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

C.D.A. Evans

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TAKING NATIONAL SECURITY SERIOUSLY:
*Navigating Japan's Expanded Restrictions on Global Trade and
Investment*

C.D.A Evans & Aviel Menter

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ABSTRACT

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 whitelist²—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[,] effective Thursday[,] 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

oversight³—so this decision represented a significant tightening of export controls. Japan’s decision enraged South Korean elected officials,⁴ trade experts,⁵ and even ordinary citizens.⁶ South Korean President Moon Jae-in condemned the decision, stating Korea “will never again lose to Japan.”⁷ Political pressure for a retaliatory response rapidly built in South Korea.⁸ Extensive bilateral negotiations failed to resolve the conflict,⁹ as did an effort to refer the dispute to the World Trade Organization (WTO).¹⁰ A widespread South Korean consumer boycott of Japanese goods further raised tensions.¹¹

Finally, on August 22, 2019, South Korea announced that it was withdrawing from the General Security of Military Information Agreement (GSOMIA).¹² 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.*

³ *Id.*; see also *South Korea to Exclude Japan from Trade Whitelist this Week, Report Says*, JAPAN TIMES (Sept. 15, 2019), <https://www.japantimes.co.jp/news/2019/09/15/national/politics-diplomacy/south-korea-exclude-japan-trade-whitelist-week-report-says/> (noting South Korea maintained a similar list).

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. . .”).

⁷ Choe Sang-Hun, *South Korea Leader Appeals to Japan as Dispute Festers*, N.Y. TIMES (Aug. 15, 2019), <https://www.nytimes.com/2019/08/15/world/asia/south-korea-japan-trade.html>.

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.

¹² *See, e.g.,* Victor Cha, *The Meaning of GSOMIA Termination: Escalation of the Japan–Korea Dispute*, CTR. FOR STRATEGIC AND INT’L STUD. (Aug. 22, 2019), <https://www.csis.org/analysis/meaning-gsomia-termination->

Administration,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.¹⁴ South Korean withdrawal from GSOMIA represented a significant blow to American foreign policy in East Asia.¹⁵ The United States has long urged South Korea and Japan—both American allies—to work together more closely.¹⁶ These American efforts helped secure the 2015 Comfort Women Accord¹⁷,

escalation-japan-korea-dispute. Ultimately, South Korea later decided to continue participation, but the withdrawal announcement has sweeping trade implications.

¹³ *The Key US Role in Keeping GSOMIA Alive*, NIPPON.COM (Dec. 2, 2019), <https://www.nippon.com/en/news/100255/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”).

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.”).

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.”).

¹⁶ NIPPON.COM, *supra* note 13.

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.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.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.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 1965.²¹ Japanese firms worried about a sudden surge of tort liability—

is-the-big-winner-in-comfort-women-agreement/ (noting the Obama Administration’s as the “primary pusher” of the agreement).

¹⁸ *U.S. Welcomes Japan–South Korea Accord over “Comfort Women” Issue*, JAPAN TIMES (Dec. 29, 2015), <https://www.japantimes.co.jp/news/2015/12/29/national/politics-diplomacy/u-s-welcomes-japan-south-korea-accord-comfort-women-issue/#.Xtw-855KhE4> (“The United States supported an agreement Monday . . . on the long-standing issue of women forced to work at Japan’s wartime military security brothels, hoping it will help further cement the trilateral security alliance.”); see also CONGRESSIONAL RESEARCH SERVICE, U.S.-SOUTH KOREA RELATIONS 46 (2016), <https://www.fas.org/sgp/crs/row/R41481.pdf> (updated Feb. 24, 2022) (describing the South Korea–Japan relationship as “perennially fraught”); U.S. Dep’t of State, *Background Briefing - Developments on the Relationship between Japan and the Republic of Korea*, (Dec. 28, 2015), <http://www.state.gov/r/pa/prs/ps/2015/12/250881.html> (discussing the “landmark” nature of the agreement).

¹⁹ See JAPAN TIMES, *supra* note 3 (discussing South Korea’s retaliatory response).

²⁰ Cory Evans, *A Serious Threat to the Japan–Korea Relationship*, NIPPON.COM (Jan. 3, 2019), <https://www.nippon.com/en/column/g00640/a-serious-threat-to-the-japan-korea-relationship.html> (“On October 30, 2018, the Supreme Court of the Republic of Korea confirmed a prior decision in a World War II forced labor court case against Japanese company Nippon Steel and Sumitomo Metal Corp.”).

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

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...").

²⁴ Celeste L. Arrington, *Japan Claims It's Restricting Exports to South Korea Because of 'National Security' Here's the Real Reason Why*, WASH. POST (July 18, 2019), <https://www.washingtonpost.com/politics/2019/07/18/japan-claims-its-restricting-exports-south-korea-because-national-security-heres-real-reason-why/>.

²⁵ See, e.g., Mari Yamaguchi, *Japan, South Korea Hold Export Talks in Search of Dispute Solution*, THE DIPLOMAT (Dec. 17, 2019), <https://thediplomat.com/2019/12/japan-south-korea-hold-export-talks-in-search-of-dispute-solution/> ("Speaker Moon Hee-san is seeking a compromise . . . a compensation fund for Korean laborers . . . would be established to which Japanese companies could donate.").

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

²⁷ Yamiguchi, *supra* note 25.

the underlying narrative, experts ignored a far simpler explanation for the entire dispute.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;²⁹ a policy that echoes major changes in the United States.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.³¹ These restrictions are quite distinct from ordinary trade

²⁸ Yamada, *supra* note 9.

²⁹ Interview with Mizobuchi Masashi, Consulate-General of Japan, N.Y.C., N.Y. (Feb. 2020).

³⁰ Mario Mancuso, *CFIUS Report Shows Trump Admin’s Push to Curb Risky M&A*, KIRKLAND & ELLIS (Nov. 25, 2019), <https://www.kirkland.com/news/in-the-news/2019/11/cfius-report-shows-trump-admins-push-to-curb-risky> (“The latest annual report released by the Committee on Foreign Investment in the United States reflects a steep increase in notices and abandoned deals...”).

³¹ See discussion *infra* Section IV.

restrictions.³² Conflating national security restrictions with ordinary trade law leads to misunderstandings of law and of policy—misunderstandings that can spill over into international conflict.³³

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.³⁴ 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.³⁵ The Allied occupation of Japan (1945–1952) brought resources, capital, and technical expertise.³⁶ Moreover, the Allies also broke up Japan’s *zaibatsu*,³⁷ the enormous quasi-state organs of commerce that propelled much of Japan’s economic growth after the Meiji

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).

³³ Zhang Jiadong, *How China, US Misunderstand Each Other*, GLOBAL TIMES (Aug. 1, 2018), <https://www.globaltimes.cn/content/1113354.shtml> (illustrating how misunderstandings can lead to conflict). See, e.g., BARBARA TUCHMAN, *THE GUNS OF AUGUST* (1962) (illustrating how misunderstandings can lead to conflict).

³⁴ C.D.A. Evans, *The Future of the Japanese Labor Movement*, DISSENT MAG. (Aug. 13, 2011), https://www.dissentmagazine.org/online_articles/the-future-of-the-japanese-labor-movement (Evans noted: “[i]t is difficult to overstate the devastation that the Second World War wreaked upon the Japanese economy.”).

³⁵ JOHN W. DOWER, *EMBRACING DEFEAT* 41–44 (1999).

³⁶ *Id.* at 68.

³⁷ *Occupation and Reconstruction of Japan (1945-52)*, U.S. DEPT. OF STATE, <https://2001-2009.state.gov/r/pa/ho/time/cwr/91194.htm> (last visited Oct. 5, 2021) (“MacArthur also tried to break up the large Japanese business conglomerates, or zaibatsu . . . to transform the economy into a free-market capitalist system.”).

Restoration (1868).³⁸ In the 1950s, Japan was forced to find an innovative replacement for these successful former conglomerates.³⁹

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.⁴⁰ Real GDP growth in Japan averaged well over 5% during this period, peaking at 17% in the early 1960s.⁴¹

Japan's post-war model focused heavily on exports. Japan pioneered a government-supported industrial policy⁴² built around *keiretsu*, financially interdependent corporate groups centered on banks

³⁸ MARIUS JANSEN, *THE MAKING OF MODERN JAPAN 372–77* (2000). The *zaibatsu* benefited from enormous economies of scale and from active government involvement in their industrial development; see, e.g., J. Mark Ramseyer & C.D.A. Evans, *Japan v. Shimizu: Negligence, Abuse of Rights and the Foundations of Japanese Private Law*, J. Japanese L. (forthcoming).

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

⁴⁰ See MICHAEL BECKLEY, YUSAKU HORIUCHI & JENNIFER M. MILLER, *AMERICA'S ROLE IN THE MAKING OF JAPAN'S ECONOMIC MIRACLE*, 18 J. E. ASIAN STUD. 1 (2018) (discussing the post-war resurgence of the Japanese economy).

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.⁴³ The Japanese government actively supported these *keiretsu* through the Ministry of International Trade and Industry (通商産業省) or MITI.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.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,⁴⁶ kept capital controls with Japanese investors,⁴⁷ and Japan adopted a highly relaxed antitrust policy that favored Japanese firms.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.⁴⁹ As Japanese companies became more competitive,

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

⁴⁴ See generally CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY, 1925–1975* (Stan. U. Press 1982). Trade policy was also deeply involved. See J. MARK RAMSEYER, *LETTING OBSOLETE FIRMS DIE: TRADE ADJUSTMENT ASSISTANCE IN THE UNITED STATES AND JAPAN*, 22 HARV. INT’L L.J. 595 (1981).

⁴⁵ Beckley et al., *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).”).

⁴⁶ J. ROBERT BROWN JR., *THE MINISTRY OF FINANCE: BUREAUCRATIC PRACTICES AND THE TRANSFORMATION OF THE JAPANESE ECONOMY* 57 (Quorum Books 1999) (“The MoF swallowed the Foreign Exchange Control Board, assuming direct authority over issues of currency exchange.”).

⁴⁷ MARK MASON, *AMERICAN MULTATIONALS AND JAPAN: THE POLITICAL ECONOMY OF JAPANESE CAPITAL CONTROLS, 1899–1980* (Harv. U. Asia Ctr. 1992).

⁴⁸ ELANOR HADLEY, *ANTITRUST IN JAPAN* 390–98 (Princeton U. Press 1970). Policies softened over time. See J. MARK RAMSEYER, *THE OIL CARTEL CRIMINAL CASES: TRANSLATIONS AND POSTSCRIPT*, 15 L. JAPAN 57 (1982).

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.⁵⁰ 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.⁵¹ Politically well-connected, General Motors and Ford applied pressure to Congress,⁵² and the Reagan Administration stepped in to renegotiate the U.S.-Japan economic relationship.⁵³

B. *Trade Negotiations and Security: The Plaza Accord*

For Japan, discussions about trade with the United States invariably implicate national security.⁵⁴ Since 1952, Japan has relied on

encounters. *See, e.g.*, C.D.A. Evans & Ishikawa Hanako, *A New Translation of Taisaku Ichido*, J. JAPANESE PHILOSOPHY (forthcoming).

⁵⁰ *See* Japan Balance of Trade, TRADING ECON., <https://tradingeconomics.com/japan/balance-of-trade> (last visited Jan. 1, 2021) (click "MAX" above chart to view entire history of trade deficit). The American trade deficit with Japan expanded through the 1960s and 1970s, dropped off briefly during the late 1970s oil shock, and then rose sharply in the early 1980s, right as domestic pressure for protectionist legislation peaked in the United States Congress. *See also* INTERNATIONAL MONETARY COOPERATION: LESSONS FROM THE PLAZA ACCORD AFTER THIRTY YEARS (Fred Bergsten & Russell Green eds. 2016) (discussing the impact of the Plaza agreement on trade policy).

⁵¹ *See, e.g.*, *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (discussing a frequently cited legal dispute that originated over concerns about antitrust issues with Japanese firms).

⁵² RANDALL HENNING & I. M. DESTLER, FROM NEGLECT TO ACTIVISM: AMERICAN POLITICS AND THE 1985 PLAZA ACCORD, 8 J. PUB. POL'Y. 317, 317 (1988) ("Pressures from producer interests, particularly multinational companies making manufactured goods, and from sympathetic members of Congress were the most important of multiple forces pushing the US Treasury toward dollar depreciation.").

⁵³ *Id.* (by negotiating with Japan and other countries, "[the Administration] could better counter the immediate threat to Administration trade policy from Congress, orchestrate depreciation, strengthen Treasury's influence within Washington and shift the burden of adjustment away from US fiscal policy.").

⁵⁴ Mizobuchi, *supra* note 29.

the United States for her security⁵⁵—under the San Francisco System,⁵⁶ Japan is in some ways an American protectorate.⁵⁷ Japan intensely monitors American domestic politics,⁵⁸ and works hard to defuse anti-Japanese tension, lest the United States reconsider the U.S.-Japan Security Partnership.⁵⁹ As China has become a more significant naval power,⁶⁰ and as North Korea’s nuclear capacity expands,⁶¹ Japan’s security challenges have increased.⁶² Initiatives like the Quadrilateral Security Dialogue⁶³ are designed to offer Japan some degree of strategic flexibility.⁶⁴ But if

⁵⁵ MICHAEL GREEN, *BY MORE THAN PROVIDENCE: GRAND STRATEGY AND AMERICAN POWER IN THE ASIA PACIFIC SINCE 1783* (Columbia U. Press 2017).

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).

⁵⁷ This characterization is controversial, but not uncommon. *See, e.g., Japan a US Protectorate*, THE DIPLOMAT (June 11, 2010), <https://thediplomat.com/2010/06/why-us-may-torpedo-japan-pm/>.

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.”).

⁶¹ Sherzod Kurbanbekov, Seung Min Woo & Sunil S. Chirayath, *ANALYSIS OF THE DPRK’S NUCLEAR WEAPONS CAPABILITIES BY ESTIMATING ITS HIGHLY ENRICHED URANIUM STOCKPILE AND NATURAL URANIUM RESERVES*, 27 SCI. & GLOBAL SECURITY 113 (2019).

⁶² Shinsuke J. Sugiyama, Ambassador of Japan to the United States of America, Ministry of Foreign Affairs of Japan, *Speech on Japan’s Strategy for the 21st Century*, at Columbia University (Nov. 16, 2018).

⁶³ This dialogue, a major initiative of Prime Minister Abe, aims to strengthen the military partnership between the United States, Japan, India and Australia. For a recent summary and assessment, *see* Patrick Buchan & Benjamin Rimland, *Defining the Diamond: The Past, Present, and Future of the Quadrilateral Security Dialogue*, CTR. STRATEGIC & INT’L STUD. (Mar. 16, 2020), <https://www.csis.org/analysis/defining-diamond-past-present-and-future-quadrilateral-security-dialogue>.

⁶⁴ *See* Nobukatsu Kanehara, 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).

⁶⁷ Prashanth Parameswaran, *Remembering Nakasone and US Asia Policy in the 1980s*, THE DIPLOMAT (Dec. 11, 2019), <https://thediplomat.com/2019/12/remembering-nakasone-and-us-asia-policy-in-the-1980s/> (“[Nakasone] also oversaw a period as prime minister when he and Reagan worked to manage the sense of drift and uncertainty in the alliance in what was termed as the ‘Ron-Yasu’ relationship. Nakasone’s memorable description of Japan as a U.S. ‘unsinkable aircraft carrier’ during his first visit to Washington in January 1983 is still quoted today.”).

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.margarethatcher.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.⁷¹ By actively trying to reduce Japanese exports through currency manipulation, the United States signaled a fundamental change to the bilateral economic relationship.⁷² 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.⁷³

Each of these steps was motivated by a policy commitment to free trade and free markets.⁷⁴ But, just as importantly, it was motivated by a desire to harmonize Japanese policy with American policy⁷⁵—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.”

- John Williamson, *What Washington Means by Reform* (1990)

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.”⁷⁶

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.”).

⁷³ RONALD MCKINNON, *THE ORDER OF ECONOMIC LIBERALIZATION: FINANCIAL CONTROL IN THE TRANSITION TO A MARKET ECONOMY* 31–35 (1993).

⁷⁴ *Id.*

⁷⁵ Taniguchi, *supra* note 66.

⁷⁶ JOHN WILLIAMSON, *LATIN AMERICAN ADJUSTMENT: HOW MUCH HAS HAPPENED?* ch. 2 (1990).

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.⁷⁷ But the ideas, and the economic philosophy behind them, are at least a decade older⁷⁸—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,⁷⁹ the World Order⁸⁰ that exists today (sometimes called the “liberal international order”⁸¹) was built by the United States and her allies in the aftermath of the Second World War.⁸² The world from 1945 to 1960 was bipolar.⁸³ The United States (along with allies, like the United Kingdom and Canada) represented a liberal, capitalist, free-market path forward.⁸⁴ Unlike, the Soviet Union, which represented a planned, communist, authoritarian path forward.⁸⁵

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).

⁸¹ *See, e.g.*, John Mearsheimer, *Bound to Fail: The Rise and Fall of the Liberal International Order*, 43 *INT’L SEC.* 7 (2019); G. John Ikenberry, Inderjeet Parmar & Doug Stokes, *Ordering the World: Liberal Internationalism in Theory and Practice*, 94 *INT’L AFFS.* 1 (2018).

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.”).

⁸³ *See generally* JOHN LEWIS GADDIS, *THE COLD WAR: A NEW HISTORY* (2005).

⁸⁴ *Id.*

⁸⁵ *Id.*

Motivated by Cold War strategic considerations,⁸⁶ but also a genuine sense of humanitarian obligation,⁸⁷ the United States spent billions of dollars around the world bolstering burgeoning free-market democracies in the 1940s and beyond.⁸⁸ Civil liberties and political freedoms were a big part of Washington's program,⁸⁹ but so was economic liberalization.⁹⁰ With American policy influence came American corporate influence,⁹¹ and these market actors pushed for pro-market reforms: liberalization, privatization, and global free trade.⁹²

In the 1980s, The Reagan Revolution,⁹³ added a new theoretical framing for these broader anti-communist strategic sentiments.⁹⁴ Armed with supply-side economics⁹⁵ and new monetarist theories,⁹⁶ and with

⁸⁶ George Kennan, *The Long Telegram*, Diplomatic Cable, U.S. DEP'T OF STATE, Moscow (Feb. 22, 1946), <http://www.ntanet.net/KENNAN.html>.

⁸⁷ For a superb recent study, see Lael Weinberger, *Rebellion Against International Law: Human Rights, Ideology, and the Bricker Amendment* (2020) (unpublished manuscript) (on file with author).

⁸⁸ MARSHALL PLAN, 1948, U.S. DEPT. OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1945-1952/marshall-plan> (last accessed Jun. 10, 2020) ("Fanned by the fear of Communist expansion . . . Congress passed the Economic Cooperation Act in March 1948 and approved funding that would eventually rise to over \$12 billion . . ."). Of course, American foreign policy was not always so pro-democracy. See, e.g., Mark Gasiorowski, *The 1953 Coup D'etat in Iran*, 19 Int'l J. Middle East Stud. 261 (1987).

⁸⁹ See generally GEORGE F. KENNAN, AMERICAN DIPLOMACY: 1900–1950 (1951).

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.").

⁹¹ See, e.g., NANCY LISAGOR & FRANK LIPSUIS, A LAW UNTO ITSELF: THE UNTOLD STORY OF THE LAW FIRM SULLIVAN & CROMWELL (Athena Publishing 1989).

⁹² *Id.*

⁹³ CRAIG SHIRLEY, REAGAN'S REVOLUTION: THE UNTOLD STORY OF THE CAMPAIGN THAT STARTED IT ALL (Thomas Nelson 2010).

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

⁹⁵ See, e.g., ARTHUR LAFFER, *The Laffer Curve: Past, Present, and Future*, HERITAGE FOUND. REPORTS (June 1, 2004), <https://www.heritage.org/taxes/report/the-laffer-curve-past-present-and-future>.

⁹⁶ See, e.g., MILTON FRIEDMAN & ANNA SCHWARTZ, A MONETARY HISTORY OF THE UNITED STATES, 1867–1960 (1963).

increasing evidence of economic weakness behind the Iron Curtain,⁹⁷ Washington began to insist with greater force on pro-market reforms.⁹⁸ This emphasis on capitalism and free trade was amplified by the collapse of the Soviet Union.⁹⁹ Now it seemed the path forward was clear.¹⁰⁰ To secure the financial support of the United States, countries were told that they needed to implement these economic reforms.¹⁰¹

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.¹⁰²

These changes fundamentally altered the structure of the Japanese economy.¹⁰³ In an effort to accommodate these policy demands, Japan revamped nearly all of its macroeconomic policies, from trade,¹⁰⁴ to antitrust,¹⁰⁵ to interest rates.¹⁰⁶ 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".¹⁰⁷ Considering the

⁹⁷ See, e.g., PAUL ROBERTS, *MELTDOWN: INSIDE THE SOVIET ECONOMY* (1990).

⁹⁸ See Mearsheimer, *supra* note 81, at 21.

⁹⁹ *Id.*

¹⁰⁰ See FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

¹⁰¹ *Id.*

¹⁰² WILLIAMSON, *supra* note 76.

¹⁰³ Interview with Genichi Osawa, Deputy Director, Ministry of Finance, in Tokyo, Japan (Jun. 24, 2019).

¹⁰⁴ SUMIYA MIKIO, *A HISTORY OF JAPANESE TRADE AND INDUSTRY POLICY*, at 148–50 (2000).

¹⁰⁵ See, e.g., Arai Koki, *Recent Development of Japanese Antitrust Policy Regarding Intellectual Property Rights*, 46 *ANTITRUST BULL.* at 591 (2001); see also H. Iyori & A. Uesugi, *THE ANTIMONOPOLY LAWS AND POLICIES OF JAPAN* (1994).

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

International Factors Behind Japan's Lost Decade, 23 J. JAPANESE & INT'L ECON., 200, 201 (2009).

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.

¹¹² See BURDEN SHARING: BENEFITS AND COSTS ASSOCIATED WITH THE U.S. MILITARY PRESENCE IN JAPAN AND SOUTH KOREA, Report of the Government Accountability Office (GAO) (Mar. 17, 2021), <https://www.gao.gov/products/gao-21-270>.

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,¹¹⁴ and expressed that to Japan.¹¹⁵ To achieve that diplomatic goal required expending political capital¹¹⁶—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.¹¹⁷

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

¹¹⁴ Jeffrey Rothfeder, *Why Obama Is Still Trying to Pass the T.P.P.*, NEW YORKER (Sept. 18, 2016), <https://www.newyorker.com/business/currency/why-obama-is-still-trying-to-pass-the-t-p-p> (“President Obama made the first of a series of last-ditch efforts to persuade Congress to approve the T.P.P.—an agreement his Administration spent five years negotiating.”).

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.ncusr.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.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.¹¹⁹ CFIUS is an inter-departmental executive branch committee.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.¹²¹ CFIUS also has a historic link to Japan—it was created due to concerns about Japanese firms taking over American competitors.¹²²

CFIUS reviews deals and makes confidential reports to the President,¹²³ who then has the authority to block such transactions.¹²⁴ CFIUS is permitted by statute to consider a number of different factors,

¹¹⁸ Jonathan Sole, *Why the U.S. Fears a Chinese Bid for Westinghouse Electric*, N.Y. TIMES (Apr. 17, 2017), <https://www.nytimes.com/2017/04/07/business/us-china-toshiba-westinghouse.html>. For further background on the strategic context and the importance of this capacity for arms control, see C. Alexander Evans, *North Korea’s Nuclear Weapons Pose a Greater Threat Than Meets the Eye*, WASHINGTON EXAMINER (Aug. 23, 2020),

<https://www.washingtonexaminer.com/opinion/op-eds/north-koreas-nuclear-weapons-pose-a-greater-threat-than-meets-the-eye>.

¹¹⁹ CFIUS was created by Section 1 of Executive Order 11858 signed on May 7, 1975, by President Gerald Ford. See Kevin Granville, *CFIUS, Powerful and Unseen, Is a Gatekeeper on Major Deals*, N.Y. TIMES (Mar. 5, 2018), <https://www.nytimes.com/2018/03/05/business/what-is-cfius.html>.

¹²⁰ *Id.* (“[CFIUS] is made up of members of the State, Defense, Justice, Commerce, Energy and Homeland Security departments, and is led by the treasury secretary.”).

¹²¹ *Id.* (“[CFIUS] also has the authority to intervene and review . . . transactions, without being asked by any of the companies involved.”).

¹²² *Id.* (“[CFIUS]’s responsibilities expanded after a crisis in the 1980s involving . . . Fairchild Semiconductor . . . [which] wanted to sell itself to Fujitsu, a Japanese company.”).

¹²³ *Id.* (“The committee’s findings, which are not publicly announced, are sent to the president, who may suspend or prohibit the deal. But . . . rejection of a deal by the committee is usually enough to kill it.”).

¹²⁴ 50 U.S.C. app. § 2170 (establishing the Exon–Florio Amendment); OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988, 5021, Pub. L. 100–418 (1988) 1107.

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.¹²⁵ 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.”¹²⁶ Although, in theory, CFIUS can block any number of transactions, historically, few transactions were scrutinized and even fewer were blocked.¹²⁷ CFIUS practice used to be a sleepy trade; you could easily work a full transactional career without ever triggering CFIUS.¹²⁸ 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.¹²⁹ All of a sudden, almost every transaction had a potential national security angle and was at real risk of being blocked.¹³⁰ Even dating app acquisitions became subject to intense CFIUS scrutiny.¹³¹ The numbers reflected this

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.*

¹²⁷ James Jackson, *The Committee on Foreign Investment in the United States (CFIUS)*, FEDERATION OF AMERICAN SCIENTISTS (Feb. 14, 2020), <https://fas.org/sgp/crs/natsec/RL33388.pdf> (providing tables compiling this information).

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.

¹³¹ Echo Wang, *China’s Kunlun Tech Agrees to U.S. Demand to Sell Grindr Gay Dating App*, REUTERS (May 13, 2019, 2:06 PM), <https://www.reuters.com/article/us-grindr-m-a-beijingkunlun/chinas-kunlun-tech-agrees-to-u-s-demand-to-sell-grindr-gay-dating-app-idUSKCN1SJ28N> (“Beijing Kunlun Tech Co Ltd said . . . it had agreed to a request by [CFIUS] to sell [the] popular gay dating app Grindr.”).

new reality: from 1991 to 2005, CFIUS launched just thirteen investigations.¹³² In 2017 alone, CFIUS launched 172 investigations.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."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.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.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.¹³⁷ For example, § 232 of the Trade Expansion Act of 1962 authorizes the Commerce Secretary to launch special investigations

¹³² Based on author's personal conversation with Mark Plotkin, New Haven (Jan. 30, 2020). *See also* Jackson, *supra* note 127.

¹³³ Jackson *supra* note 127.

¹³⁴ 50 U.S.C. §§ 4565(f)(5), 4565(f)(7)–(f)(8); *see also* Chloe Aiello, *Trump Blocks Broadcom-Qualcomm Deal, Citing National Security Concerns*, CNBC (Mar. 13, 2018, 7:32 AM), <https://www.cnbc.com/2018/03/12/trump-issues-order-prohibiting-broadcoms-bid-to-take-over-qualcomm.html>.

¹³⁵ *See, e.g.*, Christopher Balding & Donald Clarke, *Who Owns Huawei?*, SSRN (May 8, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3372669.

¹³⁶ *See, e.g.*, Jay Peters, *Grindr Has Been Sold by Its Chinese Owner After the US Expressed Security Concerns*, THE VERGE (Mar. 6, 2020, 1:26 PM), <https://www.theverge.com/2020/3/6/21168079/grindr-sold-chinese-owner-us-cfius-security-concerns-kunlun-lgbtq>; Taylor Walshe & Shining Tan, *TikTok on the Clock: A Summary of [CFIUS'] Investigation into ByteDance*, CTR. FOR STRATEGIC & INT'L STUD. (May 13, 2020), <https://www.csis.org/blogs/trustee-china-hand/tiktok-clock-summary-cfiuss-investigation-bytedance> ("American concerns over data security and the spread of Chinese propaganda on TikTok sparked [CFIUS'] investigation into ByteDance").

¹³⁷ *See* Granville *supra* 119; *see also, e.g.*, Rachel Fefer & Vivian Jones, *Section 232 of the Trade Expansion Act of 1962*, CONGRESSIONAL RESEARCH SERVICE (June 3, 2020), <https://fas.org/sgp/crs/misc/IF10667.pdf> (accessed June 11, 2020, 4:35 AM).

into the impact of foreign trade on American industry.¹³⁸ Other administrations used § 232¹³⁹ but not with the intensity shown by former Secretary Ross.¹⁴⁰ Analogous legislation and administrative action on exports¹⁴¹ and dual-use technology¹⁴² generally presented the same picture: the Trump administration was seriously committed to national security restrictions on commercial activity.

¹³⁸ 19 U.S.C. § 1862; see Rachel Fefer & Vivian Jones, *Section 232 of the Trade Expansion Act of 1962*, FEDERATION OF AMERICAN SCIENTISTS (June 3, 2020), <https://fas.org/sgp/crs/misc/IF10667.pdf>.

¹³⁹ See Rachel F. Fefer & Vivian C. Jones, *Section 232 of the Trade Expansion Act of 1962*, CONGRESSIONAL RESEARCH SERVICE (May 7, 2020), <https://crsreports.congress.gov/product/pdf/IF/IF10667/18>. Fefer & Jones note:

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. *Id.*

¹⁴⁰ *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.”). *Id.*

¹⁴¹ See Alexandra Alper, Karen Freifeld & Stephen Nellis, *Trump administration moves toward blocking more sales to Huawei: sources*, REUTERS (Jan. 14, 2020, 3:26 PM), <https://www.reuters.com/article/us-usa-huawei/trump-administration-moves-toward-blocking-more-sales-to-huawei-sources-idUSKBN1ZD2VD> (“The U.S. government is nearing publication of a rule that would vastly expand its powers to block shipments to China’s Huawei.”).

¹⁴² See Ariel Levite et al., *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 States¹⁴³

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.¹⁴⁴

A. *The Shock of 2016*

Japan closely monitors American elections.¹⁴⁵ 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.¹⁴⁶ Clinton’s foreign policy team featured experts like Jake Sullivan¹⁴⁷ and

¹⁴³ *Japanese Will ‘Watch Sony TV’ If US Is Attacked: Donald Trump*, DECCAN CHRONICAL (Aug. 6, 2016, 10:41 AM), <https://www.deccanchronicle.com/world/america/060816/japanese-will-watch-sony-tv-if-us-is-attacked-donald-trump.html>.

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,

security-440814. (discussing Sullivan's rise). He is a widely known expert on American foreign policy. *Id.* Sullivan currently serves as National Security Adviser. *Id.*

¹⁴⁸ Campbell was Assistant Secretary of State for East Asia from 2009 to 2013 and has worked frequently with Sullivan. *See generally* KURT CAMPBELL, *THE PIVOT: THE FUTURE OF AMERICAN STATECRAFT IN ASIA* (2016). He was widely expected to have a major role in Clinton's East Asia policy, and his views were well known from his work. *Id.* Campbell is now East Asia Director for President Biden's National Security Council. *Id.*

¹⁴⁹ Personal interview with Eiichi Hasegawa, Special Adviser, Prime Minister of Japan, in Tokyo, Japan (Dec. 11, 2019).

¹⁵⁰ *See generally* CAMPBELL, *supra* note 148.

¹⁵¹ *See* Rothfeder, *supra* note 114.

¹⁵² *See* Hasegawa, *supra* note 149.

¹⁵³ *See, e.g.,* C. D. ALEXANDER EVANS, *ELECTION FORECAST: EÄRWEN (FINAL CALL)* (2016) (predicting a 73% chance for Clinton to win the 2016 General Election) (unpublished report on file with author).

¹⁵⁴ Steven Shepard, *GOP Insiders: Trump Can't Win*, POLITICO (Aug. 12, 2016, 5:03 AM), <https://www.politico.com/story/2016/08/donald-trump-electoral-votes-gop-insiders-226932> ("Trump is underperforming so comprehensively . . . [an upset] would take video evidence of a smiling Hillary drowning a litter of puppies while terrorists surrounded her with chants of 'Death to America!'").

¹⁵⁵ *See generally*, H. D. P. Envall, *The Trump Administration's First 100 Days: What Should Asia Do?*, ANU COLL. OF ASIA & THE PAC. (2017), https://openresearch-repository.anu.edu.au/bitstream/1885/144542/1/Envall_Japan_Trump_Diplomacy.pdf. (.)

¹⁵⁶ *Id.*

¹⁵⁷ Steve Holland & Kiyoshi Takenaka, *Japan's PM Abe Meets Trump, Says Confident Can Build Trust*, REUTERS (Nov. 16, 2016, 8:53 PM), <https://www.reuters.com/article/us-usa-trump-japan/japans-pm-abe-meets->

Prime Minister Abe presented the President-elect with a custom-made Japanese driver,¹⁵⁸ helping to spark a personal relationship that has remained warm ever since.¹⁵⁹

Even at their very first meeting, President Trump brought up the U.S.-Japan trade deficit.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).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

trump-says-confident-can-build-trust-idUSKBN13C0C8 ("Abe, speaking after the hastily arranged 90-minute meeting at Trump Tower in Manhattan.").

¹⁵⁸ *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 . . .").

¹⁵⁹ Ayumi Teraoka, *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>. Teraoka 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." *Id.*

¹⁶⁰ See Kirk Spitzer, *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.'").

¹⁶¹ See Jim Tankersley & Mark Landler, *Trump's Love for Tariffs Began in Japan's '80s Boom*, N.Y. TIMES (May 15, 2019), <https://www.nytimes.com/2019/05/15/us/politics/china-trade-donald-trump.html>.

Administration.¹⁶² Change in macroeconomic policy, it seemed, was inevitable.¹⁶³

Yet times have changed, and policy has changed with it.¹⁶⁴ In the 1980s, Japan had a thoroughly protectionist import policy.¹⁶⁵ It was easy enough to know what steps Japan should then take: liberalize that market.¹⁶⁶ The path forward in 2016 was less obvious because Japan's economy was already very open,¹⁶⁷ and Japan remains at the forefront of global efforts to expand free trade¹⁶⁸ and promote a rules-based global economic order.¹⁶⁹ Japan has already largely implemented the liberal policy prescription favored by neoclassical economists and a new Plaza Accord is not a realistic idea.¹⁷⁰ Indeed, in 2013 the G-7 countries agreed not to engage in currency manipulation—a sort of anti-Plaza Accord.¹⁷¹ What then can Japan do to diplomatically help her closest ally—almost her suzerain¹⁷²—gain power?

¹⁶² See Mireya Solís, *Reinventing the Trading Nation: Japan, The United States, and The Future of Asia-Pacific Trade*, BROOKINGS (Nov. 2019), <https://www.brookings.edu/research/reinventing-the-trading-nation-japan-the-united-states-and-the-future-of-asia-pacific-trade/> (“[T]he arrival of Donald Trump to the White House brought about a more drastic reorientation, questioning core tenets of postwar American trade leadership.”).

¹⁶³ *Id.*

¹⁶⁴ See Holland, *supra* note 157.

¹⁶⁵ See, e.g., John Zhao, *The Making of Public Policy in Japan: Protectionism in Raw Silk Importation*, 28 *ASIAN SURV.* 926–27 (1988).

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.*

¹⁶⁸ Yasutoshi Nishimura, *Japan Stands for Free Trade*, *WALL ST. J.* (Mar. 9, 2020, 6:55 PM), <https://www.wsj.com/articles/japan-stands-for-free-trade-11583769565>.

¹⁶⁹ Daniel Hurst, *At U. N., Japan's Abe Defends the Rules-Based Order*, *THE DIPLOMAT* (Sept. 27, 2018), <https://thediplomat.com/2018/09/at-un-japans-abe-defends-the-rules-based-order/>.

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.¹⁷³ The President and his base of supporters might have cared little for the eye-rolling at the United Nations General Assembly¹⁷⁴ or at Davos—but many American elites certainly did.¹⁷⁵ Japan’s political elite are too internationalist in their grand strategy to adopt President Trump’s worldview.¹⁷⁶ But there was one controversial element that Japan could

¹⁷³ Brian Bennett et al., *Trump’s ‘America First’ Approach Receives A Cold Reception At Global Summit*, L.A. TIMES (July 8, 2017, 518 PM), <https://www.latimes.com/politics/la-fg-trump-world-20170708-story.html>.

¹⁷⁴ David A. Graham, *The World Just Laughed at Donald Trump*, THE ATLANTIC (Sept. 25, 2018), <https://www.theatlantic.com/international/archive/2018/09/trump-unga-laughter/571267/>.

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.*

¹⁷⁶ See, e.g., Laura Rosenberger, *Can the U.S.-Japan Alliance Survive Trump?*, Foreign Policy (Feb. 9, 2017), <https://foreignpolicy.com/2017/02/09/can-the-u-s-japan-alliance-survive-trump/>. 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.¹⁷⁷ By taking national security restrictions seriously, Japan found a way of taking the President's side diplomatically, scoring political points, and building strategic capital.¹⁷⁸ And, Prime Minister Abe saw a political path forward—a way to make the new restrictions palatable domestically.¹⁷⁹

National security restrictions limit private sector activity.¹⁸⁰ They irk influential and well-connected business leaders and consequently require significant political capital to be passed.¹⁸¹ 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,¹⁸² and naval

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.

¹⁸⁰ See STEVEN CALABRESI, ET AL., *THE U. S. CONSTITUTION & COMPARATIVE CONSTITUTIONAL LAW: TEXTS, CASES & MATERIALS* (2nd ed., 2022).

¹⁸¹ See, e.g., Alan Viard, *The Taxation of Carried Interest: Understanding the Issues*, 1 NAT'L. TAX J. 445 (2008) (noting the political difficulty in closing a loophole that benefits elite corporate players).

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 Sea¹⁸³—provided Japanese leaders with the political cover they needed.¹⁸⁴

Japan and China are right next to each other; they share a common intellectual and even political history.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.¹⁸⁶ Article 9 of Japan's Constitution rules out a Thucydides Trap,¹⁸⁷ meaning,

¹⁸³ *Conflict Tracker: South China Sea*, COUNCIL ON FOREIGN RELATIONS, <https://www.cfr.org/global-conflict-tracker/conflict/territorial-disputes-south-china-sea> (last visited June 10, 2020). The Council on Foreign Relations noted:

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. *Id.*

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

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

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.”).

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/>.

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.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.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.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.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.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.¹⁹³ The Constitution of Japan instead vests power in a

¹⁸⁸ These small, uninhabited islands are claimed by both Japan and China. *How Uninhabited Islands Soured China-Japan Ties*, BBC (Nov. 10, 2014), <https://www.bbc.com/news/world-asia-pacific-11341139>.

¹⁸⁹ Mireya Solis and Shujiro Urata, *Abenomics and Japan's Trade Policy in a New Era*, 13 Asian Econ. Pol. Rev. 106 (2018).

¹⁹⁰ Curtis, *supra* note 184.

¹⁹¹ *Id.*

¹⁹² This illuminating case is well-known because hedge fund Steel Partners failed to win support for a hostile takeover despite offering an incredibly generous premium on the purchase price. Alison Tudor, *Bull-Dog Wins Court Case vs Steel Partners*, REUTERS (June 27, 2007, 11:49 PM), <https://www.reuters.com/article/us-japan-bull-dog-steel-partners/bull-dog-wins-court-case-vs-steel-partners-idUSTKV00352320070628>.

¹⁹³ U.S. Const. arts. I-III.

bicameral parliament,¹⁹⁴ with a symbolic role for the emperor as a unifying figure of national identity.¹⁹⁵

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.¹⁹⁶ 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.¹⁹⁷ Throughout Japanese history, the Emperor has long held this role¹⁹⁸—from the late 8th century to the 1850s,¹⁹⁹ and then again from 1945 to the present.²⁰⁰ 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.²⁰¹ The Emperor, crucial though he or she is to Japan's national religion and identity,²⁰² has not generally held direct political power.²⁰³

The political branch of the Japanese government reflects the will of the Japanese people, represented by the elected members of Japan's Parliament.²⁰⁴ Japan's democracy features strong parties with the authority

¹⁹⁴ NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], ch. IV (Japan).

¹⁹⁵ *Id.* art. I. See also C.D.A Evans & Aviel Menter, *Reinterpreting the Reinterpretation: Collective Self-Defense as Constitutional Fidelity*, 8 PENN. STATE J.L. & INT'L AFF. (not yet published).

¹⁹⁶ Mizobuchi, *supra* note 29.

¹⁹⁷ See generally RICHARD PONSONBY-FANE, *THE IMPERIAL HOUSE OF JAPAN* (1959).

¹⁹⁸ TIMOTHY HOYE, *JAPANESE POLITICS: FIXED AND FLOATING WORLDS*, 78 (1999).

¹⁹⁹ See DONALD KEENE, *EMPEROR OF JAPAN: MEIJI AND HIS WORLD, 1852–1912*, 118 (2005).

²⁰⁰ See generally DOWER, *supra* note 32.

²⁰¹ KEENE, *supra* note 199, at 86.

²⁰² IWAHASHI KATSUJI, *SHINTO: SOUL OF JAPAN* (2017).

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.²⁰⁵ Since the 1950s, Japan's democracy has generally operated under the 1955 system (also called the one-and-a-half-party system).²⁰⁶ This system, envisioned by the political vision of Hatoyama Ichirō (鳩山 一郎),²⁰⁷ places one party, the Liberal Democratic Party (LDP) (自由民主党) at the center of Japanese elected politics.²⁰⁸ 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 1994.²⁰⁹ The LDP is a single party divided into competing factions.²¹⁰ These factions are armed with their own budgets, policy platforms, and internal hierarchy.²¹¹ The LDP is a coalition of these parties-within-a-party, rotating in and out of power.²¹² This internal dynamism helps explain how the LDP has remained in power through so many electoral upheavals.²¹³

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

²⁰⁵ See, e.g., Kajimoto Tetsushi, *LDP Expels Postal Rebel Norota*, JAPAN TIMES (Oct. 29, 2005), <https://www.japantimes.co.jp/news/2005/10/29/national/ldp-expels-postal-rebel-norota>. See also GERALD CURTIS, *THE LOGIC OF JAPANESE POLITICS: LEADERS, INSTITUTIONS, AND THE LIMITS OF CHANGE* (1999).

²⁰⁶ Junnosuke Masumi, *The 1955 System In Japan And Its Subsequent Development*, 28 ASIAN SURV. 286 (1988) (“[I]n 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.”).

²⁰⁷ See *Establishment of 1955 System*, MOD. JAPAN IN ARCHIVES <https://www.ndl.go.jp/modern/e/cha6/index.html> (last visited on Mar. 1, 2022) (“Leading the new [LDP] party as President was Hatoyama Ichiro.”).

²⁰⁸ *Id.*

²⁰⁹ See generally ELLIS KRAUSS & ROBERT PEKKANEN, *THE RISE AND FALL OF JAPAN'S LDP: POLITICAL PARTY ORGANIZATIONS AS HISTORICAL INSTITUTIONS* (2011).

²¹⁰ See, e.g., Gary Cox & Frances Rosenbluth, *The Electoral Fortunes of Legislative Factions in Japan*, 87 AM. POL. SCI. REV. 577 (1993).

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.²¹⁴ They also communicate directly with the Japanese people²¹⁵ and, by sponsoring legislation and electing the Prime Minister,²¹⁶ set the tone for the broad contours of Japanese public policy.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.²¹⁸

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

²¹⁴ Norio, *supra* note 146.

²¹⁵ *Id.*

²¹⁶ *See generally* CURTIS, *supra* note 205.

²¹⁷ Hasegawa, *supra* note 149.

²¹⁸ For a classic analysis, see Akira Kubota, *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. *Id.*

²¹⁹ Kasumigaseki is the portion of Chiyoda in central Tokyo where most of the Ministry buildings are physically located. Norio, *supra* note 146.

²²⁰ The Ministry of Finance (財務省, *Zaimu-shō*) is generally regarded as the most powerful Ministry in Kasumigaseki. Osawa, *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). *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. *Id.*

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. *Id.*

²²² *See* Kubota, *supra* note 218; *see also* Mizobuchi, *supra* note 29.

²²³ Personal interview with Iwao Horii, Parliamentary Vice Minister for Foreign Affairs, Ministry of Foreign Affairs, in Tokyo, Japan (Dec. 13, 2018).

²²⁴ *Id.*

Thatcher Westminster civil service.²²⁵ Japanese civil servants attain their positions by competitive examination and, generally, cannot be removed by politicians except for cause.²²⁶ A panel of past civil servant leaders of a Ministry traditionally work behind the scenes to select each new Vice Minister,²²⁷ with varying degrees of input from the Prime Minister and his staff (often referred to using the metonym “Kantei”).²²⁸

Japan’s independent Ministries hold enormous responsibility and autonomy within Japan’s political system.²²⁹ 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 (Ōkura-shō), founded in the eighth century.²³⁰

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).²³¹ The MoF has a specialized committee to review transactions, like the CFIUS.²³² 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.²³³

²²⁵ See, e.g., Chris Eichbaum & Richard Shaw, *Revisiting Politicization: Political Advisers and Public Servants in Westminster Systems*, 21 GOVERNANCE 337 (2008); see also DVD: *Yes Minister, The Complete Collection* (BBC Home Entertainment 2005).

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.

²³⁰ Curtis Milhaupt, *Managing the Market: The Ministry of Finance and Securities Regulation in Japan*, 30 STAN. J. INT’L L. 423 (1994).

²³¹ See generally Mitsuo Matsushita, *The Antimonopoly Law of Japan*, 11 L. IN JAPAN 57 (1978). For a more comprehensive approach that includes a discussion of private enforcement, see J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604 (1985).

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*

²³⁶ Ian Bremmer, *Shinzo Abe's Big Win in Japan Gives Him Time to Make History*, TIME (Oct. 26, 2017, 6:08 AM), <https://time.com/4998275/abe-win-japan-election-history/> Bremer notes, "[a]fter his party's landslide victory in the parliamentary elections on Oct. 22, Prime Minister Shinzo Abe of Japan is poised to become his country's strongest and most successful leader in the postwar era."

²³⁷ See, e.g., Reiji Yoshida, *Abe moves to boost control of bureaucrats*, JAPAN TIMES (May 27, 2014), <https://www.japantimes.co.jp/news/2014/05/27/national/politics-diplomacy/abe-inaugurate-new-office-exert-control-bureaucrats/>.

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.²⁴⁰

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.²⁴¹ This dynamic had clear political value for the Prime Minister, but also clear diplomatic value for Japan.²⁴²

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.²⁴³

Recent action has made clear just how serious MoF and the Prime Minister were about foreign investment restrictions. On October 18, 2019,

²⁴⁰ *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.*

²⁴¹ 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.”).

²⁴² Crowley notes:

Trump has stopped complaining about America’s security agreement with Tokyo and—unlike the case of South Korea—hasn’t made references lately to the cost of stationing troops and equipment in Japan. Abe has helped explain to Trump how important American assets in Japan are to containing China; U.S. Navy patrols into the contested South China Sea often originate from the Japan’s Yokosuka base. *Id.*

²⁴³ Osawa, *supra* note 103.

the Cabinet approved tighter restrictions on investment in sensitive industries—generally, industries with dual-use potential, like semi-conductors, some industrial chemicals, and electronics.²⁴⁴ 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.²⁴⁵ 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.²⁴⁶ Parliament specifically stated that the Act was passed to help harmonize Japanese and American trade policy.²⁴⁷

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).²⁴⁸ FIRRMA expanded CFIUS’ jurisdiction by expanding the class of covered transactions to include “other investment[s]” in American

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.

²⁴⁵ Tetsushi Kajimoto & Daniel Leussink, *Japan Tightens Rules On Foreign Stakes In 518 Firms, Citing National Security*, REUTERS (May 8, 2020, 1:25 AM), <https://www.reuters.com/article/us-japan-investment-mof/japan-tightens-rules-on-foreign-stakes-in-518-firms-citing-national-security-idUSKBN22K0Z0>.

²⁴⁶ Gearoid Reidy & Shoko Oda, *Japan Moves to Limit Foreign Investment in Half of Listed Firms*, JAPAN TIMES (May 11, 2020), <https://www.japantimes.co.jp/news/2020/05/11/business/economy-business/japan-limit-foreign-investment-listed-firms/#.XujKrGpKhE4>. Reidy & Oda note, “[b]lue chips such as Toyota Motor Corp., Sony Corp. and SoftBank Group Corp. are part of the group operating in core sectors.” *Id.*

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.*

²⁴⁸ See Defense Production Act, 50 U.S.C. § 4565(a)(4)(D)(i)(III).

businesses that afford a foreign person access to material nonpublic technical information in the possession of a U.S. business.²⁴⁹ The NDAA also included the Export Control Reform Act (“ECRA”),²⁵⁰ 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.²⁵¹

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).²⁵² Just like FIRRMA, this amendment significantly expanded the class of covered transactions subject to national security restrictions on export.²⁵³ Similarly, the 2019 FEFTA is directly concerned with restricting access to defense technology.²⁵⁴ Japan is not a significant exporter of arms,²⁵⁵ so the 2019 FEFTA amendment does not focus on

²⁴⁹ *Id.*

²⁵⁰ Consolidated Appropriations Act, 2021, Pub. L. No. 116–260, 134 Stat. 1182. *See also* National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115–91, 131 Stat. 1283.

²⁵¹ 50 U.S.C. § 4817.

²⁵² Katsuyama Masao et al., *Japanese Government Revises Rules on Foreign Investment*, BAKER MCKENZIE (Nov. 14, 2019), <https://www.bakermckenzie.com/en/insight/publications/2019/11/japan-rules-on-foreign-investment> Masao noted, “The Cabinet Office approved a draft Bill on 18 October 2019 that will be presented to the Diet for review during its current session. . . . Once enacted into law, the government’s Bill will amend the Foreign Exchange and Foreign Trade Act.” *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.*

²⁵⁴ Fuminaga Tomoko et al., *Amendments to Japan Foreign Exchange and Foreign Trade Act Now in Effect*, MORGAN LEWIS (May 8, 2020), <https://www.morganlewis.com/pubs/2020/05/amendments-to-japan-foreign-exchange-and-foreign-trade-act-now-in-effect>. Tomoko notes:

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,²⁵⁶ 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).

²⁵⁸ Personal conversation with Mizobuchi Masashi, Spokesman for the Embassy of Japan to the United States, Washington, DC (Jan. 29, 2021).

²⁵⁹ See Katsuyama, *supra* note 252.

²⁶⁰ See Samuel L. Goodman et al., *The South Korea-Japan Trade Dispute in Context: Semiconductor Manufacturing, Chemicals, and Concentrated Supply Chains*, (Oct. 2019) OFF. OF INDUS., WORKING PAPER ID-062, https://usitc.gov/publications/332/working_papers/the_south_korea-japan_trade_dispute_in_context_semiconductor_manufacturing_chemicals_and_concentrated_supply_chains.pdf.

²⁶¹ See Reuters Staff, *Factbox: The High-Tech Materials at the Heart of a Japan-South Korea Row*, REUTERS, (July 2, 2019), <https://www.reuters.com/article/us-southkorea-japan-laborers-factbox/factbox-the-high-tech-materials-at-the-heart-of-a-japan-south-korea-row-idUSKCN1TX12I>.

inspect and verify these exports.²⁶² Because some exports to South Korea were now no longer automatically approved, Japan correspondingly removed South Korea from its trade whitelist.²⁶³

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.²⁶⁴ But the chain of events leading to the whitelist removal began in the United States. President Trump signed into law the 2018 NDAA including FIRRMA and ECRA. FIRRMA and ECRA tightened American export controls on dual-use technology.²⁶⁵ In response, after high-level diplomatic talks between the United States and Japan, Japan modified its own export control laws by amending FEFTA.²⁶⁶ The FEFTA amendment expanded restrictions on two industrial chemicals regularly exported to South Korea.²⁶⁷ Because of the tightened scrutiny, South Korea was removed from the whitelist.²⁶⁸ 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.²⁶⁹ 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.²⁷⁰ At the same time, several Japanese companies have taken steps to retrench internationally for national security reasons—moving manufacturing out of South

²⁶² Personal conversation with Mizobuchi Masashi, Spokesman for the Embassy of Japan to the United States, in Washington, DC (Jan. 29, 2021).

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.

²⁶⁸ Stephen Ezell, *Understanding the South Korea-Japan Trade Dispute and Its Impacts on U.S. Foreign Policy*, <https://itif.org/publications/2020/01/16/understanding-south-korea-japan-trade-dispute-and-its-impacts-us-foreign>.

²⁶⁹ See discussion *supra* Section I.

²⁷⁰ Inoue, *supra* note 128.

Korea²⁷¹ and China,²⁷² refusing takeover bids from Chinese firms,²⁷³ and even taking some sensitive firms private.²⁷⁴ The business community is on notice: Japanese regulators now take national security restrictions seriously.²⁷⁵ If one wants to close a deal, one had better make sure one is prepared to pass through what has become an aggressive and conscientious screening process.²⁷⁶

VI. WHERE WE ARE HEADED

“Better to travel hopefully than to arrive disenchanting.”

- 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.²⁷⁷ If America continues to strictly enforce CFIUS, Section 232 and other measures, it is likely that Japan will continue to follow.²⁷⁸

²⁷¹ Mari Yamiguchi, *Japan Vows Action if S. Korea Hurts Companies in Trade Row*, ASSOCIATED PRESS (July 19, 2019), <https://apnews.com/f590b176cd1a48479961ea2d126808de>. See also Julian Ryall, *Will More Japanese Firms Exit South Korea as Tensions Rise After ‘Comfort Women’ Ruling?*, SOUTH CHINA MORNING POST (Jan. 19, 2021), <https://www.scmp.com/week-asia/economics/article/3118174/will-more-japanese-firms-exit-south-korea-tensions-rise-after> (identifying 45 Japanese companies that have recently transferred operations out of South Korea).

²⁷² Mercy A. Kuo, *Tokyo Prods Japanese Firms to Leave China*, THE DIPLOMAT (May 5, 2020), <https://thediplomat.com/2020/05/tokyo-prods-japanese-firms-to-leave-china/>.

²⁷³ Hiroto, *supra* note 128.

²⁷⁴ Kana Inagaki, *Moment of Truth for Japan’s Relationship with Private Equity*, FIN. TIMES (Mar. 30, 2020), <https://www.ft.com/content/835cc70e-c681-46ca-a161-bb7af2b2097b>.

²⁷⁵ See J. Mark Ramseyer, *Takeovers in Japan: Opportunity, Ideology and Corporate Control*, 35 UCLA L. REV. 1 (1987) (comparing and discussing how this represents a change).

²⁷⁶ Hiroto, *supra* note 128. The challenges for foreign companies are amplified by Japan’s restrictive regulations on legal representation. See J. Mark Ramseyer, *Lawyers, Foreign Lawyers, and Lawyer-Substitutes: the Market for Regulation in Japan*, 27 HARV. INT’L L.J. 499 (1986).

²⁷⁷ See Taniguchi, *supra* note 66.

²⁷⁸ *Id.*

A major factor here is the current presidential administration. President Biden²⁷⁹ is widely considered a trade moderate,²⁸⁰ having voiced his support for several free-trade agreements in the past.²⁸¹ This fundamental difference in trade philosophy will doubtlessly inform his administration,²⁸² which will likely be less rigorous about national security restrictions.²⁸³

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.²⁸⁴ Toughness on China has already emerged as a hot-button political issue in the 2020 campaign.²⁸⁵ National security restrictions code politically somewhat orthogonally to other trade debates,²⁸⁶ 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-

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/2021/01/20/13465c90-5a7c-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."

²⁸¹ See, e.g., Roll Call Vote for H. R. 3450 (North American Free Trade Agreement), U.S. SENATE, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=1&vote=00395.

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, Corporal says, "Biden emphasizes . . . a renewed commitment to reducing trade barriers."

²⁸⁴ See, e.g., Kurt Campbell & Ely Ratner, *The China Reckoning: How Beijing Defied American Expectations*, FOREIGN AFFAIRS (Mar. 2018), <https://www.foreignaffairs.com/articles/china/2018-02-13/china-reckoning>.

²⁸⁵ See, e.g., Jonathan Swan, *Trump 2020 Plan: Hit Biden as "Soft" on China*, AXIOS (Apr. 12, 2020), <https://www.axios.com/trump-campaign-joe-biden-china-0bc24346-0942-4df0-b929-7d9807732e15.html>.

²⁸⁶ Personal interview with Keith Wright, Chairman, New York County Democratic Party, in New York, N.Y. (Feb. 12, 2020).

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.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.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.²⁸⁹

In particular, the elevation of Koizumi Shinjirō (小泉 進次郎)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),²⁹¹

²⁸⁷ See Robert D. Blackwill, *Implementing Grand Strategy Toward China: Twenty-Two U.S. Policy Prescriptions* at 23, 35, COUNCIL ON FOREIGN RELATIONS, Report No. 85 (Jan. 2020), https://cdn.cfr.org/sites/default/files/report_pdf/CSR85_Blackwill_China.pdf.

²⁸⁸ See generally NISSAN INSTITUTE/ROUTLEDGE JAPANESE STUDIES SERIES, *THE DEMOCRATIC PARTY OF JAPAN IN POWER: CHALLENGES AND FAILURES* (Yoichi Funabashi, Koichi Nakano, 1st ed. 2016).

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. *Id.*

²⁹⁰ Koizumi Shinjirō is the second son of former Prime Minister Koizumi Junichiro. See generally Asako Yasushi, et al., *Dynastic 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. *Id.* Koizumi was appointed to the Cabinet for the first time in 2019, serving as Minister of Environment. *Id.* It is common in Japan for Members of Parliament to succeed a family member to a seat in the Diet. *Id.*

²⁹¹ Koizumi Junichiro served as Prime Minister of Japan from 2001 to 2006. See Reiji Yoshida, *Junichiro Koizumi: Maverick Reformer Left Japan All Shook Up*, JAPAN TIMES (Apr. 25, 2019), <https://www.japantimes.co.jp/news/2019/04/25/national/politics-diplomacy/junichiro-koizumi-maverick-reformer-left-japan-shook/>. An iconoclastic, charismatic, vaguely populist but quite conservative politician, Koizumi carved a place in Japanese political history with his flamboyant style and

is already one of the most popular politicians in Japan.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.²⁹³ The other names often mooted for Prime Minister are either unlikely (Deputy Prime Minister Asō Tarō,²⁹⁴ or LDP Secretary-General Nikai Toshihiro)²⁹⁵ or would represent more continuity, as Prime Minister Suga Yoshihide²⁹⁶ has with Prime Minister Abe (former LDP General Secretary Kishida

direct appeals to the Japanese electorate. *Id.* Koizumi oversaw several privatizations and major reforms, doing constant battle with Japan's status-quo-oriented bureaucracy. *Id.*

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ Asō Tarō served as Prime Minister of Japan from 2008 to 2009. *See* Jun Hongo, *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. *Id.* Conservative, with strong back-room support, Asō has long commanded the support of a respectable, rightish faction. *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. *Id.*

²⁹⁵ *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. *Id.* The son of a local politician, Nikai started in local politics before moving to the Diet. *Id.* With close ties to his district granting him unusual longevity, Nikai has built the third largest LDP faction. *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. *Id.* Although a kingmaker, Nikai is thought unlikely as a candidate to succeed Prime Minister Abe because of his age—he is now 81. *Id.*

²⁹⁶ *See generally* Hashimoto Goro, *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. *Id.* He previously served as Chief Cabinet Secretary, a powerful coordinating role within the Cabinet. *Id.* Suga is a serious, experienced politician. *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. *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. *Id.*

Fumio,²⁹⁷ and Minister of Defense Kono Taro,²⁹⁸ are also in this vein). By contrast, Koizumi Shinjiro is an independent,²⁹⁹ with appeal across LDP factions and, like his father, likely might try to convert public approval into policy change.³⁰⁰

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-ruling-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),³⁰¹ 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,³⁰² and that makes them more likely to support restrictions.

In politics, predictions are always speculative.³⁰³ 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.³⁰⁴

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.³⁰⁵ Japan is an

³⁰¹ See Daimon Sayuri, *The All-Powerful Voice of Corporate Japan*, JAPAN TIMES (Jun. 16, 2009), <https://www.japantimes.co.jp/news/2009/06/16/reference/the-all-powerful-voice-of-corporate-japan/> (noting Keidanren is a common shorthand for the Japan Business Federation, a lobbying group for large firms roughly analogous to America’s Business Roundtable).

³⁰² See Norio, *supra* note 146.

³⁰³ See, e.g., Arthur Henning, *Dewey Defeats Truman*, CHI. DAILY TRIB. (Nov. 2, 1948). See also Joshua Clinton, *Polling Problems and Why We Should Still Trust (Some) Polls*, VAND. PROJECT UNITY & AM. DEMOCRACY (Apr. 2021), <https://www.vanderbilt.edu/unity/2021/01/11/polling-problems-and-why-we-should-still-trust-some-polls/>.

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.³⁰⁶ Japanese consumers save at high rates,³⁰⁷ but the Japanese market offers few attractive options. Japanese real estate, amazingly, yields negative returns over time,³⁰⁸ and the stock market has been flat at best.³⁰⁹ Most Japanese individuals and businesses with an appetite for risk aim to invest their money abroad, in high-growth markets like China,³¹⁰ Vietnam,³¹¹ Thailand,³¹² and the United States.³¹³ Foreign direct investment targeted at Japan has been dwindling since the collapse

³⁰⁶ See generally Kenneth Froot, *Japanese Foreign Direct Investment 1–7* (Nat'l Bureau of Econ. Rsch., Working Paper No. 3737, 1991), https://www.nber.org/system/files/working_papers/w3737/w3737.pdf.

³⁰⁷ Jesper Koll, *Japan, Savings Superpower of the World*, JAPAN TIMES (Sept. 2, 2018), <https://www.japantimes.co.jp/opinion/2018/09/02/commentary/japan-commentary/japan-savings-superpower-world/#.Xugl82pKhE4>.

³⁰⁸ Freakonomics Radio, *Why Are Japanese Homes Disposable?*, FREAKONOMICS (Feb. 26, 2014), <https://freakonomics.com/podcast/why-are-japanese-homes-disposable-a-new-freakonomics-radio-podcast-3/>.

³⁰⁹ Masayuki Tamura, *30 Years Since Japan's Stock Market Peaked, Climb Back Continues*, NIKKEI ASIA (Dec. 29, 2019, 2:37 JST), <https://asia.nikkei.com/Spotlight/Datawatch/30-years-since-Japan-s-stock-market-peaked-climb-back-continues>.

³¹⁰ See WAYNE MORRISON, CONG. RES. SERV., RL33544, CHINA'S ECONOMIC RISE: HISTORY, TRENDS, CHALLENGES, AND IMPLICATIONS FOR THE UNITED STATES 4 (2019) (depicting figures on page four contrasting growth in Chinese and Japanese GDP per capita adjusted for PPP).

³¹¹ Vien Nhu, *Foreign Direct Investment Keeps Flowing to Vietnam*, VIET. INSIDER (Mar. 24, 2020), <https://vietnaminsider.vn/foreign-direct-investment-keeps-flowing-to-vietnam/> (“[A Japan External Trade Organization] survey released last February showed that Vietnam is the top destination of Japanese enterprises this year.”).

³¹² Sakai Soji, *Expectations of Japanese Companies in Thailand*, THAI. BD. OF INV. (Mar. 19, 2018), https://www.boi.go.th/index.php?page=boi_presentation_detail&topic_id=118803.

³¹³ *Japan-U.S. Investment Report*, JETRO (Jun. 18, 2019), <https://www.jetro.go.jp/usa/japan-us-investment-report-2019.html> (“Year-after-year since 1990, Japanese direct investment in the U.S. has steadily grown.”).

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

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

³¹⁴ See, e.g., Shigenori Shiratsuka, *The Asset Price Bubble in Japan in the 1980s: Lessons for Financial and Macroeconomic Stability*, BIS PAPERS NO. 21, BANK FOR INT’L SETTLEMENTS 42-62 (2003), <https://www.bis.org/publ/bppdf/bispap21e.pdf>. The “asset price bubble” refers to overvaluation at the peak of Japan’s economic expansion and ensuing economic collapse as the “asset price bubble.” *Id.*

³¹⁵ See, e.g., Robert Lawrence, *Japan’s Low Levels of Inward Investment: The Role of Inhibitions on Acquisitions*, in FOREIGN DIRECT INV, NAT’L BUREAU OF ECON. RSCH. (Kenneth Froot ed., 1992), <https://www.nber.org/chapters/c6535.pdf>.

³¹⁶ *Id.* at 86.

³¹⁷ *Id.* at 97.

³¹⁸ See, e.g., Prableen Bajpai, *The 5 Fastest Growing Economies In The World*, NASDAQ (Jun. 27, 2019, 2:06 PM), <https://www.nasdaq.com/articles/the-5-fastest-growing-economies-in-the-world-2019-06-27> (identifying Bangladesh and India as two of the fastest growing economies).

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

³²⁰ *Id.* (showing Thailand behind Vietnam but still in the top 10).

³²¹ *Id.* (showing India second in the world).

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).

³²³ *Id.* (“Expected Risk”).

³²⁴ CAPGEMINI, WORLD WEALTH REPORT 2019 13 fig.7, <https://worldwealthreport.com/wp-content/uploads/sites/7/2019/07/World-Wealth-Report-2019.pdf> (showing the diversified breakdown of financial assets by high net worth individuals, including extensive safe-haven assets).

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

Japan is home to many of the world's oldest companies,³²⁷ and the conservative management philosophy³²⁸ of many blue-chip Japanese corporate executives³²⁹ that suits the needs of safe-haven investors.³³⁰ American investors looking for safe havens often direct their interest to Europe—to places like Switzerland,³³¹ Lichtenstein,³³² and other nations.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.³³⁴ The collapse in

³²⁵ *Id.*

³²⁶ See generally Sean Creehan & Paul Tierno, *Japan's Complicated Role as a Global Safe Haven*, Fed. Reserve Bank of S.F. (June 29, 2018), <https://www.frbsf.org/banking/asia-program/pacific-exchanges-podcast/japans-complicated-role-as-a-global-safe-haven/>.

³²⁷ Bryan Lufkin, *Why So Many of the World's Oldest Companies are in Japan*, BBC (Feb. 12, 2020), <https://www.bbc.com/worklife/article/20200211-why-are-so-many-old-companies-in-japan>.

³²⁸ See, e.g., Nigel Holden, *Why Globalizing with a Conservative Corporate Culture Inhibits Localization of Management: The Telling Case of Matsushita Electric*, 1 INT'L J. CROSS CULT. MGMT. 53 (2001).

³²⁹ Kazuaki Nagata, *Foreign Talent Eager to Work for Japanese Firms, But Staid Office Culture a Hindrance*, JAPAN TIMES (Dec. 31, 2018), <https://www.japantimes.co.jp/news/2018/12/31/national/foreign-talent-eager-work-japanese-firms-staid-office-culture-hindrance/#.XujdEGpKhE4>. See, e.g., Yingyan Wang, *Mission-Driven Organizations in Japan: Management Philosophy and Individual Outcomes*, 1 J. BUS. ETHICS 111 (2011).

³³⁰ See Creehan & Tierno *supra*, note 326.

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/aca58ee7493653c6a556b8c72afbd91f> (“Switzerland remained the largest offshore center, domiciling \$2.3 trillion in personal wealth in the country.”).

³³² Andrew Henderson, *Banking and Foundations in Liechtenstein: “A Safe Haven, Not a Tax Haven”*, NOMAD CAPITALIST, <https://nomadcapitalist.com/2015/03/18/liechtenstein-banking-foundations-tax-haven/> (last updated Aug. 19, 2021, 8:20 AM).

³³³ Melissa Parietti, *The Top 10 European Tax Havens*, INVESTOPEDIA, <https://www.investopedia.com/articles/wealth-management/121515/top-10-european-tax-havens.asp> (last updated Apr. 30, 2021).

³³⁴ Bethany Allen-Ebrahimian, *Beijing's Bullying Has Ruined Its Relationship with Sweden*, AXIOS (Apr. 29, 2020), <https://www.axios.com/china-sweden-relationship-afe1cd3b-db50-4d2f-9ac6-d66b67c4b7f6.html>.

diplomatic relations between China and Sweden³³⁵ was followed closely in Southeast Asia and illustrates this point.³³⁶

While Japan is proximate to Southeast Asia, it is also accessible, reliable, conservative, and well-governed.³³⁷ Southeast Asian investors are therefore often very interested in acquiring Japanese assets.³³⁸ Some of these assets are in the energy and infrastructure sectors.³³⁹ Insofar as national security restrictions obstruct these acquisitions, investors from Southeast Asia (and counsel representing those investors) will need to start looking elsewhere.³⁴⁰

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.³⁴¹ The Japanese firm quickly found a Chinese buyer for the divested subsidiary,³⁴² but the MoF blocked the transaction on national security grounds.³⁴³ Worried about American antitrust pressure, the American acquisition also fell through.³⁴⁴ This recent example illustrates

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>.

³³⁷ See generally *Freedom in the World 2019: Japan*, FREEDOM HOUSE, <https://freedomhouse.org/country/japan/freedom-world/2019> (last visited Jan. 10, 2021).

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.³⁴⁵ Japan's policy changes are a small part of this global movement.³⁴⁶ However, the consequences are likely to be significant—both for the world economy³⁴⁷ and for cross-border transactional practitioners.³⁴⁸

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.³⁴⁹ Instead, South Korea was only collaterally harmed. The underlying policy was part of a much broader change in Japanese trade policy.³⁵⁰ As the United States has tightened national security restrictions on trade, capital, and investment, Japan has tightened her restrictions to match.³⁵¹ Dual-use technology is one of the first places we would expect to see these policy changes—and,

³⁴⁵ See, e.g., Joseph E. Stiglitz, *The End of Neoliberalism and the Rebirth of History*, COLUM. BUS. SCH. IDEAS & INSIGHTS (Nov. 6, 2019), <https://www8.gsb.columbia.edu/articles/chazen-global-insights/end-neoliberalism-and-rebirth-history>; see also Ian Gladding, *Rise of Economic Nationalism and Its Implications*, LEWIS UNIV. EXPERTS BLOG (Apr. 25, 2018), <https://www.lewisu.edu/experts/wordpress/index.php/rise-of-economic-nationalism-and-its-implications/>.

³⁴⁶ See Gladding, *supra* note 345.

³⁴⁷ Kuhlmann, *supra* note 341.

³⁴⁸ See *supra*, text accompanying note 340.

³⁴⁹ Hosokawa Masahiko, *A Warning to the Republic of Korea (ROK), Which Betrayed Japan's Trust: What is the Main Factor Causing the Japan-ROK Export Control Issue to Get Complicated?*, DISCUSS JAPAN (Nov. 5, 2019), <https://www.japanpolicyforum.jp/economy/pt201911050913509877.html>.

³⁵⁰ *Id.*

³⁵¹ See discussion *supra* Section VI.B.

as predicted, dual-use exports were one of the first sectors targeted.³⁵² It wasn't personal.³⁵³ For South Korea and Japan, perhaps that suggests a road toward smoother relations.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.³⁵⁵ The uncertainty of risk allocation in project finance³⁵⁶ must already contend with the complexity of arbitration,³⁵⁷ capital markets, and the shifting winds of exchange rates.³⁵⁸ Now, these projects must increasingly navigate the byzantine politics of national security clearances.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.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.

³⁵² *Id.*

³⁵³ Masahiko, *supra* note 349.

³⁵⁴ See, e.g., Kathryn Botto, *Overcoming Obstacles to Trilateral U.S.-ROK-Japan Interoperability*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Mar. 18, 2020), <https://carnegieendowment.org/2020/03/18/overcoming-obstacles-to-trilateral-u.s.-rok-japan-interoperability-pub-81236>.

³⁵⁵ MAJOR, LINDSEY & AFRICA, LAW FIRM PRACTICE AREA SUMMARY 3 (2017).

³⁵⁶ *Id.* at 6.

³⁵⁷ See generally W. MICHAEL REISMAN ET. AL., INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS, AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES (2016).

³⁵⁸ Brown, *supra* note 46.

³⁵⁹ See discussion *supra* Sections VI.B.

³⁶⁰ RICHARD HAAS, THE WORLD: A BRIEF INTRODUCTION (2020).

