The overview of the Economic Security Promotion Bill and its impact on business

February 28, 2022

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Shintaro Okawa

※ This is an English translation of a presentation material in Japanese. Please refer to the Japanese version for more details.
Purpose of this presentation material

- The Cabinet approved the Economic Security Promotion Bill (“ESPB”, the official name: a bill to promote security by taking economic measures in an integrated manner) on February 25, 2022. It is expected to be approved in this ordinary Diet.

- This presentation material provides an overview of the ESPB and explains the key issues that may be discussed in the Diet and enactment process of cabinet orders and ministerial orders.

- Please note that at the time of preparation of this material, although the text of the ESPB has been published, the Diet has not yet deliberated on the ESPB, nor have cabinet orders and ministerial orders been published.

- Please contact the below address for any questions regarding this material.

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Background to the ESPB

Basic Policy 2021 and Expert meetings for economic security legislation

- The 4 main areas of the ESPB were already formed in **June 2021** in the Basic Policy for Economic and Fiscal Management and Reform 2021 (Decided by the Cabinet on June 18, 2012) (“Basic Policy 2021”).

- The government has established the Expert Committee on Economic Security Legislation (“Committee”) under the Minister of Economic Security. The Committee’s meetings have been held for 4 times. The ESPB was formulated in accordance with the recommendation paper of the Committee which was released on **February 1, 2022**.
Upcoming schedule for the ESPB

Assuming that the ESPB will be approved in this Diet, the implementation dates are as follows. In general, the promotional part will come into effect earlier and the regulatory part will be later.

- **Resilient Supply Chain:** Within 9 months from the promulgation
- **Security of Critical Infrastructure:** Within 1 year and 6 months (for some provisions, within 1 year and 9 months) from the promulgation
- **Reinforcement of Technological Base:** Within 9 months from the promulgation
- **Secret Patents:** Within 2 years from the promulgation

[Jan 17, 2022]
Commencement date of the ordinary Diet

[June 15, 2022]
The estimated final date of the ordinary Diet

[March 2023? (within 9 month from the promulgation)]
Formulation of cabinet orders / ministerial orders and public comment process

[Dec 2023? (within 1 year and 6 months from the promulgation)]
Resilient Supply Chain
Partial enforcement date

[March 2024? (within 1 year and 9 months from the promulgation)]
Resilient Supply Chain / Reinforcement of Technological Base
Enforcement Date

[June 2024? (within 2 years from the promulgation)]
Secret Patents
Enforcement date

[Feb 25, 2022]
The ESPB approved by the Cabinet

[March 2023? (within 1 year and 6 months from the promulgation)]
Security of Critical Infrastructure
Full enforcement date

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Overview of the Economic Security Promotion Bill and its impact on business
The ESPB is composed of 4 areas. Resilient Supply Chain and Reinforcement of Technological Base are *promotional* in nature, while Security of Critical Infrastructure and Secret Patents are *regulatory* in nature.

### The structure of the articles of ESPB

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Article</th>
<th>Section</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1 - 5</td>
<td>General provisions</td>
</tr>
<tr>
<td>2</td>
<td>6 - 48</td>
<td>Resilient Supply Chain</td>
</tr>
<tr>
<td>3</td>
<td>49 - 59</td>
<td>Security of Critical Infrastructure</td>
</tr>
<tr>
<td>4</td>
<td>60 - 64</td>
<td>Reinforcement of Technological Base</td>
</tr>
<tr>
<td>5</td>
<td>65 - 85</td>
<td>Secret Patents</td>
</tr>
<tr>
<td>6</td>
<td>86 - 91</td>
<td>Miscellaneous</td>
</tr>
<tr>
<td>7</td>
<td>92 - 99</td>
<td>Penalties</td>
</tr>
</tbody>
</table>
Features of the ESPB

- The ESPB delegates details of the regulation to cabinet orders and ministerial orders to enable swift responses to changes in the security environment.

- In order to maintain the legislature’s control over cabinet orders and ministerial orders, the government is supposed to formulate **basic policies and guidelines** in line with the requirements provided in the ESPB, and formulate/execute cabinet orders and ministerial orders in accordance with such policies and guidelines.
(For reference) Process of legislations in Japan

Approval by the Cabinet = Submission to the Diet

Approval by the Diet

Approval of the Cabinet Order / Ministerial Order

Enforcement Date

February 25, 2022 for the ESPB

No public comment for the laws

Public comment process

In general, no substantial changes will be made in a public comment process. Need to make inputs in the earlier stages.
(For reference) Structure of the Japanese law

- Law (法律)
- Cabinet Order (政令)
  - Ministerial Order (省令)
    - Notice (告示)
  - Ministerial Order (省令)
    - Notice (告示)
- Cabinet Order (政令)
  - Ministerial Order (省令)
    - Notice (告示)
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Outline of Resilient Supply Chain

1. Establishment of Basic Policy (Article 2)
2. Establishment of Basic Guidelines for Ensuring Stable Supply (Article 6)
3. Designation of Specific Important Goods (Article 7)
4. Establishment of the Policy for Measures to Ensure Stable Supply (Article 8)
5. Preparation and submission of the supply security plan (Article 9, Paragraph 1)
6. Certification of the Supply Security Plan (Article 9, Paragraph 4)
7. Implementation of various support measures

By the government (= the Cabinet approval)

Designated by a cabinet order (= the Cabinet approval)

For each Specific Important Goods, by a minister in charge

Certified by a minister in charge

Prepared and submitted by private business operators that seek supports under the ESPB
Designation of Specific Important Goods

(1) Necessity and broad dependency of goods

Important goods (including programs) that are indispensable for the survival of the nation or on which the life of the nation or economic activities at large depend or Raw materials, parts, facilities, equipment, devices, or programs necessary for their production (“Raw Materials and Parts”)

(2) Necessity of prior actions to economic statecraft

Things that, in the case of excessive dependence or potential dependence on foreign sources, in order to prevent a situation in which the safety of the nation and its citizens is impaired due to actions taken by foreign forces, measures shall be taken to strengthen the their supply chain, such as (i) development of a production base for the goods and Raw Materials and Parts necessary for their production (hereinafter referred to as “Goods”), diversification of supply sources, stockpiling, or introduction, development, or improvement of production technologies, or (ii) reduction of dependence on the Goods by rationalizing the use of the Goods, developing alternatives, or taking other measures to reduce dependence on the Goods.

- Goods fulfilling (1) and (2) are to be designated as Specific Important Goods by a cabinet order.
- Although we need to wait for a cabinet order for concrete items, the Basic Policy 2021 and the Committee have referred to semiconductors, important minerals including rare earths, batteries, and pharmaceuticals.
8 support measures for Specific Important Goods

i. Special Provisions for Operations of Japan Finance Corporation
   - Facilitation of fund procurement through two-step loans

ii. Special Provisions of the Small and Medium Business Investment and Consultation Corporation Act
   - Expansion of the scope of underwriting of shares and other equities by the Small and Medium Business Investment and Consultation Corporation

iii. Special Provisions of the Small and Medium Enterprise Credit Insurance Act
   - Expansion of guarantee limits for business fund borrowed by SMEs

iv. Opinion Statement by the JFTC
   - Hearing of opinions from the JFTC prior to the preparation and submission of a joint supply security plan by competitors

v. Request to Conduct Ex Officio Investigation of AD / CVD / SG
   - A system to request the minister in charge to conduct an ex officio investigation when there is sufficient evidence to take anti-dumping, countervailing duty and safeguard measures

vi. Subsidy through a newly established fund at the Stable Supply Securing Support Entities ("SSE")

vii. Subsidy through a newly established fund at the Stable Supply Securing Support Independent Administrative Institutions ("SSIAI")
   - Subsidies provided by the funds newly established at the SSE and SSIAI

viii. Support for Specific Important Goods for which special measures need to be taken
   - Special measures, such as stockpiling or selling by standard price at times of price hikes of Specific Important Goods of particular importance
(i) Special Provisions for Operations of Japan Finance Corporation

Establishment of guidelines
(Article 13, Paragraph 1)
Approval of Business Implementation Policy
(Article 15, Paragraph 2)
Designation of Designated Financial Institutions
(Article 16, Paragraph 1)

Establishment of Business Implementation Policy
(Article 15, Paragraph 1)

Establishment of Business Rules
(Article 16, Paragraph 2)

Implementation of the business
based on the Certified Supply Security Plan

GoJ

FILP loans

Japan Finance Corporation

Conclusion of agreement

Designated Financial Institutions

loans

Certified Business Operators
(ii) Special Provisions of the Small and Medium Business Investment and Consultation Corporation Act

**Principle**

Companies with capital of 300 million yen or less are the target of new investments by the Small and Medium Business Investment and Consultation Corporation.

ESPB introduces an exception for the case where a company implements the Certified Supply Security Plan.

**Exception**

The following cases will be added to the target of new investment by the Small and Medium Business Investment and Consultation Corporation:

- When establishing a company (kabushiki-kaisha) with a capital exceeding 300 million yen.
- When a small or medium-sized company (kabushiki-kaisha) with capital exceeded 300 million yen issues shares and other equities.
### (iii) Special Provisions of the Small and Medium Enterprise Credit Insurance Act

#### Separate limit of ordinary insurance, unsecured insurance, and special small-lot insurance

<table>
<thead>
<tr>
<th>Insurance limit</th>
<th>Ordinary insurance</th>
<th>Unsecured insurance</th>
<th>Special small-lot insurance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cooperation</td>
<td>200 million yen</td>
<td>80,000,000 yen</td>
<td>12,500,000 yen</td>
</tr>
<tr>
<td>Association</td>
<td>400 million yen</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

#### Expansion of limit of overseas investment-related insurance and new business development insurance

<table>
<thead>
<tr>
<th>Insurance limit</th>
<th>Cooperation</th>
<th>Association</th>
</tr>
</thead>
<tbody>
<tr>
<td>Overseas investment-related insurance</td>
<td>200 million yen</td>
<td>400 million yen</td>
</tr>
<tr>
<td>New business development insurance</td>
<td></td>
<td>600 million yen</td>
</tr>
</tbody>
</table>
(iv) Opinion Statement by the JFTC

- A minister in charge can ask the JFTC’s opinion prior to the certification of the Supply Security Plan and the JFTC can provide opinion statements after the certification.
- While the ESPB allows more than two companies in the same industry jointly prepare and submit the Supply Security Plan, the JFTC's opinion will be sought to prevent violations of the Antimonopoly Act of Japan.
- This support measure is provided so that SMEs with niche technology that form supply chains of Specific Important Goods can make stable joint applications.

However, the following issues should be noted.

- The JFTC is not obligated to automatically refrain from enforcing the Antimonopoly Law of Japan by providing or not providing the opinion statements.
- This is only the opinion of the JFTC, a Japanese authority, and competition authorities in other countries may have different opinions.
(v) Request to Conduct Ex Officio Investigation of AD / CVD / SG

- The minister in charge may request an investigation if he or she believes that there is sufficient evidence to take anti-dumping (AD), subsidy countervailing duty (CVD) or safeguard (SG) measures.
- An investigation may be initiated ex officio when there is sufficient evidence of substantial damage to Japanese industry without requests by business operators. The ESPB allows the minister in charge to request a minister in charge of the investigation to conduct an ex officio investigation.
- Article 48, Paragraph 2 of the ESPB states that a minister in charge may request individuals, corporations or other organizations engaged in the business of producing, importing or selling Specific Important Goods to submit reports or materials on matters necessary for the request for investigation. However, answer to such request is mere obligation to make effort with no penalty.

It is not clear if this provision works from the following reasons:
- The effectiveness of the request for the reports/materials is unclear because it is not an obligation with penalty.
- It is extremely rare to consummate ex officio investigations in other countries.
(vi)(vii) Subsidy through funds at SSE/SSIAI

The reason why similar systems have been established in parallel is...

Newly established fund for each entity
Support for SIGs for which special measures need to be taken

Specific Important Goods + Difficult to ensure stable supply by (i) to (vii).

Designation

Specific Important Goods for which special measures need to be taken to ensure stable supply

Those specific as essential for the survival of the people by a cabinet order

If outsourcing of production is included in “measures necessary to ensure stable supply”, GOCO (Government Owned Contractor Operated) style production can be introduced.

Stockpiling, international cooperation, encouragement to reduce use, and other measures necessary to ensure stable supply

When SIGs prices have risen due to shortages caused by foreign actions, the government can transfer/lease the SIGs with necessary conditions at the standard price before the price rise. = Additional measures can be taken
### Report request and on-site inspection

- Article 48 allows reporting request and on-site inspection by the government in relation to the Resilient Supply Chain part (Chapter 2 of the ESPB).

<table>
<thead>
<tr>
<th>#</th>
<th>Scope of measures</th>
<th>Target of the measure</th>
<th>Required actions</th>
<th>Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Para 1</td>
<td>To the extent necessary to implement the Resilient Supply Chain part</td>
<td>Individuals, corporation or other organizations engaged in production, import or sale of goods pertaining to the business under the jurisdiction of a minister in charge</td>
<td>Submission of necessary reports or materials concerning the status of production, import, sale, procurement or storage of the goods pertaining to the business under the jurisdiction of a minister in charge or raw materials necessary for their production</td>
<td>Effort obligation No penalties</td>
</tr>
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<tr>
<td></td>
<td>To the extent necessary to implement the Measure No.(v)</td>
<td>Individuals, corporation or other organizations engaged in production, import or sale of goods pertaining to the business under the jurisdiction of a minister in charge</td>
<td>Submission of necessary reports or materials concerning matters necessary for the Measure No.(v)</td>
<td></td>
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<tr>
<td>Para 4</td>
<td>To the extent necessary to implement the Resilient Supply Chain part</td>
<td>Certified Business Operators</td>
<td>Submission of necessary reports or materials concerning the status of implementation of the Certified Supply Security Plan and other necessary matters</td>
<td>Maximum 300,000 yen fine</td>
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<tr>
<td></td>
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<tr>
<td></td>
<td>To the extent necessary to implement the Resilient Supply Chain part</td>
<td>Designated Financial Institutions</td>
<td>Submission of necessary reports or materials concerning the Supply Securing Promotion Services On-site inspection, and questions and inspection of books, documents and other objects concerning the Supply Securing Promotion Services</td>
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<td></td>
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</tr>
<tr>
<td>Para 5</td>
<td>To the extent necessary to implement the Resilient Supply Chain part</td>
<td>Stable Supply Securing Support Entities</td>
<td>Submission of necessary reports or materials concerning the Supply Securing Support Services On-site inspection, and questions and inspection of books, documents and other objects concerning the Supply Securing Support Services</td>
<td>Maximum 300,000 yen fine</td>
</tr>
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<tr>
<td></td>
<td>To the extent necessary to implement the Resilient Supply Chain part</td>
<td>Managers to whom the government outsourced operation of facilities by Article 45</td>
<td>Submission of necessary reports or materials concerning the Facility Management Services On-site inspection, and questions and inspection of books, documents and other objects concerning the Facility Management Services</td>
<td></td>
</tr>
</tbody>
</table>

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Outline of Security of Critical Infrastructure

- Establishment of Basic Policy (Article 2)
- Basic Guidelines for Specific Social Infrastructure Services (Article 49)
- Designation of Specific Critical Infrastructure Business (Article 50)
- Designation of Specific Critical Infrastructure Providers (Article 50)

By the government (= the Cabinet approval)
Designated by a cabinet order (= the Cabinet approval)
For each SCIB, designated by a minister in charge

Subject to prior notification obligation
Overview of prior notification system

Specific Critical Infrastructure Provider (to be designated individually)

Introduction of Specific Important Equipment (SIE to be specified in a ministerial order)

OR

Consignment of maintenance, management and operation of SIE (Limited to services specified in a ministerial order as Important Maintenance Management)

Prior notification is required before such introduction and consignment
Scope of regulated providers (SCIP)

- Many of the substantive details are delegated to cabinet orders and ministry orders, and it is difficult to assess the impact on each company from the text of the ESPB.
- We need to keep an eye on the process for cabinet orders and ministerial orders after the ESPB is approved in the Diet.

- General framework in the bill
  - Specific scope to be specified in a cabinet order

- Designation criteria to be specified in a ministerial order
  - Providers to be designated by a minister in charge
Scope of regulated business (SCIB)

- The general framework of the Specific Critical Infrastructure Business is provided in the ESPB. However, the details are to be determined by a cabinet order.

<table>
<thead>
<tr>
<th>#1</th>
<th>Electricity business</th>
</tr>
</thead>
<tbody>
<tr>
<td>#2</td>
<td>Gas business</td>
</tr>
<tr>
<td>#3</td>
<td>Petroleum refining and oil/gas import business</td>
</tr>
<tr>
<td>#4</td>
<td>Water supply business</td>
</tr>
<tr>
<td>#5</td>
<td>Railroad business</td>
</tr>
<tr>
<td>#6</td>
<td>Cargo trucking business</td>
</tr>
<tr>
<td>#7</td>
<td>Freight forwarding business and tramper service business</td>
</tr>
<tr>
<td>#8</td>
<td>International air transportation business and domestic scheduled air transportation business</td>
</tr>
<tr>
<td>#9</td>
<td>Airport business and airport concession business</td>
</tr>
<tr>
<td>#10</td>
<td>Telecommunication business</td>
</tr>
<tr>
<td>#11</td>
<td>Core broadcasting business</td>
</tr>
<tr>
<td>#12</td>
<td>Postal business service</td>
</tr>
<tr>
<td>#13</td>
<td>Finance Business: (i) banking business, (ii) insurance business, (iii) financial instruments exchange, financial instruments debt underwriting business, and Type I financial instruments business, (iv) trust business, (v) fund clearing business and third-party prepaid means issuing business, (vi) business of the Deposit Insurance Corporation and the Agricultural and Fishery Cooperative Savings Insurance Corporation, (vii) operations of book-entry transfer institutions such as the Japan Securities Depository Center, (viii) business of electronic claims recording institutions such as Japan Electronic Claims Institution.</td>
</tr>
<tr>
<td>#14</td>
<td>Issuer of credit cards</td>
</tr>
</tbody>
</table>
Contents of the prior notification

- The following items shall be included in the prior notification.
- The burden greatly differs depending on the extent to which information on the parts incorporated in the equipment and the information on the subcontractors needs to be described. However, their details will be specified in a ministerial order.

i. Outline of the Specific Important Equipment (“SIE”)
ii. In the case of introduction of SIE, the following items:
   - Contents and timing of introduction
   - Matters concerning suppliers of SIE specified by a ministerial ordinance
   - Matters concerning facilities, equipment, devices, or programs that constitute a part of the SIE and that may be used as a means of Specific Disturbance (foreign actions with respect to the introduction of SIE or the consignment of IMM that interfere with the stable supply of SCIB) specified by a ministerial ordinance
iii. In the case of consignment of Important Maintenance Management (“IMM”) of SIE, the following matters
   - Contents and timing or period of consignment of IMM
   - Matters concerning counter party of consignment of IMM specified by a ministerial ordinance
   - Matters concerning subcontracts specified by a ministerial ordinance in the case where the counter party of consignment of IMM consign IMM to another business operator
iv. Other matters concerning introduction of SIE or consignment of IMM specified by a ministerial ordinance
Flow of prior notification

- The system is similar to FEFTA, but there are some differences (see the next slide).
- The notifying entity is the Specific Critical Infrastructure Business Operator, not SIE suppliers or service providers.

Prior Notification

- Extension of review period

Recommendations for change or suspension

- Order for change or suspension
  - not accepted
  - default

Penalties

- accept
- default

- The waiting period is, in principle, 30 days but it can be shortened.
- The waiting period may be extended to 4 months at maximum.

- Recommendations can be issued when there is a significant risk that SIEs or its service are used as a means of the Specific Disturbance.

- Imprisonment with a maximum of two years or a fine of not more than one million yen, or both.

Recommendations and orders could be issued even after the clearance in the case where international situation or others have changes.
## Comparison with prior notification of FEFTA

<table>
<thead>
<tr>
<th>FEFTA (Foreign Exchange and Foreign Trade Act)</th>
<th>ESPB</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearing of the committee’s opinion is required before making recommendations</td>
<td>Hearing of the committee’s opinion is <strong>NOT</strong> required before making recommendations</td>
</tr>
<tr>
<td>Violations of the order will be subject to penalties as well as the sales order</td>
<td>Violations of the order will <strong>ONLY</strong> be subject to penalties. No provisions for sales order are provided.</td>
</tr>
<tr>
<td>Imprisonment with a maximum of three years or a fine of not more than one million yen, or both. However, if the triple of the price of the object of the violation exceeds one million, the penalty shall be not more than the triple of the price</td>
<td>Imprisonment with a maximum of two years or a fine of not more than one million yen, or both</td>
</tr>
<tr>
<td>The Administrative Procedure Law applies to the extension of review period or orders</td>
<td><strong>Partial exemption from the Administrative Procedure Act</strong> for extension of review period or orders (ex. explanation of reason is not required)</td>
</tr>
<tr>
<td>No exceptions of prior notification for urgent cases</td>
<td>Exceptions of prior notification for urgent cases exist. An <strong>urgent case only requires post notification</strong>.</td>
</tr>
<tr>
<td>If there is a material change in the content in the submitted prior notification, it may be treated as lack of proper prior notification</td>
<td>If there is a material change in the content in the submitted prior notification, <strong>another notification for such change will be required</strong></td>
</tr>
<tr>
<td>No administrative orders will be imposed after the clearance</td>
<td>Recommendations and orders could be issued even after the clearance in the case where international situation or others have changes</td>
</tr>
</tbody>
</table>
Points that are not clear from the ESPB

- **De facto extension of the review period by voluntary withdrawal**
  - While the waiting period is 30 days in principle, the review period of prior notifications under the FEFTA is usually extended by voluntary withdrawal and re-submission.
  - It is not clear if the authority will be taking the same measures under the ESPB as well.

- **Mitigation conditions**
  - Under the FEFTA, mitigation conditions are often required by providing certain conditions on prior notification drafts. If certain conditions are provided in prior notification drafts and an applicant violates them, it is considered to be “false notification” from the timing of submission and subject to penalties and sales orders.
  - However, since there is a logic jump between violating conditions and being “false” from the beginning, it is an unstable system from legal aspect.
  - It is not clear if the authority will be taking the same measures under the ESPB as well.

- **De facto pre-consultation process**
  - The Committee report states that the government should set up a mechanism to receive consultation from regulated infrastructure providers in advance.
  - The FEFTA also has a de facto pre-consultation process. While the pre-consultation process is not provided in the ESPB, it is not clear if it will be introduced and how it will be operated.
# Report request and on-site inspection

- Article 58 allows reporting request and on-site inspection by the government in relation to the Security of Critical Infrastructure part (Chapter 3 of the ESPB).

<table>
<thead>
<tr>
<th>#</th>
<th>Scope of measures</th>
<th>Target of the measure</th>
<th>Required actions</th>
<th>Penalties</th>
</tr>
</thead>
<tbody>
<tr>
<td>Para 1</td>
<td>To the extent necessary to designate SCIP</td>
<td>Persons engaged in SCIB</td>
<td>Submission of necessary reports or materials concerning SCIB</td>
<td>Maximum 30,000 yen fine</td>
</tr>
<tr>
<td>Para 2</td>
<td>To the extent necessary to cancel the designation of SCIP, issue recommendations or orders based on a prior notification review, and issue post-clearance recommendations or orders in changes of circumstances.</td>
<td>SCIP</td>
<td>Submission of necessary reports or materials concerning SCIB On-site inspection, and questions and inspection of books, documents and other objects concerning SCIB</td>
<td>Maximum 30,000 yen fine</td>
</tr>
</tbody>
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Outline of Reinforcement of Technological Base

Establishment of Basic Policy
(Article 2)

Basic Guidelines for Research and Development of Specific Important Technology
(Article 60)

No designation of Specific Important Technology
(Neither enumerated in the ESPB nor delegated to cabinet order/ministerial order)

Specific Important Technology ("SIT")
Advanced technology that may be important for maintenance of the people’s lives and economic activities in the future and is likely to cause damage to the security of the nation and its citizens in the event that (i) the technology or information used in the research and development of the technology is improperly used by a foreign actors or (ii) stable use of the technology cannot be maintained due to actions by foreign actors because of relying on the foreign actors for goods or services using the technology

The Committee’s report refers to advanced key technologies in the fields of space, ocean, quantum, AI and others
Establishment of councils for R&D

R&D of SIT

R&D funded by the government

Voluntary council

R&D funded by Designated Funds

Compulsory council

The Program for Fostering Key Technologies for Economic Security, which is a part of the FY 2021 supplementary budget ⇒ However, not limited to such program in the ESPB text
The purpose of the Council

- “Seeds” and “Needs” information useful for promoting R&D will be shared and cooperation on social implementation from institutional aspects will be done by the government, think tanks (see the next slide), and other organizations.
- These information sharing and cooperation are theoretically possible even without the Council. However, while sensitive information might be shared in the Council, the information sharing cannot be done only with NDA but confidentiality obligation with criminal penalty is needed.
- In order to achieve the information sharing and cooperation, confidentiality obligation with criminal penalty equivalent to that of public officers is imposed to the members of the Council.
- A person who is or was engaged in the operation of the Council shall not divulge or steal any secrets obtained in connection with the operation without justifiable reason. Violations are subject to imprisonment with a maximum of one year or a fine of not more than 500,000 yen.
Research Organization for SIT (Think tank)

Prime Minister

Consignment

Research Organization for SIT (Think tank)

An organization who conforms to the standards listed in Article 64, Paragraph 2 as a person capable of appropriately conducting research and study necessary for the promotion of R&D of SIT and the appropriate utilization of the results thereof.

Relevant administrative organization

Provision of necessary information and materials

Ex. National Academy of Sciences (NAS), American Association for the Advancement of Science (AAAS) and RAND Corporation in the US

Officers and employees, or those who have held these positions, must not divulge or steal any secrets obtained in connection with the consigned work without justifiable reason.

Imprisonment with a maximum of one year or a fine of not more than 500,000 yen
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Outline of Secret Patents

- Establishment of Basic Policy (Article 2)
- Basic Guidelines for Secret Patent Applications (Article 65)
- Designation of Specific Technology Fields (Article 66)

By the government (= the Cabinet approval)

Designated by a cabinet order (= the Cabinet approval)

Subject of second screening
Flow of secret patents

- **Patent Application**
  - **Primary screening** (3 months)
  - **Secondary screening**
  - **Prohibition of foreign applications** (10 months)
  - **Withdrawal of application**
  - **Not designated**
  - **Designated as Secret Patent**
  - **Return to usual patent process**
  - **Application will be made public**
  - **Termination of the designation**

The secret period may be extended on a year-by-year basis with no limitation. Various restrictions apply during the secret period.
Subject fields of secret patents

A
Specific Technological Fields

B
Technological fields that are likely to have a significant impact on industrial development if they are designated

C
Of B, those that meet the requirements specified by a cabinet order

All designated by a cabinet order
Target scope of the Secret Patents

- The details of the target scope of the Secret Patents are delegated to a cabinet order. It is difficult to estimate accurate target scope of the Secret Patents from the ESPB text.
- The following three types are listed in the Committee’s report. Needs to be noted for the future discussions over the cabinet order ( (iii) corresponds to Article 66, Paragraph 2).
- The point of discussion is to what extent “other” of (ii) can be expanded.

i. Technology related to the development of nuclear weapons, and single-use technology only for weapons that is extremely sensitive to the security of Japan

ii. Dual-use technology that is the result of government-sponsored projects or developed for defense or other purposes.

iii. Dual-use technology where the applicants themselves agree to make it secret
**Primary screening and secondary screening**

**JPO**

Primary screening

Forwarding (Within 3 months)

**Prime Minister**

Secondary screening

Review of applicability to Secret Patents target scope (Article 66, Paragraph 1)

Substantive review (Article 67, Paragraph 1)

Notification to Patent Applicant

Submit documents within 14 days

**Prime Minister**

Secret Designation

Abandonment or withdrawal

Prohibition of disclosure (Article 68)

Period of up to one year

Period can be renewed (without limitation)
Restrictions on the Secret Period

(1) Restriction on withdrawal of secret patent application (Article 72)
- The Applicant cannot abandon or withdraw the application during the secret period.

(2) Restriction on implementation of secret patent (Article 73)
- During the secret period, no patent shall be implemented without the permission of the Prime Minister.
- The Prime Minister grants a license when he/she finds it appropriate from the viewpoint of preventing the leakage of information concerning the secret patent.
- Permission may be subject to conditions necessary to prevent the leakage of information related to the invention to be preserved.

(3) Prohibition of disclosure of secret patent (Article 74)
- In principle, the content of secret patent must not be disclosed during the secret period.

(4) Proper management of secret patent (Article 75)
- Necessary and appropriate measures shall be taken to prevent the leakage of information concerning the secret patent. Such measures shall be specified by a ministerial order.

(5) Approval system for change of invention-sharing business operator (Article 76)
- Any changes or additions of an invention-sharing business operator (a business operator approved to handle information related to secret patent) must be approved by the Prime Minister.
Secret Patents and Subsequent Applicant (Article 81)

- **A** First Applicant
  - Designation of Secret Patent
  - Cancel of Designation
  - Patent rights
  - Compensation for ordinary damages

- **B** Subsequent Applicant
  - Designation of Secret Patent
  - Chargeable non-exclusive license
  - No legal use rights

- **C** Non-applicant
Other key issues of secret patent

Obligation of first country application (for the subject inventions)

- No person shall file a foreign application of an invention in Japan that has not been made public, if such invention is the subject of a secret patent.
- However, the cases where (i) a patent application has been filed in Japan and 10 months have passed since the application date, or (ii) a patent application does not proceed to the secondary examination within 3 months from the application date are exempted.
- It is possible to check with the JPO in advance, for a fee of 25,000 yen, whether a foreign application violates such regulations.

Compensation for loss with secret patent designation

- The government shall compensate those who have suffered losses due to the secret patent designation for losses that should normally arise.
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For your eyes only

For your eyes only
For your eyes only

For your eyes only
For your eyes only
For your eyes only
Shintaro Okawa handles cross-border transactions and related compliance issues, especially national security regulations such as FDI regulations, export controls, and economic sanctions. Previously, he worked for the Ministry of Economy, Trade, and Industry (specifically in the Trade Control Department and Economic Security Office) from 2019 until 2021. While working for the ministry, he was involved in the amendment of the Foreign Exchange and Foreign Trade Act (FDI Regulation) and in policymaking for the Economic Security Promotion Bill.

**Major Publications**
- "Full Commentary on the Foreign Exchange and Foreign Trade Act: Trade Control" (Commercial Law Review, 2022)
- "Introduction to Economic Security for the Financial Industry and IT Vendors" (The Finance, 2021)
- "Serial Article: Economic Security for Corporate Legal Affairs" (Business Houmu, serialized from Dec 2021)
- "Clarification of 'Deemed' Export Control Under the Foreign Exchange and Foreign Trade Act: Explanation Based on Public Comments" (CISTEC Journal, 2021)
- "Clarification of 'Deemed' Export Control Under the Foreign Exchange and Foreign Trade Act: Explanation from the Basics of Security Export Control" (NBL, 2021)
- "METI's Approach to Foreign Direct Investment review under the Foreign Exchange and Foreign Trade Act" (Commercial Law Review, 2020)
- "Revisions to the Foreign Exchange and Foreign Trade Act - Impacts on the Prior Notification and Screening System Regarding Inward Direct Investment, Etc." (BUSINESS LAWYERS, 2019)

**Biography**

**Languages:**
Japanese, English and Spanish

**Bar Admissions:**
Admitted in Japan, 2016
Daini Tokyo Bar Association

**Background**
- The University of Tokyo (LL.B., 2015)
What we can help you in the area of economic security

**Economic Security Promotion Bill**
- Analysis of ESPB, parliamentary deliberations, cabinet orders/ministerial orders and evaluation of business impact of each company
- Support to prepare roadmap for ESPB compliance
- Assist in supply chain research of equipment and services
- Support of communication with authorities in the process of discussion over cabinet orders/ministerial orders

**FDI regulations**
- Compliance with FDI regulations of the Foreign Exchange and Foreign Trade Act
- Compliance with FDI regulations of FIRMA in the U.S.
- Analysis of cabinet orders/ministerial orders of the Important Real Estate Survey Law (newly introduced FDI regulation for real estate), evaluation of the business impact of each company, and compliance with the Important Real Estate Survey Law
- Response to shareholder activism using the Foreign Exchange and Foreign Trade Act

**Export control / Economic sanction**
- Compliance with export controls and economic sanctions of the Foreign Exchange and Foreign Trade Act
- Compliance with export controls of the EAR/ITAR in the US, and analysis of their impact on the supply chain
- Compliance with economic sanctions of OFAC regulations in the US, and analysis of its impact on the supply chain
- Compliance with China's Export Administration Law and Anti-Foreign Sanctions Law