technologies and other technological advancements.

V. FUTURE ISSUES

Japan strengthened its economic and national security legislations in response to the trade conflict between the United States and China, aligning itself with the actions taken by the United States. Japan's acknowledgment of the significance of national security regulations may be attributed to the influence of the United States and Japan's acceptance of this need, partially driven by its geographical location.

Technology is crucial for ensuring national security. The effective prevention of technology leakage cannot be accomplished by one country alone. International peace is difficult to attain without collaboration among allied states. Therefore, in Japan, a collaborative alliance with the United States is essential for implementing economic security measures, including enhancing supply chains.

Nippon Steel Corporation, Japan's largest steel manufacturer, declared a plan to acquire Unites States Steel Corporation (U.S. Steel) in December 2023.¹²⁵ This would require obtaining clearance from the Committee on

¹²³ Patent Act Article 64. JAPANESE LAW TRANSLATION, Act No. 121 of 1959, art. 64, <https://www.japaneselawtranslation.go.jp/ja/laws/view/4617> (last visited Aug. 1, 2024).

¹²⁴ Act on the Promotion of Ensuring National Security through Integrated Implementation of Economic Measures Article 73, 78. JAPANESE LAW TRANSLATION, Act No. 43 of 2022, arts. 73, 78, <https://www.japaneselawtranslation.go.jp/en/laws/view/4523> (last visited Aug. 1, 2024).

¹²⁵ News Release, Nippon Steel Corporation, Acquisition of United States Steel Corporation (Dec. 18, 2023), https://www.nipponsteel.com/common/secure/en/ir/library/pdf/20231218_100.pdf.

Foreign Investment in the United States by the FIRRMA. According to a press release, this is not a hostile takeover,¹²⁶ and considering that Japan is an ally of the United States, there is no credible evidence that the national security of the United States would face significant risk. Nevertheless, the steel workers expressed their disapproval of the planned takeover.¹²⁷ The deal has become one of the issues in the presidential election in the fall of 2024. The Republican candidate, Former President Trump, declared his opposition in January 2024, with President Biden following suit in March.¹²⁸ Additionally, Treasury Secretary Janet Yellen endorsed President Biden's remarks at a news conference.¹²⁹ As a result, Nippon Steel declared its intention to postpone the finalization of the deal, initially scheduled for September 2024, to December 2024.¹³⁰ The acquisition proposal was authorized at the U.S. Steel shareholders' meeting.¹³¹ It is comprehensible that there is an unfavorable perception that U.S. Steel would be in foreign hands, as it is a prominent American industrial corporation. However, implementation of FIRRMA is a legal matter that should not be influenced by political factors.¹³² If acquisitions from allies that do not raise national security concerns are not approved, it may violate the basic principle of liberalizing the flow of capital. It will be necessary to observe the position of Vice President Kamala Harris, who has effectively secured the Democratic nomination for president, with respect to the agreement.

The lack of expected coordination among allies poses a significant obstacle to supply chain robustness. This problem can justify a shift back to

¹²⁶ *Id.* at Appendix.

¹²⁷ *USW Slams Nippon Plan to Acquire USS*, UNITED STEEL WORKERS, (Dec. 18, 2023), <https://m.usw.org/news/media-center/releases/2023/usw-slams-nippon-plan-to-acquire-us> (last visited Aug. 1, 2024).

¹²⁸ Gavin Bade and Brittany Gibson, *Trump pledges to block US Steel sale*, POLITICO (Jan. 31, 2024), <https://www.politico.com/news/2024/01/31/trump-us-steel-sale-00138910>; Trevor Hunnicutt & Alexandra Alper, *Biden says U.S. Steel must stay domestically owned, a major blow to Nippon Steel*, REUTERS (Mar. 15, 2024), <https://www.reuters.com/markets/us/biden-say-us-steel-must-remain-domestically-owned-operated-2024-03-14/>.

¹²⁹ Alan Rappoport, *Furor Over U.S. Steel Bid Puts Secretive Government Panel In Spotlight*, THE NEW YORK TIMES - INTERNATIONAL EDITION, (May 6, 2024), <https://www.nytimes.com/2024/05/03/us/politics/us-steel-nippon-steel-biden-cfius.html>.

¹³⁰ News Release, [Changes to Disclosed Matters] Acquisition of United States Steel Corporation, NIPPON STEEL CORPORATION, (May 3, 2024), https://www.nipponsteel.com/en/news/20240503_100.html (last visited Aug. 1, 2024).

¹³¹ News Release, U.S. Steel Corporation, U. S. Steel Stockholders Approve Transaction with Nippon Steel Corporation (NSC) (April 12, 2024), https://assets-global.website-files.com/657e2ba174351fdd7e22a128/661d6594e837474c0f28e90b_X%20Shareholder%20Approval%20Release.pdf.

¹³² Rikako Watai, *To affirm U.S. openness, Washington should approve U.S. Steel sale*, NIKKEI ASIA (Feb. 7, 2024), <https://asia.nikkei.com/Opinion/To-affirm-U.S.-openness-Washington-should-approve-U.S.-Steel-sale>.

domestication and could contribute to “decoupling” between Japan and the United States. The acquisition of U.S. Steel by Nippon Steel will be significant in assessing the prospects of global collaboration.