Taking National Security Seriously: Navigating Japan’s Expanded Restrictions on Global Trade and Investment

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This paper explores recent changes to Japan’s national security restrictions on the foreign acquisition of Japanese companies and other financial assets. Commentators have often incorrectly characterized these...
developments as driven by economic or diplomatic considerations. In fact, a different set of concerns has motivated Japan’s policy shift: national security. Due to the critical security relationship between Japan and the United States, Japanese macroeconomic policy often changes in response to American politics. Recently, changes in the Trump Administration’s approach to the Committee on Foreign Investment in the United States (CFIUS) have caused corresponding changes in how Japan regulates international business transactions. Even under the Biden administration, these changes are likely here to stay, and corporate leaders will have to learn how to navigate them.

RESEARCH AREAS

Comparative Law, Merger Control, CFIUS, National Security Law, Capital Controls, Japanese Law, Cross-Border M&A

I. A CRISIS OF TRADE, A CRISIS OF SECURITY

“BEHIND EVERY TRADE DISPUTE LURKS POTENTIAL ARMED CONFLICT.”

NOBUKATSU KANEHARA, CHIEF STRATEGIST TO THE GOVERNMENT OF JAPAN (2013–2019)

On July 1, 2019, Deputy Chief Cabinet Secretary Yasutoshi Nishimura (西村 康稔) announced that Japan had decided to increase scrutiny of exports to the Republic of Korea (South Korea).¹ South Korea was on Japan’s whitelist—a list of countries whose exports require little

¹ Japan to Restrict Tech Exports to S. Korea Amid Frayed Ties, KYODO NEWS (July 1, 2019, 9:20 PM), https://english.kyodonews.net/news/2019/07/45db06dfa456-update2-japan-to-restrict-tech-exports-to-s-korea.html. (“The Ministry of Economy, Trade[,] and Industry said that[,] individual applications will be necessary for exports to South Korea of three materials—fluorinated polyimide, hydrogen fluoride[,] and resists…”).

² Donald Kirk, Japan Ejects South Korea from Export “White List” as Trade Relations Fray, FORBES (Aug. 2, 2019, 6:55 AM), https://www.forbes.com/sites/donaldkirk/2019/08/02/japan-ejects south-korea-from-export-white-list-as-trade-relations-fray/#7fc498e06eea (“Japan’s decision
oversight—so this decision represented a significant tightening of export controls. Japan’s decision enraged South Korean elected officials, trade experts, and even ordinary citizens. South Korean President Moon Jae-in condemned the decision, stating Korea “will never again lose to Japan.” Political pressure for a retaliatory response rapidly built in South Korea. Extensive bilateral negotiations failed to resolve the conflict, as did an effort to refer the dispute to the World Trade Organization (WTO). A widespread South Korean consumer boycott of Japanese goods further raised tensions.

Finally, on August 22, 2019, South Korea announced that it was withdrawing from the General Security of Military Information Agreement (GSOMIA). A signature achievement of the Obama Friday . . . remove[s] Korea from the ‘white list’ of 27 nations given breaks on export [controls] from Japan . . . .”). Japan later removed South Korea from the whitelist. Id.


4 Kirk, supra note 2 (“Korean leaders were clearly outraged by the Japanese decision…”).

5 KYODO NEWS, supra note 1 (“The South Korean government condemned the announcement, calling it a violation of international law and vowing to take firm action.”).

6 Park Chan-kyong & Julian Ryall, South Koreans Call for Boycott of Japanese Cars, Beer and Cosmetics as “Trade War” Intensifies, S. CHINA MORNING POST (July 4, 2019, 6:00 PM), https://www.scmp.com/week-asia/economics/article/3017263/south-koreans-call-boycott-japanese-cars-beer-and-cosmetics (“South Koreans have on social media called for people to give Japanese clothes and beer a miss . . . ”).


8 See id.

9 Interview with Shigeo Yamada, Chief of Staff to Foreign Minister Motegi, Ministry of Foreign Aff. of Japan, in Tokyo, Japan (Dec. 2019).

10 Id.

11 See Park & Ryall, supra note 6.

Administration,\textsuperscript{13} GSOMIA is a joint intelligence-sharing agreement that permits South Korea and Japan to directly share intelligence, particularly information about the Democratic People’s Republic of Korea (North Korea) and its clandestine nuclear weapons program.\textsuperscript{14} South Korean withdrawal from GSOMIA represented a significant blow to American foreign policy in East Asia.\textsuperscript{15} The United States has long urged South Korea and Japan—both American allies—to work together more closely.\textsuperscript{16} These American efforts helped secure the 2015 Comfort Women Accord\textsuperscript{17},

even if it witheld information about the Democratic People’s Republic of Korea (North Korea). South Korea and Japan to directly share intelligence, particularly information about the Democratic People’s Republic of Korea (North Korea) and its clandestine nuclear weapons program.\textsuperscript{14} South Korean withdrawal from GSOMIA represented a significant blow to American foreign policy in East Asia.\textsuperscript{15} The United States has long urged South Korea and Japan—both American allies—to work together more closely.\textsuperscript{16} These American efforts helped secure the 2015 Comfort Women Accord\textsuperscript{17},

\textsuperscript{13} The Key US Role in Keeping GSOMIA Alive, NIPPON.COM (Dec. 2, 2019), https://www.nippon.com/en/news/l00255/the-key-us-role-in-keeping-gsomia-alive.html (“Through its alliances with Japan and South Korea, the United States acted as a hub for a tripartite security system that played an important role in deterring China, along with North Korea and Russia. . . . GSOMIA helped to shore up the soft underbelly of the system. . . . [T]he agreement was concluded in 2016 at the strong recommendation of the United States”).

\textsuperscript{14} Id. (“Two years earlier, in 2014, the three countries had entered a Trilateral Information Sharing Arrangement . . . . Details about missiles launched by North Korea were conveyed between the governments of South Korea and Japan via the U[S] administration, but there were constraints . . . . and Washington could not pass intelligence to Tokyo without Seoul’s agreement. GSOMIA considerably improved this situation.”).

\textsuperscript{15} Cha, supra note 12 (“While this action is vindictively directed at Japan, it weakens the U.S.–[South Korea] alliance as it weakens trilateral cooperation”). After extensive diplomacy, South Korea ultimately decided to postpone and then shelve GSOMIA withdrawal. GSOMIA Survives as South Korea Reverses Decision to Exit Intel Pact with Japan, JAPAN TIMES (Nov. 22, 2019), https://www.japantimes.co.jp/news/2019/11/22/national/politics-diplomacy/japan-south-korea-gsomia-talks/ (“In a dramatic last-minute about-face, the South Korean presidential office announced Friday that it will reverse course on its earlier decision to end a key intelligence-sharing pact with Japan—just hours before the expected expiry of the deal. The announcement by Seoul, which saved the GSOMIA—at least for now—came in the face of strong and persistent pressure from the United States to keep it alive. Washington demanded that Seoul renew the pact, which is widely regarded as a symbol of the military cooperation between South Korea, Japan[,] and the U[nited] S[tates] against North Korea. Observers say Seoul’s scrapping of the pact could have further escalated diplomatic disputes between South Korea and Japan, drawing the two countries into an even larger diplomatic row.”).

\textsuperscript{16} NIPPON.COM, supra note 13.

\textsuperscript{17} See Miyoung Kim, The U.S. the big winner in “comfort women” agreement, EASTASIAFORUM, https://www.eastasiaforum.org/2016/01/07/the-us-
an effort to “finally resolve” the most vexing historical disputes that have long clouded the Japan–South Korea relationship.\textsuperscript{18}

Withdrawing from a major security treaty may seem a dramatic response to a trade dispute. But from South Korea’s perspective, the conflict was started by Japan.\textsuperscript{19} In November 2018, the South Korean Supreme Court upheld a series of tort awards against Japanese companies for the use of forced labor during the Second World War.\textsuperscript{20} Japan fiercely protested these fines, arguing that the issue had been resolved by a massive direct government payment during the resumption of diplomatic relations in 1965.\textsuperscript{21} Japanese firms worried about a sudden surge of tort liability—

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\textsuperscript{19} See JAPAN TIMES, supra note 3 (discussing South Korea’s retaliatory response).


\textsuperscript{21} Id. (“[T]he countries agreed to a separate protocol, the Agreement on the Settlement of Problems Concerning Property and Claims on the Economic Cooperation Between Japan and the Republic of Korea [through which] Japan agreed to pay $300 million to the ROK, along with $200 million in preferential loans. The money . . . ‘settle[d] completely and finally’ . . . outstanding claims for unpaid labor.’”).
particularly because the Republic of Korea’s (ROK) Supreme Court decision potentially applied to successor firms.22

Although aware of Japan’s objections to the decision, the South Korean government refused to accept Japan’s use of export barriers as a means of retaliation.23 South Korea argued, if Japan were permitted to use trade restrictions to apply diplomatic pressure, the precedent set for the international trade system, would be devastating.24 As the crisis deepened, leaders weighed in on how to find an off-ramp for Japan and South Korea’s tit-for-tat escalations.25 A range of ideas were mooted: trust-building measures, conferences, track 1.5 exchanges,26 and ultimately, later, largely successful diplomatic talks.27

Yet, amidst all this expertise and problem-solving, few questioned the underlying narrative of Japan’s initial whitelist restriction. By ignoring

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22 Cory Evans, *Nippon Steel: South Korea Is Going Rogue*, THE EPOCH TIMES (Jan. 16, 2019), https://www.theepochtimes.com/nippon-steel-south-korea-is-going-rogue_2766550.html (“The ROK Supreme Court apparently believes that any corporation, from any country, can be held liable in the ROK for any actions that involve the ROK in any way—even if liability is explicitly precluded by treaty.”). The meaning of the term “successor firms” in the opinion is unclear, but it may potentially refer to any firm that took over a portion of an offending company, as well as to any firm created (wholly or in part) as a result of mergers or other corporate transactions involving the offending firm.

23 Mina Pollmann, *What’s Driving Japan’s Trade Restrictions on South Korea?*, THE DIPLOMAT (July 29, 2019), https://thediplomat.com/2019/07/whats-driving-japans-trade-restrictions-on-south-korea/ (“These trade restrictions are, for all intents and purposes, retaliation for the South Korean high court’s decision last October…”).


26 Track 1.5 diplomacy refers to discussions between officials and non-official policy influencers. See Yamada, supra note 9.

27 Yamaguchi, supra note 25.
the underlying narrative, experts ignored a far simpler explanation for the entire dispute.\textsuperscript{28} Accustomed to a policy culture where national security restrictions are outside the bounds of normal trade policy, experts largely missed what was really going on. Japan’s whitelist decision was not a strategic retaliation response at all—it was the manifestation of a new national security policy on trade,\textsuperscript{29} a policy that echoes major changes in the United States.\textsuperscript{30}

This essay analyzes national security restrictions on foreign investment, comparing recent policy movement in the United States and Japan. It begins with a historical analysis of the role of trade tensions in the U.S.-Japan relationship, extracting from that history a cardinal principle of Japanese policymaking: security concerns and the diplomatic importance of the U.S.-Japan alliance, which trumps economic interests. The essay then applies that principle to recent doctrinal changes in American and Japanese national security law, proposing that political efforts to harmonize the two national doctrines explain the bulk of recent policy movement in Japan. Indeed, the same national security considerations—particularly concern over investment from entities controlled by foreign governments—have simultaneously become more prominent in both Japan and the United States. This essay concludes by discussing the importance of understanding Japan’s rationale—and the consequences of these new policies on international affairs. We argue that these new national security restrictions are here to stay, and that business leaders will have to learn to live with them; because, ultimately, their effects will extend far beyond the Korean Peninsula.

Ultimately, national security restrictions on foreign investment—and on the flow of capital—make up an important independent branch of law.\textsuperscript{31} These restrictions are quite distinct from ordinary trade

\textsuperscript{28} Yamada, \textit{supra} note 9.
\textsuperscript{29} Interview with Mizobuchi Masashi, Consulate-General of Japan, N.Y.C., N.Y. (Feb. 2020).
\textsuperscript{31} See discussion \textit{infra} Section IV.
restrictions. Constraining national security restrictions with ordinary trade law leads to misunderstandings of law and of policy—misunderstandings that can spill over into international conflict.

II. THE POST-WAR ECONOMIC MIRACLE AND THE PLAZA ACCORD

“When goods don’t cross borders, soldiers will.”

- Frederic Bastiat

The Second World War left the Japanese economy in ruins. Most of Japan’s major cities were burned to the ground, a large majority of the population was displaced, and non-military economic production largely ground to a halt. The Allied occupation of Japan (1945–1952) brought resources, capital, and technical expertise. Moreover, the Allies also broke up Japan’s zaibatsu, the enormous quasi-state organs of commerce that propelled much of Japan’s economic growth after the Meiji

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32 See, e.g., Dalian Meisen Woodworking Co., Ltd. v. United States, No. 20-00109 (Ct. Int'l Trade 2021) (distinguishing between ordinary trade law and its strict statutory limits and broader policy considerations related to fraud or national security).


36 Id. at 68.

Restoration (1868). In the 1950s, Japan was forced to find an innovative replacement for these successful former conglomerates.

A. The Miracle Economy

To the great surprise of the international policy community, Japan somehow got it right. From the 1950’s to the 1980’s, Japan entered a long period of sustained economic growth, now called the Post-War Economic Miracle. Real GDP growth in Japan averaged well over 5% during this period, peaking at 17% in the early 1960s.

Japan’s post-war model focused heavily on exports. Japan pioneered a government-supported industrial policy built around keiretsu, financially interdependent corporate groups centered on banks


39 Evans, supra note 34 (“The boom years were powered by keiretsu, large corporate conglomerates with extensive vertical and horizontal integration.”).


41 Id. (“The average growth rate from 1945 to 1958 was 7.1 percent, whereas it was 9.5 percent from 1959 to 1970, according to the most widely used comparative and historical data.”).

42 Id. (arguing against the conventional view of this period, described as: “In the 1950s and 1960s, a coalition of Japanese bureaucrats and businesspersons set Japan on a path of export-led growth, buoyed by massive domestic investment, foreign technology acquisition, protectionist barriers, and well-designed industrial policies. As a result of these far-sighted policies, economic growth accelerated dramatically.”). Features of Japanese culture sentiment no doubt helped contribute to this system. See, e.g., C.D.A. Evans, What Keeps the Japanese People Together, DISSENT MAG. (May. 11, 2011), https://www.dissentmagazine.org/blog/what-keeps-the-japanese-people-together (“The idea behind this approach is a thorough reinforcement of the importance of order combined with a belief that the behavior of everyone is needed to keep society together.”).
and trading companies.\textsuperscript{43} The Japanese government actively supported these \textit{keiretsu} through the Ministry of International Trade and Industry (通商産業省) or MITI.\textsuperscript{44}

Throughout the Miracle Economy period, Japan imposed stiff tariffs on imports, particularly in key areas like automobiles and electronics, to develop industrial champions at home.\textsuperscript{45} Japan also regularly engaged in softer forms of economic intervention. An active monetary policy through the Ministry of Finance kept currency exchange rates depressed,\textsuperscript{46} kept capital controls with Japanese investors,\textsuperscript{47} and Japan adopted a highly relaxed antitrust policy that favored Japanese firms.\textsuperscript{48}

As Japan’s economy continued to flourish, the United States began to increase pressure on Japanese political leaders to reform Japan’s approach to trade.\textsuperscript{49} As Japanese companies became more competitive,

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\textsuperscript{43} Evans, 	extit{supra} note 34 (“As the economy overheated in the 1980s, \textit{keiretsu} alliances increasingly came to rely on their financial and property divisions to generate profits.”).


\textsuperscript{45} Beckley et al., \textit{supra} note 40, at 16 (“Many of the tools that Japan used to stimulate growth and cultivate globally competitive firms—e.g., export subsidies, import tariffs, foreign investment restrictions—are now regulated or banned by the World Trade Organization (WTO).”).


\textsuperscript{49} See generally MICHAEL HISCOX, THE DOMESTIC SOURCES OF FOREIGN ECONOMIC POLICIES (4th ed. Oxford U. Press 2017) (describing a move away from the Bretton Woods era toward more reciprocal free trade arrangements). In a certain sense, of course, there has always been a security element to the trade relationship between Japan and the United States, going back to their first
they began to erode the market share for American multinationals, and the trade deficit between Japan and the United States expanded significantly. Japan’s increasing market share in the automotive industry created a particularly sensitive political challenge. By the mid-1980’s many American car manufacturers were in trouble, and they blamed Toyota and other Japanese firms. Politically well-connected, General Motors and Ford applied pressure to Congress, and the Reagan Administration stepped in to renegotiate the U.S.-Japan economic relationship.

B. Trade Negotiations and Security: The Plaza Accord

For Japan, discussions about trade with the United States invariably implicate national security. Since 1952, Japan has relied on
the United States for her security—under the San Francisco System. Japan is in some ways an American protectorate. Japan intensely monitors American domestic politics, and works hard to defuse anti-Japanese tension, lest the United States reconsider the U.S.-Japan Security Partnership. As China has become a more significant naval power, and as North Korea’s nuclear capacity expands, Japan’s security challenges have increased. Initiatives like the Quadrilateral Security Dialogue are designed to offer Japan some degree of strategic flexibility. But if


56 The term “San Francisco System” is used by diplomats and strategists to refer to the network of American bilateral security alliances in East Asia. See generally Victor Cha, Powerplay: Origins of the U.S. Alliance System in East Asia, 34 INT’L SEC. 3 (2001).


58 Mizobuchi, supra note 29.

59 Id.

60 See generally Geoffrey Till, Asia’s Naval Expansion: An Arms Race in the Making? (2017) (“Much has been made in international media of the development of China’s first aircraft carrier, and it is true that this platform is symbolic of Beijing’s growing confidence and willingness to deploy overseas.”).


64 See Nobukatsu Kanenara, Assistant Chief Cabinet Secretary in the Prime Minister’s Office of Japan, Lecture at Columbia University: Japan’s Grand Strategy and Universal Values (Apr. 11, 2017).
anything, the U.S.-Japan Security Alliance has become even more critical for Japan over the past decade.65

In the 1980s, American pressure on the unbalanced trade relationship seemed like a major strategic crisis.66 Under pressure and led by a conservative government that sought preservation of the American security relationship above all else,67 Japan and the United States entered a series of negotiations to liberalize their economic relationship.68 One of the most important consequences was the Plaza Accord, signed on September 22nd, 1985.69

The Plaza Accord was an agreement to devalue the American dollar relative to the German Deutschmark and the Japanese Yen.70 The agreement was intended to balance the yawning trade deficit by lowering the buying power of American consumers relative to Japanese

65 Id. Press Release, United States Department of State, President Donald J. Trump and Prime Minister Shinzo Abe Advance the United States’ and Japan’s Global Partnership (May 27, 2019) (on file with author).
66 Interview with Dr. Tomohiko Taniguchi, Senior Adviser, Cabinet of Japan, in Tokyo, Japan (July 11, 2019).
68 See Shinsuke, supra note 62.
69 Announcement of the Ministers of Finance and Central Bank Governors of France, Germany, Japan, the United Kingdom, and the United States (Plaza Accord) (Sept. 22, 1985) (text available online at https://www.margaretthatcher.org/document/109423 (last accessed Jun. 9, 2020 at 7:45am)).
70 Jeffrey Frankel, The Plaza Accord, 30 Years Later (Nat’l Bureau of Econ. Rsch, Working Paper No. 21813, 2015), https://www.nber.org/papers/w21813 (“At the Plaza Hotel in New York on September 22, 1985, US officials and their counterparts among the Group of Five largest industrialized countries agreed to act to bring down the value of the dollar. . . . In the two years 1985-87 [sic], the dollar came back down 40 per cent. [sic]”).
consumers. By actively trying to reduce Japanese exports through currency manipulation, the United States signaled a fundamental change to the bilateral economic relationship. After the Plaza Accord, Japan would continue to liberalize, adopting new and revamped antitrust legislation and taking several steps to open its financial markets to global investments.

Each of these steps was motivated by a policy commitment to free trade and free markets. But, just as importantly, it was motivated by a desire to harmonize Japanese policy with American policy—and to mirror the developing Washington Consensus.

### III. The Washington Consensus

“The paper identifies and discusses ten policy instruments about whose proper deployment Washington can muster a reasonable degree of consensus.”


Are you a struggling developing country? Do you want help (and money) from the most powerful country in the world? Are you wondering how to make your country prosperous, successful, and free? Don’t worry! Washington has the answer: free markets, democracy, stable monetary policy, free market exchange rates and a liberalized trade policy—a package of reforms, called the “Washington Consensus.”

71 Id. ("Largely as a result of the strong dollar and lost price competitiveness, the US trade balance had fallen to record lows as of 1985.").

72 Id. ("The ‘Plaza Accord’ is best viewed not as the precise product of the meeting on September 22, 1985, but as shorthand for a historic change in US policy that began when James Baker became Treasury Secretary in January of that year.").


74 Id.

75 Taniguchi, supra note 66.

The term “Washington Consensus” is said to have been coined by the economist John Williamson, writing in the context of reform for countries in South America. But the ideas, and the economic philosophy behind them, are at least a decade older—with roots that date to the end of the Second World War.

A. The United States and World Order

Although the United States had the largest economy in the world by the 1920s, the World Order that exists today (sometimes called the “liberal international order”) was built by the United States and her allies in the aftermath of the Second World War. The world from 1945 to 1960 was bipolar. The United States (along with allies, like the United Kingdom and Canada) represented a liberal, capitalist, free-market path forward. Unlike, the Soviet Union, which represented a planned, communist, authoritarian path forward.

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77 Id.
78 Id. at 112–14.
79 TOM KEMP, THE CLIMAX OF CAPITALISM: THE US ECONOMY IN THE TWENTIETH CENTURY 2 (2014) (“In the decades following the Civil War, a modest primary-producing and exporting country became the leading industrial power, out-stripping the European Powers and assuming world leadership . . .”).
80 By this term, diplomats and strategists generally mean the international institutions of world government. See, e.g., HENRY KISSINGER, WORLD ORDER (2014).
82 ROBERT KAGAN, SUPERPOWERS DON’T GET TO RETIRE, NEW REPUBLIC (May 26, 2014), https://newrepublic.com/article/117859/superpowers-dont-get-retire (“Almost 70 years ago, a new world order was born from the rubble of World War II, built by and around the power of the United States.”).
84 Id.
85 Id.
Motivated by Cold War strategic considerations, but also a genuine sense of humanitarian obligation, the United States spent billions of dollars around the world bolstering burgeoning free-market democracies in the 1940s and beyond. Civil liberties and political freedoms were a big part of Washington’s program, but so was economic liberalization. With American policy influence came American corporate influence, and these market actors pushed for pro-market reforms: liberalization, privatization, and global free trade.

In the 1980s, The Reagan Revolution added a new theoretical framing for these broader anti-communist strategic sentiments. Armed with supply-side economics and new monetarist theories, and with

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90 FOREIGN RELATIONS OF THE UNITED STATES, 1955–1957, at 24 (John Glennon et al. eds., 1987). (“[The President] also believed that in the long run only an increase in world trade, with the United States participating, would provide countries such as India with what they require and wish.”).


92 *Id.*


94 See FRANK MEYER, THE CONSERVATIVE MAINSTREAM (Arlington House 1969) (providing a persuasive statement of this political philosophy).


increasing evidence of economic weakness behind the Iron Curtain, Washington began to insist with greater force on pro-market reforms. This emphasis on capitalism and free trade was amplified by the collapse of the Soviet Union. Now it seemed the path forward was clear. To secure the financial support of the United States, countries were told that they needed to implement these economic reforms.

B. Japan and the Washington Consensus

With specific relevance to Japan’s export-oriented model, 1980s and early-1990s U.S.-Japan bilateral negotiators emphasized the fifth, sixth, and seventh principles from Williamson’s *What Washington Means by Policy Reform*: competitive exchange rates, liberalization of imports, and liberalization of inward foreign direct involvement.

These changes fundamentally altered the structure of the Japanese economy. In an effort to accommodate these policy demands, Japan revamped nearly all of its macroeconomic policies, from trade, to antitrust, to interest rates. There is a real argument that many of these changes helped inflate the “Bubble Economy”, ultimately leading to the broad economic collapse of Japan’s “Lost Decade”. Considering the

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98 See Mearsheimer, supra note 81, at 21.
99 Id.
101 Id.
102 WILLIAMSON, supra note 76.
103 Interview with Genichi Osawa, Deputy Director, Ministry of Finance, in Tokyo, Japan (Jun. 24, 2019).
106 Osawa, supra note 103.
107 The Lost Decade refers to a period of persistently low growth and economic recession that plagued Japan in the ten years after the burst of the Japanese Asset Bubble. Scholars tend to date this decade to somewhere in the 1990–2000 range. See, e.g., Hamada Koichi & Yasushi Okada, *Monetary and
economic pain that followed, it would seem reasonable for many Japanese to hold these interventions against Washington, and view with hostility the Japanese administrations responsible. Yet, quite consistently, public opinion polling finds otherwise.108 Nor is blame the attitude taken by Japanese elites.109

There is a simple explanation here: Japanese are aware that, strategically, policymakers in the 1980s had little choice. Japan’s security relies on the American alliance—and security trumps economy.110 If the United States demands a change to Japan’s economic policy, Japan, ultimately, will make it.111 Japanese seem to understand that, after all, these policy changes were in American corporate interests, and that the Security Alliance is costly to maintain (and largely borne by the American taxpayer).112 The rise of China’s strategically and, more generally, positive views toward America’s post-war conduct during the “Occupation”, also help explain these surprisingly forgiving sentiments.

The desire to get on the same page with the United States is critical to Japanese policymaking. It helps explain, for example, Prime Minister Abe’s intense (and politically costly) efforts to persuade farmers (and Members of Parliament (MPs)) to accept tariff changes as part of the Trans-Pacific Partnership (TPP).113 At the time, the Obama Administration


108 Taniguchi, supra note 66.
109 Osawa, supra note 103.
110 Douglas Webber, Trade and Security in East Asia: Political (Non?) Integration in an Insecure Region, in THE EVOLUTION OF REGIONALISM IN ASIA: ECONOMIC AND SECURITY ISSUES (David Heirbert ed., 2007) (“[Ultimately] it is the other way round – politics trumps economics.”).
111 Mizobuchi, supra note 29.
113 Jonathan Soble, After Trump Rejects Pacific Trade Deal, Japan Fears Repeat of 1980s, N.Y. TIMES (Jan. 25, 2017), https://www.nytimes.com/2017/01/25/business/trump-tpp-japan-trade.html (“But it could be politically awkward for Mr. Abe, who sold the deal on the merits of American involvement. Even on narrow commercial grounds, he would have some explaining to do... with the United States out of the picture, Mr. Abe could be accused of selling out farmers for little gain.”).
cared very deeply about the TPP, and expressed that to Japan. To achieve that diplomatic goal required expending political capital—and, perhaps in some sectors, economic pain. But that’s a tradeoff Japan was willing to make because ultimately, America’s guarantor role in Japan’s security is viewed as so critically important.

But what happens when American demands become less liberal? What then?

IV. COMMITTEE ON FOREIGN INVESTMENT IN THE UNITED STATES (CFIUS), THE TRUMP ADMINISTRATION & NATIONAL SECURITY RESTRICTIONS

“With CFIUS it is not like you can pick up the book and know what you are doing. The law is not that complicated and it is reasonably straightforward, but there’s no body of cases.”

- Mark Plotkin, Covington & Burling

Everyone understands intuitively that some international transactions should be blocked on national security grounds. Imagine that an Iranian company wished to purchase a nuclear power plant operator like Westinghouse. This would obviously be a non-starter. Few firms in the

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115 Kurt Campbell, Chairman of the Center for a New American Security and Former Assistant Secretary of State for East Asia, The Pivot, National Committee on U. S. China Relations (July 14, 2016), available at https://www.ncuscr.org/event/pivot (last visited June 10, 2020).

116 Interview with Kanehara Nobuktasu, Deputy Assistant, Chief Cabinet Secretary of Japan, in Tokyo, Japan (Dec. 14, 2015).

117 The Abe Administration continued to push TPP after the United States withdrew, but this is no counterexample because by that point the political sacrifices were already made. See Takashi Terada, *How and Why Japan Has Saved the TPP: From Trump Tower to Davos*, ASAN FORUM (Feb. 19, 2018).
world possess the technical capacity to single-handedly create nuclear weapons—but Westinghouse is one that does.\textsuperscript{118} Given Iran’s foreign policy stance, it is not in America’s national interest to permit this sale. Even the most permissive of administrations would surely block it.

In the United States, the principal tool for blocking a foreign acquisition on the grounds of national security is CFIUS.\textsuperscript{119} CFIUS is an inter-departmental executive branch committee.\textsuperscript{120} It monitors pending international transactions and is also sometimes notified voluntarily if counsel for an acquirer (or target of acquisition) feels disclosure would be prudent.\textsuperscript{121} CFIUS also has a historic link to Japan—it was created due to concerns about Japanese firms taking over American competitors.\textsuperscript{122}

CFIUS reviews deals and makes confidential reports to the President,\textsuperscript{123} who then has the authority to block such transactions.\textsuperscript{124} CFIUS is permitted by statute to consider a number of different factors,
including the importance of the relevant industry to national security, whether the investor is controlled by a foreign government, and the impact of the transaction on terrorism and nonproliferation. In practice, when CFIUS objects, that generally kills the deal; the President generally follows the committee’s recommendations, and the President’s decision to block a transaction is “not . . . subject to judicial review.” Although, in theory, CFIUS can block any number of transactions, historically, few transactions were scrutinized and even fewer were blocked. CFIUS practice used to be a sleepy trade; you could easily work a full transactional career without ever triggering CFIUS. That changed with the election of President Trump.

The Trump Administration took CFIUS and other national security restrictions very seriously—and CFIUS also served as a great vehicle for advancing the Administration’s trade-skeptical agenda. All of a sudden, almost every transaction had a potential national security angle and was at real risk of being blocked. Even dating app acquisitions became subject to intense CFIUS scrutiny. The numbers reflected this

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125 See 50 U.S.C. § 4565(f).
126 Id. § 4565(e)(1). This bar on judicial review applies specifically to the “final ‘action[s]’ the President takes ‘to suspend or prohibit any covered transaction that threatens to impair the national security of the United States.’” Ralls Corp. v. Comm. on Foreign Invest., 758 F.3d 296, 311 (D.C. Cir. 2014) (quoting 50 U.S.C. § 4565(d)(1)). It does not necessarily bar other kinds of challenges to CFIUS decisions, such as constitutional challenges to “the process preceding such presidential action.” Id.
128 Interview with Inoue Hiroto, Partner, Nagashima Ohno & Tsunematsu, in Tokyo, Japan (Jun. 19, 2019).
129 Jackson, supra note 127 ("CFIUS ‘is the [number one] weapon in the Trump administration’s protectionist arsenal, the ultimate regulatory bazooka’").
130 Inoue, supra note 128.
new reality: from 1991 to 2005, CFIUS launched just thirteen investigations.\textsuperscript{132} In 2017 alone, CFIUS launched 172 investigations.\textsuperscript{133}

In applying national security restrictions, the Trump administration emphasized three statutory factors in particular: whether the transaction affects the United States’ “international technological leadership,” whether it has “national security-related effects on . . . critical technologies,” and whether “the covered transaction is a foreign government-controlled transaction.”\textsuperscript{134} This latter factor has had a particular impact on foreign investment from China, where it can be very difficult to distinguish between private and government-owned entities.\textsuperscript{135} For example, CFIUS has recently objected to investments in multiple Chinese-owned tech companies whose consumer apps gather sensitive personal data about American users.\textsuperscript{136}

While CFIUS is the primary legal tool for blocking foreign acquisition of sensitive American assets, it formed just one part of the Trump Administration’s heightened scrutiny of international transactions.\textsuperscript{137} For example, § 232 of the Trade Expansion Act of 1962 authorizes the Commerce Secretary to launch special investigations

\textsuperscript{132} Based on author’s personal conversation with Mark Plotkin, New Haven (Jan. 30, 2020). \textit{See also} Jackson, \textit{ supra} note 127.

\textsuperscript{133} Jackson \textit{ supra} note 127.


into the impact of foreign trade on American industry.\textsuperscript{138} Other administrations used § 232\textsuperscript{139} but not with the intensity shown by former Secretary Ross.\textsuperscript{140} Analogous legislation and administrative action on exports\textsuperscript{141} and dual-use technology\textsuperscript{142} generally presented the same picture: the Trump administration was seriously committed to national security restrictions on commercial activity.


Prior to the Trump Administration, [twenty-six] Section 232 national security investigations were initiated, beginning in 1963. . . . Of these [twenty-six] cases, Commerce made negative determinations 62% of the time. Prior to 2018, when Commerce made positive determinations, the President recommended action six times. In one case, the President sought voluntary restraint agreements. . . . [O]ne [determination] resulted in a conservation fee, later held illegal by a federal court; two actions were based on the Mandatory Oil Import Program that predated enactment of Section 232; and, twice the President imposed an embargo. \textit{Id.}

\textsuperscript{140} \textit{Id.} Fefer & Jones note, “[t]he Trump Administration has conducted multiple investigations under Section 232 . . . . President Trump acted after five separate investigations found potential threats; two additional investigations are ongoing. Prior to the Trump Administration, 1986 was the last time a president imposed tariffs or other trade restrictions under Section 232.”. \textit{Id.}


\textsuperscript{142} See Ariel Levite et al., \textit{Toward a Nuclear Firewall: Bridging the NPT’s Three Pillars}, CARNEGIE ENDOWMENT FOR INT’L PEACE (Mar. 20, 2017), https://carnegieendowment.org/2017/03/20/toward-nuclear-firewall-bridging-npt-s-three-pillars-pub-68300 (dual-use technology refers to technology that can be used for military or civilian purposes).
V. ADAPTING TO AMERICA: TAKING NATIONAL SECURITY SERIOUSLY

“You know we have a treaty with Japan where if Japan is attacked, we have to use the full force and might of the United States. If we’re attacked, Japan doesn’t have to do anything. They can sit home and watch Sony television, OK?”

- Donald Trump, 45th President of the United States

Considering the Trump Administration’s skeptical line on international trade and the persistent budget deficit with Japan, it should come as no surprise that almost immediately after the November 2016 election, Japan began to reorient its trade policy.

A. The Shock of 2016

Japan closely monitors American elections. In 2016, Japan predicted, along with many other experts, that former Secretary of State, Hillary R. Clinton would be elected President of the United States. Clinton’s foreign policy team featured experts like Jake Sullivan and


144 See Joshua Hunt, Japan’s Pivot from Obama to Abe, THE NEW YORKER (Dec. 9, 2016). https://www.newyorker.com/news/news-desk/japans-pivot-from-obama-to-trump (noting that the surprise election of Donald Trump may have been unexpected but could lead to Prime Minister Abe achieving some of his military and constitutional goals if he works well with the new American president).

145 Taniguchi, supra note 66.

146 Interview with Takeuchi Norio, Member of Parliament, House of Representatives of Japan, in New York, N.Y. (Apr. 16, 2019).

147 Sullivan was Senior Policy Advisor to Clinton’s 2016 campaign and previously served as Director of Policy Planning at the State Department. See Natasha Bertrand, The Inexorable Rise of Jake Sullivan, POLITICO (Nov. 27, 2020) https://www.politico.com/news/2020/11/27/jake-sullivan-biden-national-
Kurt Campbell,148 both well known to Japanese policymakers.149 Japanese elites anticipated that the (expected) Clinton Administration would pursue an East Asia security strategy broadly similar to former President Barack Obama,150 with a similar focus on free trade and the free flow of capital.151

The election of President Trump took Japanese policymakers by surprise.152 Although mathematical models had consistently suggested the possibility of an upset,153 qualitative experts long discounted it.154 Fortunately, Japanese diplomacy responded adroitly.155 Japan’s Prime Minister, Abe Shinzō, immediately arranged to stop over in New York on his way to a diplomatic conference in South America.156 There he met with President-elect Trump at his home in Trump Tower.157 An avid golfer,
Prime Minister Abe presented the President-elect with a custom-made Japanese driver,\textsuperscript{158} helping to spark a personal relationship that has remained warm ever since.\textsuperscript{159}

Even at their very first meeting, President Trump brought up the U.S.-Japan trade deficit.\textsuperscript{160} President Trump has held few views so consistently as his instinct that the United States is, to use the President’s words, getting “ripped off” by the America-led WTO system in general (and Japan in particular).\textsuperscript{161} Japanese diplomats traveling with Prime Minister Abe at that first conference in New York wryly remarked on the similarity to the early 1980s diplomatic pressure from the Reagan

\textsuperscript{158} \textit{Id.} (“Abe gave Trump a golf driver and received golf-wear in return, Japanese officials said.”). See also Envall, supra note 132 (“When Japanese Prime Minister Shinzo Abe visited then US President-elect Donald Trump in November 2016, he presented Trump with a Honmas Beres S-05 golf driver embellished with gold . . . .”).

\textsuperscript{159} Ayumi Teraoka, \textit{Resolved: Abe’s Investment in His Relationship with President Trump Has Advanced Japanese Interests}, 3 DEBATING JAPAN 1 (Jan. 30, 2020) https://www.csis.org/analysis/resolved-abes-investment-his-relationship-president-trump-has-advanced-japanese-interests. Teriaoka writes, “[n]o foreign leader has closer ties with President Donald Trump than Prime Minister Shinzō Abe. Since the 2016 presidential election, the two leaders have met 20 times, played 5 rounds of golf, and had 32 phone calls, at times speaking twice a week.” \textit{Id.}

\textsuperscript{160} \textit{See} Kirk Spitzer, \textit{Stakes High In Trump’s First Meeting With A Foreign Leader}, USA TODAY (Nov. 16, 2016, 12:22 PM), https://www.usatoday.com/story/news/world/2016/11/16/stakes-high-trumps-first-meeting-foreign-leader/93959970/ (“Abe is likely to try to salvage at least part of a major trade deal, secure a commitment to Japan’s continued defense and establish a working relationship with the next U.S. leader who has a history of bashing Japan and campaigned on a platform of ‘America First.’”).

Yet times have changed, and policy has changed with it. In the 1980s, Japan had a thoroughly protectionist import policy. It was easy enough to know what steps Japan should then take: liberalize that market. The path forward in 2016 was less obvious because Japan’s economy was already very open, and Japan remains at the forefront of global efforts to expand free trade and promote a rules-based global economic order. Japan has already largely implemented the liberal policy prescription favored by neoclassical economists and a new Plaza Accord is not a realistic idea. Indeed, in 2013 the G-7 countries agreed not to engage in currency manipulation—a sort of anti-Plaza Accord. What then can Japan do to diplomatically help her closest ally—almost her suzerain—gain power?


163 Id.
164 See Holland, supra note 157.
166 Mitsuhiro Fukao, Liberalization of Japan’s Foreign Exchange Controls and Structural Changes in the Balance of Payments, 8 BANK JAPAN MONETARY & ECON. STUD. 101, 103 (1990).
167 Id.
170 See Frankel, supra note 70.
171 Id. Frankel notes, “[i]ndeed the G-7 in 2013, fearing ‘currency manipulation,’ specifically agreed to refrain from intervention in a sort of ‘anti-Plaza accord.’”
172 Suzerainty, of course, is an overstatement—but the idea still finds its way into the strategic discourse. See, e.g., Dong Wang, The Discourse of Unequal Treaties in Modern China, 76 PAC. AFF. 399 (2003).
B. Say Yes Where You Can

It is helpful here to recall the intense skepticism and opposition President Trump faced in initially advancing his “America First” global agenda. The President and his base of supporters might have cared little for the eye-rolling at the United Nations General Assembly or at Davos—but many American elites certainly did. Japan’s political elite are too internationalist in their grand strategy to adopt President Trump’s worldview. But there was one controversial element that Japan could

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175 Id. Graham notes:

The figurative laughter of 2014 has become the literal laughter of 2018. . . . [I]n an age when the United States is withdrawing from the world stage, allies are saying they cannot rely on Washington’s word, and U.S. soft power is at its lowest ebb. . . . the tittering in Turtle Bay is an indication that America can still unite the global community, if only in giggles. Id.


Rosenberger notes:

But the questions being raised in Tokyo—from across the political spectrum—are not just about specific U.S. policies...It seems that while the basics of the alliance may muddle through, this broader strategic vision for the alliance [as a force for global values] appears at odds with a Trump foreign policy in which the United States pulls back from Asia, undermines the international order, and disregards a rules-based approach to shaping the international environment. Id.

The internationalism of Japanese foreign policy elites has long been true, even historically amongst the most nationalist. See, e.g., C. D. A. Evans and Hanako Ishikawa, A New Translation of Yoshida Shoin’s Taisaku Ichido, 8 J. JAPANESE PHIL. (forthcoming 2022).
take on board: national security restrictions on trade and investment. By taking national security restrictions seriously, Japan found a way of taking the President’s side diplomatically, scoring political points, and building strategic capital. And, Prime Minister Abe saw a political path forward—a way to make the new restrictions palatable domestically.

National security restrictions limit private sector activity. They irk influential and well-connected business leaders and consequently require significant political capital to be passed. Strengthening Japan’s relationship with the United States may be sufficient motivation for Japanese leaders, but ordinary voters need more. Recent actions by China’s government—scandals at the Confucius Institutes, and naval

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177 See discussion supra Section I (noting the purpose of this article, in part, is to demonstrate that Japan’s foreign economic policy is informed by its national security concerns).

178 This insight into the diplomatic and strategic impact of Japan’s national security priorities comes directly from a confidential conversation the author had with an advisor to Prime Minister Abe (out of concern for the privacy and confidentiality of the source, the author’s choose not to directly cite and identify the advisor).

179 Similar to the previous citation, the author’s choose not to directly disclose the identities of the Prime Minister’s advisors who provided the insights of this sentence.


182 Confucius Institutes teach Chinese and Chinese culture around the World. Although modeled on relatively uncontroversial cultural programs like the Alliance Francaise, Confucius Institutes have become controversial because of their relationship with the Communist Party of China (CCCP) and their possible involvement in intelligence gathering and political influence. See Elizabeth Redden, Closing Confucius Institutes, INSIDE HIGHER ED. (Jan. 9, 2019), https://www.insidehighered.com/news/2019/01/09/colleges-move-close-chinese-government-funded-confucius-institutes-amid-increasing. Redden notes: Emblematic of this strain of criticism, the American Association of University Professors issued a report in 2014 urging colleges to close their CIs or renegotiate the agreement to ensure academic freedom and control. . . . [T]he director of the FBI, Christopher Wray, told a Senate panel last February that the FBI was concerned about the institutes. *Id.*
expansion in the South China Sea\textsuperscript{183}—provided Japanese leaders with the political cover they needed.\textsuperscript{184}

Japan and China are right next to each other; they share a common intellectual and even political history.\textsuperscript{185} As China has expanded her economy, and as her role on the world stage has begun to swamp Japan’s, the anxiety of ordinary Japanese citizens toward China has increased.\textsuperscript{186} Article 9 of Japan’s Constitution rules out a Thucydides Trap,\textsuperscript{187} meaning,

\begin{quote}

China continues to construct military and industrial outposts on artificial islands it has built in disputed waters. . . . [I]n recent years, satellite imagery has shown China’s increased efforts to reclaim land in the South China Sea by physically increasing the size of islands or creating new islands altogether. . . . [C]hina has [also] militarized Woody Island by deploying fighter jets, cruise missiles, and a radar system. \textit{Id.}

\textsuperscript{184} Personal conversation with Gerald Curtis, Apr. 14, 2022 (New York, NY).

\textsuperscript{185} JANSEN, supra note 38. See also THOMAS KASULIS, ENGAGING JAPANESE PHILOSOPHY: A SHORT HISTORY (2017).

\textsuperscript{186} See, e.g., Bruce Stokes & Kat Devlin, Countries’ Views of Japan, Abe; Japanese Views of China, PEW RSCH. CTR. (Nov. 12, 2018), https://www.pewresearch.org/global/2018/11/12/countries-views-of-japan-abe-japanese-views-of-china/ (“Japan and China share a complicated history that has resulted in immensely negative perceptions. . . . [I]n 2018, 78% of Japanese have an unfavorable view of China, by far the most negative response across all countries surveyed.”).

\textsuperscript{187} This term refers to the idea that a declining power opens hostilities against a rising power, for fear that her relative strategic position will otherwise continue to decline. The concept was taken from THUCYDIDES, THE HISTORY OF THE PELOPONNESIAN WAR (431 BC). The term is named after an argument Thucydides is said to have advanced in explaining Sparta’s motivation for war with Athens. See GRAHAM ALLISON, DESTINED FOR WAR: CAN AMERICA AND CHINA ESCAPE THUCYDIDES’S TRAP? (2017). But see Kori Schake, The Summer of Misreading Thucydides, THE ATLANTIC (July 18, 2017), https://www.theatlantic.com/international/archive/2017/07/the-summer-of-misreading-thucydides/533859/.
\end{quote}
there is little risk of war, even over the hotly contested Senkaku Islands (尖閣諸島), but the tensions are very frightening to voters.\footnote{188}

In an effort to harmonize national security economic policy with the United States, Prime Minister Abe implemented a range of tighter national security restrictions on international transactions.\footnote{189} In doing so, Abe was aware of the diplomatic cover it would provide to the Trump administration and the gains that Japan would experience in navigating these dialogues with the President.\footnote{190} Prime Minister Abe was mindful of the limitations in their general strategic posture and recognized they could sell the policy to the Japanese people as a response to rising Chinese global ambitions.\footnote{191} In other words, Japan started to take national security restrictions seriously.

V. WHERE WE ARE NOW

"We like the sauce the way that it is."

- A shareholder representative explaining his vote to reject a hostile takeover bid for Bulldog Sauces, despite a thirty percent offered premium on the share price.\footnote{192}

Policymaking in Japan is fundamentally different than policymaking in the United States. The Constitution of the United States divides the American government into the Legislative, Executive, and Judicial branches.\footnote{193} The Constitution of Japan instead vests power in a

\footnote{190} Curtis, \textit{supra} note 184.
\footnote{191} \textit{Id}.
\footnote{193} U.S. Const. arts. I-III.
bicameral parliament, with a symbolic role for the emperor as a unifying figure of national identity.

A. The Structure of Japanese Policymaking

The Japanese government effectively operates with three branches—or at least three roles: the ceremonial, the political, and the administrative. The ceremonial branch serves as the center of Japanese national polity, reifies Japan’s connection to her past, and allows wide support for a reigning (but not ruling) sovereign. Throughout Japanese history, the Emperor has long held this role—from the late 8th century to the 1850s, and then again from 1945 to the present. The brief interludes of direct Imperial control—the Asuka and early Nara periods (7th and 8th centuries) and the Empire of Japan period (1868–1945) were historical aberrations. The Emperor, crucial though he or she is to Japan’s national religion and identity, has not generally held direct political power.

The political branch of the Japanese government reflects the will of the Japanese people, represented by the elected members of Japan’s Parliament. Japan’s democracy features strong parties with the authority

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194 Nihonkoku Kenpō [Kenpō] [Constitution], ch. IV (Japan).
196 Mizobuchi, supra note 29.
200 See generally Dower, supra note 32.
201 Keene, supra note 199, at 86.
203 Amy Gunia, Five Things to Know About The Modern Japanese Monarchy, TIME (Apr. 29, 2019, 6:17 AM), https://time.com/5579401/japan-monarchy-emperor-abdication/ (“For most of the country’s history, emperors acted as figureheads, while shoguns effectively controlled the country with their military powers.”).
204 Takeuchi Norio, supra note 146.
to remove even high-ranking elected officials by party vote. Since the 1950s, Japan’s democracy has generally operated under the 1955 system (also called the one-and-a-half-party system). This system, envisioned by the political vision of Hatoyama Ichirō (鳩山 一郎), places one party, the Liberal Democratic Party (LDP) (自由民主党) at the center of Japanese elected politics. Since its formation in 1955, the LDP has held a working majority in every Japanese Parliament save for a brief spell in opposition from 2009–2012—and an even briefer period of a few months in 1994. The LDP is a single party divided into competing factions. These factions are armed with their own budgets, policy platforms, and internal hierarchy. The LDP is a coalition of these parties-within-a-party, rotating in and out of power. This internal dynamism helps explain how the LDP has remained in power through so many electoral upheavals.

Japan’s Parliament, called the Diet, is extremely important to setting policy. Diet Members (often referred to using the metonym

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206 Junnosuke Masumi, The 1955 System In Japan And Its Subsequent Development, 28 ASIAN SURV. 286 (1988) (“In the following month the two conservative parties, the Democratic Party and the Liberal Party, also merged to form the Liberal Democratic Party. This was the founding of the 1955 System.”).


208 Id.


211 Id.

212 Id. Cox and Rosenbluth note, “[t]he legislative factions of the Liberal Democratic Party . . . are so autonomous that the LDP is typically viewed as a coalition of factions, rather than a unitary party.” Id.

213 There are alternate explanations, but they do not, in my view, fully explain the continued success of the LDP as a party. See Gary Cox, Frances Rosenbluth & Michael Thies, Electoral Reform and the Fate of Factions: The Case of Japan's Liberal Democratic Party, 29 BRIT. J. POL. SCI. 33 (1999).
‘Nagatachō’) supervise Japan’s day-to-day government.\textsuperscript{214} They also communicate directly with the Japanese people\textsuperscript{215} and, by sponsoring legislation and electing the Prime Minister,\textsuperscript{216} set the tone for the broad contours of Japanese public policy.\textsuperscript{217} But members of Parliament do not run day-to-day administration and do not pretend to; that function is instead reserved for the administrative or governmental branch.\textsuperscript{218}

Japan’s administrative or governmental branch (often referred to with the metonym “Kasumigaseki”)\textsuperscript{219} consists of Japan’s great Ministries of State. Each Ministry—the Ministry of Finance,\textsuperscript{220} the Ministry of Foreign Affairs,\textsuperscript{221} etc.—is responsible for day-to-day management of a domain of Japanese public policy.\textsuperscript{222} The Ministries are led by a Minister, who is always a member of Parliament.\textsuperscript{223} But day-to-day operations are generally run by a Vice Minister, a career civil servant,\textsuperscript{224} with a job description similar to Permanent Undersecretary of State in the pre-

\begin{itemize}
\item \textsuperscript{214} Norio, \textit{supra} note 146.
\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{See} generally CURTIS, \textit{supra} note 205.
\item \textsuperscript{217} Hasegawa, \textit{supra} note 149.
\item \textsuperscript{218} For a classic analysis, see Akira Kubota, \textit{The Political Influence of the Japanese Higher Civil Service}, 28 JAPAN Q. 45 (1981) Kubota notes,“what is extraordinary about the Japanese higher civil service is the degree to which it has successfully initiated important social and economic policies. \textit{Id.}
\item \textsuperscript{219} Kasumigaseki is the portion of Chiyoda in central Tokyo where most of the Ministry buildings are physically located. Norio, \textit{supra} note 146.
\item \textsuperscript{220} The Ministry of Finance (財務省, Zaimu-shō) is generally regarded as the most powerful Ministry in Kasumigaseki. Osawa, \textit{supra} note 103. MoF, as it is abbreviated, takes the lead in currency markets, the budget and appropriations process, as well as central banking (a responsibility it shares with the formally independent Bank of Japan). \textit{Id}. There is no direct analogue in the American system; perhaps the Treasury Department is closest although MoF also consolidates functions from the Congressional Budget Office, Federal Reserve, as well as House Committees on Appropriations and Budget. \textit{Id.}
\item \textsuperscript{221} The Ministry of Foreign Affairs (外務省, Gaimu-shō) is a highly prestigious Ministry in charge of coordinating foreign affairs. Personal interview with Yoshizane Ishii, Executive Advisor for Foreign Affairs, Office of the Prime Minister, in Tokyo, Japan (Dec. 11, 2019). The analogue in the American system is the Department of State. \textit{Id.}
\item \textsuperscript{222} \textit{See} Kubota, \textit{supra} note 218; see also Mizobuchi, \textit{supra} note 29.
\item \textsuperscript{223} Personal interview with Iwao Horii, Parliamentary Vice Minister for Foreign Affairs, Ministry of Foreign Affairs, in Tokyo, Japan (Dec. 13, 2018).
\item \textsuperscript{224} \textit{Id.}
\end{itemize}
Thatcher Westminster civil service. 💡 Japanese civil servants attain their positions by competitive examination and, generally, cannot be removed by politicians except for cause. 💡 A panel of past civil servant leaders of a Ministry traditionally work behind the scenes to select each new Vice Minister, with varying degrees of input from the Prime Minister and his staff (often referred to using the metonym “Kantei”). 💡

Japan’s independent Ministries hold enormous responsibility and autonomy within Japan’s political system. 💡 Many of the Ministries predate the current constitution and trace their roles back to ancient history. For example, the Ministry of Finance (MoF) traces its origins back to His Imperial Majesty’s Treasury (Okura-shō), founded in the eighth century.

**B. National Security and Restraints on Trade**

National security restrictions are broadly enforced by the MoF, along with special divisions like the Federal Trade Commission (FTC) for antimonopoly law (antitrust). 💡 The MoF has a specialized committee to review transactions, like the CFIUS. 💡 But corporate executives share a notoriously cozy connection with the higher rungs of Japan’s civil service, and until very recently it was rare to see the MoF provide much pushback against major transactions.

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226 Horii, supra note 223.
227 Hasegawa, supra note 149.
228 See, e.g., TOMOHITO SHINODA, KOIZUMI DIPLOMACY: JAPAN'S KANTEI APPROACH TO FOREIGN AND DEFENSE AFFAIRS (2011).
229 See generally Kubota, supra note 218.
232 Osawa, supra note 103.
233 Hiroto, supra note 128. Similarly, the United States blocked few transactions before the current administration. See also Jackson, supra note 127.
Strategic and political motivations have motivated the Abe, Suga and Kishida Administrations to change that modus operandi since 2016. 234 Not all Prime Ministers are able to impose their will on Kasumigaseki’s notoriously independent bureaucracy. 235 But Prime Minister Abe was probably strongest Prime Minister since the Second World War. 236 His many years in office and keen political instincts cemented his control over the LDP and allowed him to place waves of advisors into key government posts. 237 Specifically with regard to national security, Prime Minister Abe oversaw an extraordinary concentration of power within Kantei (官邸) itself through the creation of a new National Security Council (NSC). 238 Created in 2013 to mirror its American counterpart, 239 Japan’s NSC has allowed the Prime Minister and his advisers to carefully select and groom

234 Id.
235 See Mishima Ko, A Big Bang for Japanese Mandarins? The Civil Service Reform of 2014, 40 INT’L J. PUB. ADMIN. 1101 (2017) Ko discussing the civil service notes:

Its purpose was to remold Japan’s independent-minded bureaucrats into the elected officials’ obedient servants. Unfortunately, the reform is unlikely to deliver expected results. The failure’s major reason concerns the fact that Japanese bureaucracy’s unusually large role in policymaking paradoxically discourages elected officials to use their major reining tool against it. Id. at


238 Adam Liff, Japan’s National Security Council at five, BROOKINGS (Dec. 4, 2018), https://www.brookings.edu/blog/order-from-chaos/2018/12/04/japans-national-security-council-at-five/. Liff notes, “Prime Minister Shinzo Abe’s administration established the NSC after a decades-long reform movement aimed at strengthening the prime minister’s office . . . Its creation was, and remains, a big deal.” Id.

239 Id. Further, Liff says, “[t]he NSC facilitates top-down decision making on national security issues, deeper integration and inter-agency coordination for strategic planning and crisis management, and a more robust, political demand-driven intelligence cycle.” Id.
elite members of the bureaucracy by rotating them through Kantei. As the years have passed this approach has led to an unprecedented control over the bureaucracy.\footnote{Id. Liff notes, “[t]he council also serves longer-term efforts by Japan’s political leaders to expand and strengthen the ‘prime ministerial executive’ at the expense of its historically powerful bureaucracy.” Id.}

Much of Prime Minister Abe’s political appeal was built around his strong personal relationship with President Trump, and the feeling that only Prime Minister Abe could maintain that.\footnote{Indeed, many insiders speculated that if President Trump was to lose re-election Prime Minister Abe would probably soon retire. See, e.g., Michael Crowley, ‘Absolutely Unprecedented’: Why Japan’s Leader Tries So Hard to Court Trump, POLITICO (May 24, 2019), https://www.politico.com/magazine/story/2019/05/24/shinzo-abe-trump-japan-226985 (“Japan needs America’s protection—and finds itself staring across the Pacific at an erratic partner . . . Abe will do what he must to maintain it, whatever the cost . . . Many Japanese officials argue, though, that Abe has made the best of an awkward situation.”).} This dynamic had clear political value for the Prime Minister, but also clear diplomatic value for Japan.\footnote{Crowley notes:}

The Prime Minister then, wanted to see tighter national security restrictions for diplomatic and policy reasons. His advisers and his faction want to see it for political reasons. The LDP wanted to see it for electoral reasons. The bureaucracy has been influenced enough by a decade of Prime Minister Abe’s leadership to act. It is no surprise then that MoF, led by Tarō Asō (麻生太郎), the Deputy Prime Minister and an ally of Prime Minister Abe within the LDP, took unusually rapid steps to put a new national security agenda into place.\footnote{Osawa, supra note 103.}

Recent action has made clear just how serious MoF and the Prime Minister were about foreign investment restrictions. On October 18, 2019,
the Cabinet approved tighter restrictions on investment in sensitive industries—generally, industries with dual-use potential, like semiconductors, some industrial chemicals, and electronics. On May 8th, 2020, the Cabinet announced even tighter restrictions, identifying 518 firms whose corporate function involves national security and significantly increasing restrictions on foreign investors in these firms. Parliament then passed the Foreign Exchange and Foreign Trade Act, requiring foreign investors to disclose in advance when they intend to acquire more than 1% in one of these designated firms. Parliament specifically stated that the Act was passed to help harmonize Japanese and American trade policy.

Just as recent strengthening of American enforcement has emphasized CFIUS factors that are particularly attuned to trade with China, so too, recent guidance from the Ministry of Finance has made clear that Japanese regulators have very similar policy goals. For example, in the United States, President Trump signed into law the National Defense Authorization Act (NDAA) on August 13th, 2018, which included the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA). FIRRMA expanded CFIUS’ jurisdiction by expanding the class of covered transactions to include “other investment[s]” in American

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244 Wataru Suzuki, *Five things to know about Japan’s new foreign investment rules*, NIKKEI (Oct. 18, 2019, 18:02 JST), https://asia.nikkei.com/Politics/Five-things-to-know-about-Japan-s-new-foreign-investment-rules. Of course, these tighter restrictions also harm American companies trying to invest in Japan. Nevertheless, American diplomacy has, in the current Administration, sought to see them enacted—possibly for diplomatic reasons, or perhaps for their strategic impact on China and other investor states.


247 *Id.* Discussing the purpose in adopting the legislation, Reidy & Oda note, “Japan has said the legislation is necessary to protect national security and likened it to recent legislation in the U.S.” *Id.*

businesses that afford a foreign person access to material nonpublic technical information in the possession of a U.S. business. The NDAA also included the Export Control Reform Act (“ECRA”), which requires interagency review of export controls on countries subject to US arms embargoes (e.g., China) and establishes a process to identify “emerging and foundational technologies” for future export controls.

Just over a year later on August 1, 2019, the Japanese Parliament confirmed an amendment to the Japanese Foreign Exchange and Foreign Trade Act (FEFTA). Just like FIRRMA, this amendment significantly expanded the class of covered transactions subject to national security restrictions on export. Similarly, the 2019 FEFTA is directly concerned with restricting access to defense technology. Japan is not a significant exporter of arms, so the 2019 FEFTA amendment does not focus on

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249 Id.
253 Masao noted, “the government’s Bill will amend FEFTA to lower the threshold above which prior-notification is needed for foreign investors to hold an equity stake in Japanese listed companies in certain key industries.” Id.

Among the Designated Business Sectors, certain business sectors that would particularly pose a risk to Japan’s national security have been designated as Core Business Sectors, including, but not limited to, weapons, aircrafts, nuclear facilities, and space and dual-use technologies that are able to divert to military use (e.g., artificial intelligence, robotics). Id.

255 Following the Second World War, Japan ceased exporting arms. See https://www.mofa.go.jp/policy/un/disarmament/policy/index.html. However, this policy was partially reversed in 2014 during the Abe Administration—but export
arms embargoes like the ECRA. However, just like the ECRA, the 2019 FEFTA amendment does instruct Kasumigaseki to develop new guidelines for export controls on “dual-use” technology, which can be used for military purposes, with a particular emphasis on “emerging and foundational technologies.” If the FEFTA seems oddly familiar, it should. The identical language is no coincidence—the 2019 FEFTA amendment was specifically designed to mirror changes in the NDAA, as Prime Minister Abe confirmed directly in several parliamentary discussions.257 Prime Minister Abe discussed the newly enacted 2019 FEFTA amendment with President Trump in December 2020; in that diplomatic conversation he spoke directly about how to further harmonize national security regulations.258

The 2019 FEFTA amendment expanded the types of dual-use technology regulated by Japanese export control law.259 The newly expanded categories included fluorinated polyimide and hydrogen fluoride, intermediate refined chemicals used in chip-manufacturing but also in some military applications.260 Because fluorinated polyimide and hydrogen fluoride were added to the heightened-scrutiny provisions triggered by their dual-use potential under the 2019 amendment, Japanese export law mandated tighter scrutiny of importing countries’ end-user controls, including South Korea’s.261 South Korea was unable to provide this information, requiring Japan, under the 2019 amendment, to manually

of arms is still quite restricted. See https://www.mofa.go.jp/fp/nsp/page1we_000083.html.
256 Fuminaga, supra note 254.
257 Personal conversation with Ishii Yoshizane, Executive Secretary to the Deputy Prime Minister, in Tokyo, Japan (Dec. 9, 2019).
259 See Katsuyama, supra note 252.
inspect and verify these exports. Because some exports to South Korea were now no longer automatically approved, Japan correspondingly removed South Korea from its trade whitelist.

At the time, given the political climate, it seemed natural to view the trade whitelist decision as motivated by political tension between Japan and South Korea. But the chain of events leading to the whitelist removal began in the United States. President Trump signed into law the 2018 NDAA including FIRAMA and ECRA. FIRAMA and ECRA tightened American export controls on dual-use technology. In response, after high-level diplomatic talks between the United States and Japan, Japan modified its own export control laws by amending FEFTA. The FEFTA amendment expanded restrictions on two industrial chemicals regularly exported to South Korea. Because of the tightened scrutiny, South Korea was removed from the whitelist. As discussed above, this chain of causation has everything to do with policy, diplomacy, trade, and international affairs, and it has little to do with forced labor. Further, it is a part of a broader trend.

Just like in the United States, Japan’s corporate deal makers have recently seen a radical uptick in scrutiny from MoF. At the same time, several Japanese companies have taken steps to retrench internationally for national security reasons—moving manufacturing out of South

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263 Reuters Staff, supra note 261.
264 See, e.g., Donald Kirk, Japan Ejects South Korea From Export ‘White List’ As Trade Relations Fray, FORBES (Aug. 2, 2019), https://www.forbes.com/sites/donaldkirk/2019/08/02/japan-ejects-south-korea-from-export-white-list-as-trade-relations-fray/ (“The prevailing view here in Korea is that the Japanese decision was taken as retaliation for the ruling on compensation.”).
265 See ANDREW SMALL, TRANSatlantic COOPERATION on ASIA and the TRUMP ADMINISTRATION (2019).
266 Kanehara, supra note 116.
267 Goodman, supra note 260.
269 See discussion supra Section I.
270 Inoue, supra note 128.

VI. WHERE WE ARE HEADED

“Better to travel hopefully than to arrive disenchanted.”

- Japanese Proverb

It is a sign of Japan’s peculiar deference to the United States that America’s next policy steps have such an impact on where Japan goes from here; Japan has already staked out a desire to mirror American policy.\footnote{See Taniguchi, supra note 66.} If America continues to strictly enforce CFIUS, Section 232 and other measures, it is likely that Japan will continue to follow.\footnote{Id.}
A major factor here is the current presidential administration. President Biden is widely considered a trade moderate, having voiced his support for several free-trade agreements in the past. This fundamental difference in trade philosophy will doubtlessly inform his administration, which will likely be less rigorous about national security restrictions.

Yet there is a developing bipartisan consensus that United States policy toward China over the past two decades has been too soft and too open. Toughness on China has already emerged as a hot-button political issue in the 2020 campaign. National security restrictions code politically somewhat orthogonally to other trade debates, so it no surprise that the Biden administration has continued to take a tough line on CFIUS and other national security restrictions, even as it pursues free-

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279 Toluse Olorunnipa & Annie Linskey, Joe Biden is Sworn in as President, Pleads for Unity in Inaugural Address to a Divided Nation, WASHINGTON POST (Jan. 20, 2021), https://www.washingtonpost.com/politics/joe-biden-sworn-in/2021/01/20/13465e90-5a7c-11eb-a976-bad6431e03e2_story.html.

280 Jack Caporal, What Is Former Vice President Biden’s Policy on Trade?, CSIS (Feb. 12, 2020), https://www.csis.org/analysis/what-former-vice-president-bidens-policy-trade Discussing President Biden’s approach, Caporal notes, “Biden’s traditional vision [is] of a rules-based, market opening, pro-free trade policy—a view that until the last presidential election had become the norm in both parties since the passage of NAFTA.”


282 Caporal, supra note 280. Caporal notes, “[d]espite a shifting trade policy landscape, Biden still unashamedly embraces a U.S.-led, rules-based international order with an emphasis on reducing trade barriers and setting global trade standards.” Id.

283 Id. Discussing the likelihood Biden liberalizes trade more generally, Caporal says, “Biden emphasizes . . . a renewed commitment to reducing trade barriers.”


trade agreements generally. In this context, the Trans-Pacific Partnership (TPP) is an illuminating example: though strongly supported by free-trade advocates, it was generally seen as strategically oriented toward containing the influence of China.\(^\text{287}\) Thus, it seems the policies of being open to trade and still tough on China can go together.

Still, even if change does not come from the United States, it may come from within Japan. The DPJ tried to pursue many radical steps during its short term, but a shakeup in party control might be necessary for long term effects.\(^\text{288}\) It is more likely a shift within the LDP from Prime Minister Suga to the LDP’s next leader will occur, each of whom could have different approaches to national security.\(^\text{289}\)

In particular, the elevation of Koizumi Shinjirō (小泉 進次郎)\(^\text{290}\) to Prime Minister could lead to dramatic changes in the way Japan’s national security restrictions are enforced. Koizumi Shinjirō, the son of charismatic former Prime Minister Koizumi Junichiro (小泉 純一郎),\(^\text{291}\)


\(^\text{289}\) Horii, supra note 223. This comment was expressed entirely descriptively; MP Horii expressed no opinions on the Suga Administration’s trade policy broadly—simply that other potential leaders might make different policy decisions. \textit{Id.}

\(^\text{290}\) Koizumi Shinjirō is the second son of former Prime Minister Koizumi Junichiro. See generally Asako Yasushi, et al., Dyamic Politicians: Theory and Evidence from Japan, 16 JAPANESE J. POL. SCI. 5 (2015). After a master’s degree at Columbia and a short stint at CSIS, Koizumi succeeded his father as the Member of Parliament representing Yokohama in 2008. \textit{Id.} Koizumi was appointed to the Cabinet for the first time in 2019, serving as Minister of Environment. \textit{Id.} It is common in Japan for Members of Parliament to succeed a family member to a seat in the Diet. \textit{Id.}

is already one of the most popular politicians in Japan.\textsuperscript{292} Though he is still young and has only served at a relatively junior level in the Cabinet, insiders in Nagatachō (永田町) expect great things.\textsuperscript{293} The other names often mooted for Prime Minister are either unlikely (Deputy Prime Minister Asō Tarō,\textsuperscript{294} or LDP Secretary-General Nikai Toshihiro)\textsuperscript{295} or would represent more continuity, as Prime Minister Suga Yoshihide\textsuperscript{296} has with Prime Minister Abe (former LDP General Secretary Kishida

...direct appeals to the Japanese electorate. \textit{Id.} Koizumi oversaw several privatizations and major reforms, doing constant battle with Japan’s status-quo-oriented bureaucracy. \textit{Id.}\textsuperscript{292} \textit{Id.}\textsuperscript{293} \textit{Id.}\textsuperscript{294} Asō Tarō served as Prime Minister of Japan from 2008 to 2009. \textit{See} Jun Hongo, \textit{The Blunt, Blue-Blooded Asō is Back}, JAPAN TIMES (Jan. 22, 2013), https://www.japantimes.co.jp/news/2013/01/22/reference/the-blunt-blue-blooded-aso-is-back/. First elected in 1979, Asō is the descendant of legendary Japanese statesmen Yoshida Shigeru and Okubo Toshimichi. \textit{Id.} Conservative, with strong back-room support, Asō has long commanded the support of a respectable, rightish faction. \textit{Id.} Although he has great strength behind the scenes, insiders consider Asō unlikely to succeed Abe, because he has served as PM before and because he is now 79 years old. \textit{Id.}\textsuperscript{295} \textit{See Profiles of Incoming LDP Party Executives}, KYODO NEWS (Sept. 25, 2007), https://www.japantimes.co.jp/news/2007/09/25/national/profiles-of-incoming-ldp-party-executives/. Nikai Toshihiro has served in the Japanese Parliament since 1983. \textit{Id.} The son of a local politician, Nikai started in local politics before moving to the Diet. \textit{Id.} With close ties to his district granting him unusual longevity, Nikai has built the third largest LDP faction. \textit{Id.} He has never served as Prime Minister, possibly either because of a perception of weaker connections with established Party elites and policy experts, or because Nikai left the party during the 2000s, returning during the Koizumi Administration. \textit{Id.} Although a kingmaker, Nikai is thought unlikely as a candidate to succeed Prime Minister Abe because of his age—he is now 81. \textit{Id.}\textsuperscript{296} \textit{See generally} Hashimoto Goro, \textit{Suga Yoshihide: Japan’s Next Prime Minister?}, NIPPON (July 3, 2019), https://www.nippon.com/en/in-depth/d00495/suga-yoshihide-japan%E2%80%99s-next-prime-minister.html. Suga Yoshihide, Japan’s current Prime Minister, was elected to the Diet in 1996. \textit{Id.} He previously served as Chief Cabinet Secretary, a powerful coordinating role within the Cabinet. \textit{Id.} Suga is a serious, experienced politician. \textit{Id.} He also has some measure of popularity—he famously announced the name of the new Imperial Era (“Reiwa”) on Japanese television, viewed live by millions of people. \textit{Id.} Suga is closely connected with former Prime Minister Abe and is not likely to represent a major break from the Prime Minister’s policy platform. \textit{Id.}
Fumio, and Minister of Defense Kono Taro, are also in this vein). By contrast, Koizumi Shinjiro is an independent, with appeal across LDP factions and, like his father, likely might try to convert public approval into policy change.

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297 See generally Leika Kihara, Japan’s Kishida Boosts Abe’s Chances of Staying on as PM, REUTERS (July 24, 2018, 7:59 AM), https://www.reuters.com/article/us-japan-politics-kishida/japans-kishida-unlikely-to-run-in-ruled-party-leadership-race. Id. Moderate, likable, youngish and technocratic, the centrist Fumio Kishida has long been an affable candidate for Japan’s next Prime Minister (PM). Id. Something of a protege of PM Abe, Kishida has served as Foreign Minister and Defense Minister and previously served as Chairman of the LDP’s Policy Research Council. Id. Leader of the small but unified Koga faction, Kishida has positioned himself as cosmopolitan and center-left. Id. Insiders suggest that his lack of committed support from the rank-and-file will continue to make his path to Prime Minister challenging. Id. Regardless, Kishida has always been a consensus-oriented wonk, and it is unlikely he would make dramatic changes as Prime Minister. Id.

298 See Isabel Reynolds, Japan Defense Minister to Enter Race to Succeed Premier Abe, BLOOMBERG (Oct. 16, 2019), https://www.bloomberg.com/news/articles/2019-10-17/japan-defense-minister-to-enter-race-to-succeed-premier-abe. Intense and notably fluent in English, Kono Taro has the background for Prime Minister, having served, like Kishida, as both Minister of Foreign Affairs and Minister of Defense. Id. Kono is the son of a very prominent Japanese politician, particularly well-known for his authorship of the Kono Statement, Japan’s first formal apology for the treatment of comfort women. Id. With close ties to South Korea and an unusually extensive history in American politics, Kono has earned great praise internationally. Id. His weaknesses in Nagatacho are thought to stem from his maverick reputation and his lack of strong factional support. Id.

299 See Cox, supra note 213 (noting “independent” refers less to the ideological spectrum of Koizumi Shinjiro’s views and more to the fact that he does command a dedicated parliamentary faction).

300 See Yoshida, supra note 291 (noting Koizumi Junichiro was well known for battling bureaucratic resistance by appealing to the public will). Yoshida notes:

[Koizumi] was a lone wolf who pushed for a number of administrative reforms, each of which unfolded with political drama that centered around battles between his ‘reformist’ camp and the anti-reform old guards . . . . Koizumi’s strategy was to take advantage of public sentiment — which potentially set a dangerous precedent for populist politics. Id.
Yet because national security restrictions run somewhat orthogonal to ordinary party debates, even predicting public approval is challenging. Therefore, generally, more conservative members of Parliament, supported by business groups like Keidanren (日本経済団体連合会), oppose capital controls, and so might be expected to oppose national security restrictions on commerce. But these same members of parliament are likely to take the toughest policy lines against China, and that makes them more likely to support restrictions.

In politics, predictions are always speculative. For now, at least, it seems that national security restrictions are here to stay. And if they change in the next few years, they seem as likely to tighten as they are to weaken.

VII. WHY IT MATTERS

“Mr. Campbell—who cares?”

- Bertram Cooper, MAD MEN (Season 1, Episode 12)

Regulatory restraints on trade matter when they impact industry and even the most aggressive restrictions, enforced with intensity, are hardly relevant if the industry regulated barely notices. Japan is an

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302 See Norio, supra note 146.


304 Sayuri, supra note 301.

305 See, e.g., 49 U.S.C. § 41724 (regulating the pricing policy for passengers bringing musical instruments aboard commercial aircraft).
investor country. Japanese consumers save at high rates, but the Japanese market offers few attractive options. Japanese real estate, amazingly, yields negative returns over time, and the stock market has been flat at best. Most Japanese individuals and businesses with an appetite for risk aim to invest their money abroad, in high-growth markets like China, Vietnam, Thailand, and the United States. Foreign direct investment targeted at Japan has been dwindling since the collapse


of the “asset bubble”\textsuperscript{314}—with little evidence of a change in trajectory.\textsuperscript{315} These demographic and macroeconomic factors make the impact of national security restrictions less salient.\textsuperscript{316} But the restrictions still matter because they help illustrate a broader global trend and because of their impact on savers in other countries.\textsuperscript{317}

Southeast Asia is home to many of the fastest growing economies in the world.\textsuperscript{318} Extraordinary wealth has been and is being created in Vietnam,\textsuperscript{319} Thailand,\textsuperscript{320} and India.\textsuperscript{321} Emerging markets tend to outperform developed markets,\textsuperscript{322} but they are extremely volatile.\textsuperscript{323} The newly prosperous often look to more developed markets to serve as a safe haven for their wealth,\textsuperscript{324} searching for a steady market economy where ownership


\textsuperscript{316} \textit{Id.} at 86.

\textsuperscript{317} \textit{Id.} at 97.


\textsuperscript{319} CREDIT SUISSE RESEARCH INSTITUTE, GLOBAL WEALTH REPORT 2019 18 fig.2 (2019).

\textsuperscript{320} \textit{Id.} (showing Thailand behind Vietnam but still in the top 10).

\textsuperscript{321} \textit{Id.} (showing India second in the world).

\textsuperscript{322} Ray Dalio, The All Weather Strategy, BRIDGEWATER 4 (Fall, 2009), http://sdcera.granicus.com/MetaViewer.php?view_id=4&clip_id=75&meta_id=9141 (showing riskier assets have a higher expected return).

\textsuperscript{323} \textit{Id.} (“Expected Risk”).

provides reliable revenue.\textsuperscript{325} For these new investors, Tokyo is a very attractive option.\textsuperscript{326}

Japan is home to many of the world’s oldest companies,\textsuperscript{327} and the conservative management philosophy\textsuperscript{328} of many blue-chip Japanese corporate executives\textsuperscript{329} that suits the needs of safe-haven investors.\textsuperscript{330} American investors looking for safe havens often direct their interest to Europe—to places like Switzerland,\textsuperscript{331} Lichtenstein,\textsuperscript{332} and other nations.\textsuperscript{333} Southeast Asian investors are more reluctant to do so, both because these markets are relatively inaccessible and because their relationships with China, the regional great power, are often frosty.\textsuperscript{334} The collapse in

\textsuperscript{325} Id.


\textsuperscript{330} See Creehan & Tierno supra, note 326.

\textsuperscript{331} Id.; For Wealth Managers, Advanced Analytics Are a New Key to Success, AP NEWS (June 14, 2018), https://apnews.com/press-release/pr-globenewswire/ac658ce74936536c6a556b8c72afbd91f (“Switzerland remained the largest offshore center, domiciling $2.3 trillion in personal wealth in the country.”).


diplomatic relations between China and Sweden was followed closely in Southeast Asia and illustrates this point.

While Japan is proximate to Southeast Asia, it is also accessible, reliable, conservative, and well-governed. Southeast Asian investors are therefore often very interested in acquiring Japanese assets. Some of these assets are in the energy and infrastructure sectors. Insofar as national security restrictions obstruct these acquisitions, investors from Southeast Asia (and counsel representing those investors) will need to start looking elsewhere.

While Southeast Asian investors are perhaps the most immediately hit by national security restrictions, there are also many knock-on economic effects. Recently, a Japanese company acquiring an American software firm was asked to divest one division to comply with American antitrust guidelines. The Japanese firm quickly found a Chinese buyer for the divested subsidiary, but the MoF blocked the transaction on national security grounds. Worried about American antitrust pressure, the American acquisition also fell through. This recent example illustrates

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335 Id.
336 See, e.g., Drew Thompson, From Singapore to Sweden, China’s Overbearing Campaign for Influence is Forcing Countries to Resist and Recalibrate Relations with Beijing, SOUTH CHINA MORNING POST (Nov. 7, 2019), https://www.scmp.com/comment/opinion/article/3036441/singapore-sweden-chinas-overbearing-campaign-influence-forcing.
338 See Suzuki, supra note 244 (“Japan is home to the world’s third-largest stock market by value. Many of Japan’s top companies are publicly traded and foreign investors have substantial holdings in them.”).
339 Id.
340 Of course, elsewhere could be China, which would hardly seem to achieve American strategic aims. On the other hand, perhaps this is less likely. Investors targeting Japan are generally looking for a safe haven that offers smaller returns with less risk. Few investors in China share that profile. See generally, Creehan & Tierno supra, note 326.
341 Personal interview with Axel Kuhlmann, Partner, Nagashima Ohno & Tsunematsu, in Tokyo, Japan (June 17, 2019).
342 Id.
343 Id.
344 Id.
how blocked economic transactions can spread through the market, and why national security restrictions are so significant.

Furthermore, recent Japanese efforts to tighten restrictions on foreign buyers mirrors a broader global trend towards a more nationalistic capitalism. Japan’s policy changes are a small part of this global movement. However, the consequences are likely to be significant—both for the world economy and for cross-border transactional practitioners.

VIII. CONCLUSION

“Even when the intended scope is limited, the impact of international action is often transformative. This is both the promise and the peril of diplomacy.”

- Caroline Kennedy, United States Ambassador to Japan (2013–2017)

There is good news, then, for South Korea because it seems that Japan really was not retaliating for diplomatic slights. Instead, South Korea was only collaterally harmed. The underlying policy was part of a much broader change in Japanese trade policy. As the United States has tightened national security restrictions on trade, capital, and investment, Japan has tightened her restrictions to match. Dual-use technology is one of the first places we would expect to see these policy changes—and,
as predicted, dual-use exports were one of the first sectors targeted.\footnote{352 Id.} It wasn’t personal.\footnote{353 For South Korea and Japan, perhaps that suggests a road toward smoother relations.\footnote{354}}

On the other hand, for international business practitioners the road ahead may be quite bumpy indeed. International business transactions are already some of the most complex business deals in corporate legal practice.\footnote{355 The uncertainty of risk allocation in project finance must already contend with the complexity of arbitration, capital markets, and the shifting winds of exchange rates.\footnote{358}} Now, these projects must increasingly navigate the byzantine politics of national security clearances.\footnote{359} And yet, national security practice remains frustratingly local since national security policy is set in national capitals as the province of separate national governments.\footnote{360}

If current trends continue, practitioners may someday have to learn to separately navigate the national security policies of the world’s nearly two hundred countries. For now, at least, that has yet to happen—but Japan’s experience suggests that we may be well on our way.

\footnote{352 Id.}{\footnote{353 Id. at 6.}}
\footnote{356 Id. at 6.}{\footnote{357 Brown, supra note 46.}}
\footnote{359 See discussion supra Sections VI.B.}{\footnote{360 RICHARD HAAS, THE WORLD: A BRIEF INTRODUCTION (2020).}}