
一般財団法人安全保障貿易情報センター 御中

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

February 28, 2022

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※ 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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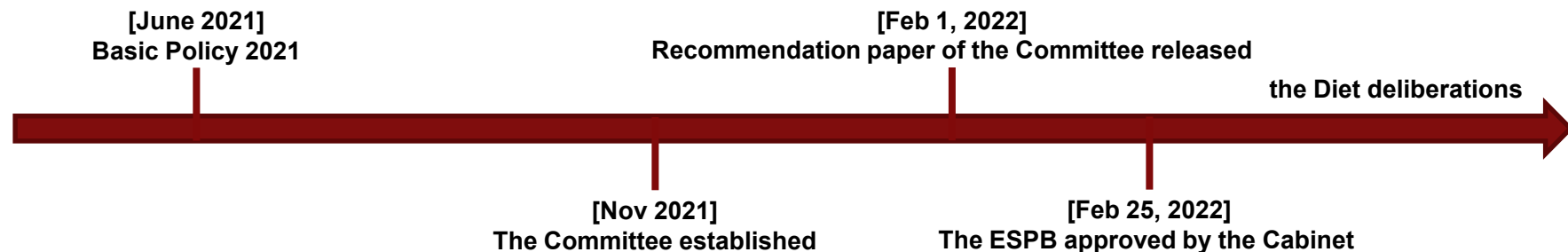
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Background to the ESPB

Basic Policy 2021 and Expert meetings for economic security legislation

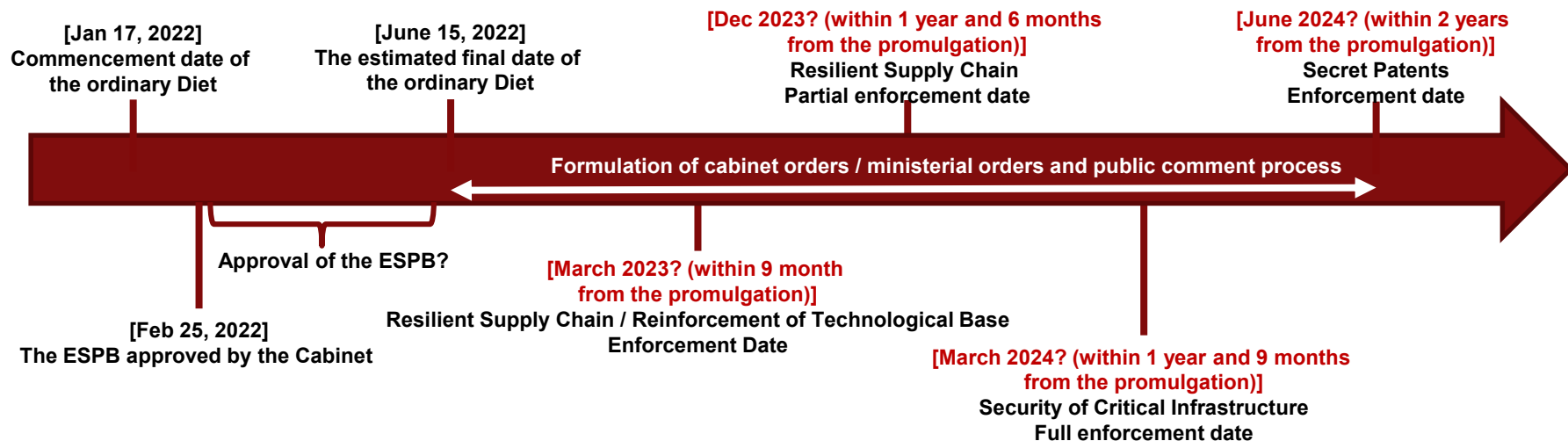
- The 4 main areas of the ESPB were already formed in **June 2021** in the Basic Policy for Economic and Fiscal Management and Reform 2021 (Decided by the Cabinet on June 18, 2012) (“Basic Policy 2021”).
- The government has established the Expert Committee on Economic Security Legislation (“Committee”)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



Outline of the ESPB

- 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.

**Resilient
Supply Chain**

**Security of Critical
Infrastructure**

**Reinforcement of
Technological Base**

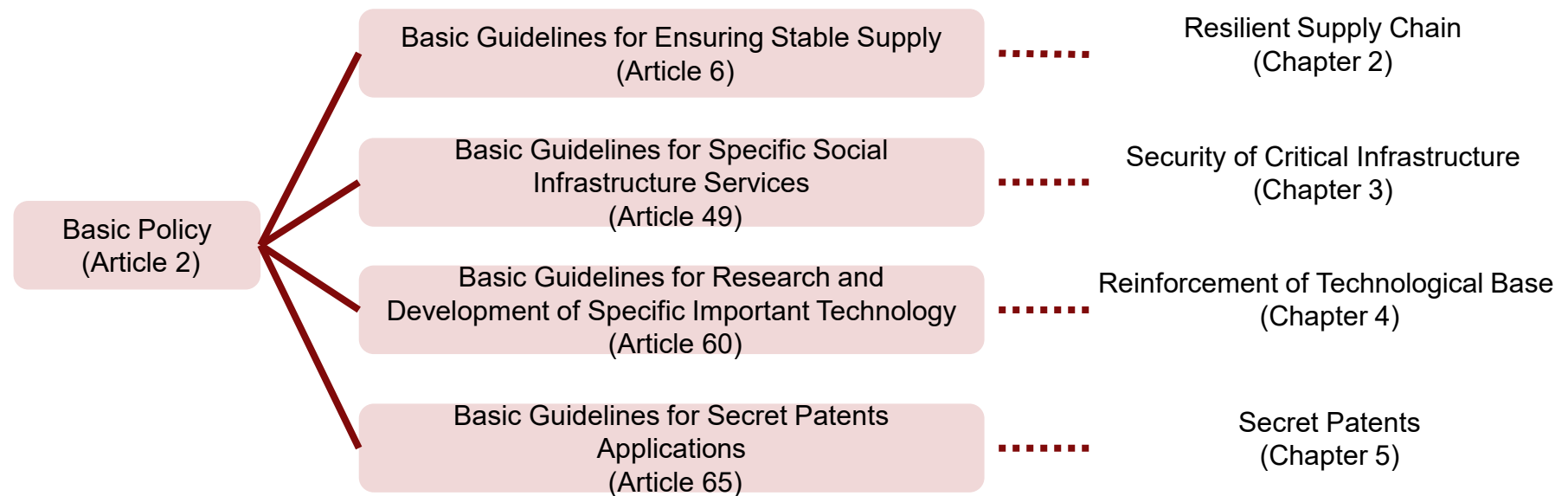
**Secret
Patents**

The structure of the articles of ESPB

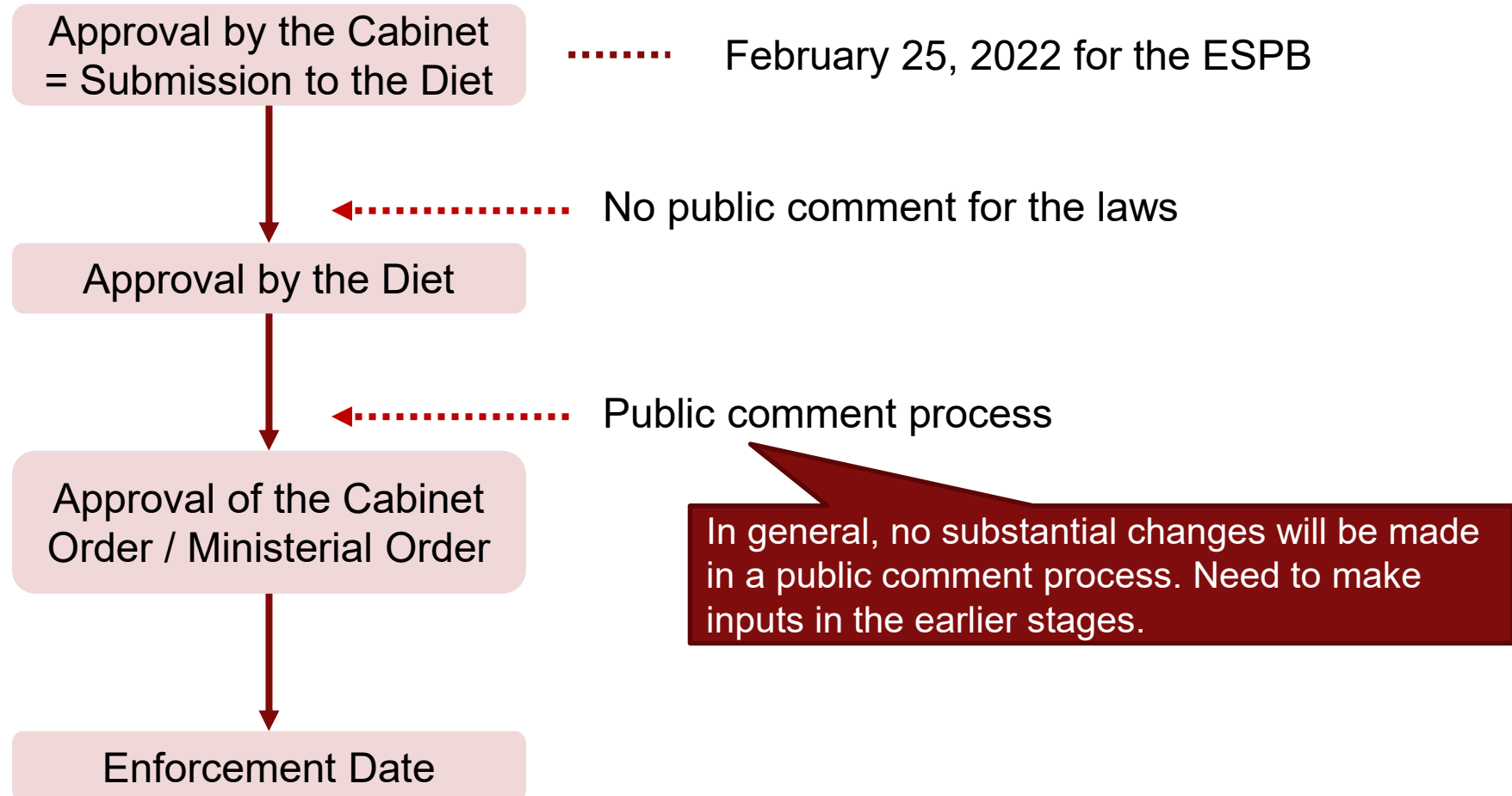
Chapter 1	Article 1 - Article 5	General provisions
Chapter 2	Article 6 - Article 48	Resilient Supply Chain
Chapter 3	Article 49 - Article 59	Security of Critical Infrastructure
Chapter 4	Article 60 - Article 64	Reinforcement of Technological Base
Chapter 5	Article 65 - Article 85	Secret Patents
Chapter 6	Article 86 - Article 91	Miscellaneous
Chapter 7	Article 92 - Article 99	Penalties

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



(For reference) Structure of the Japanese law

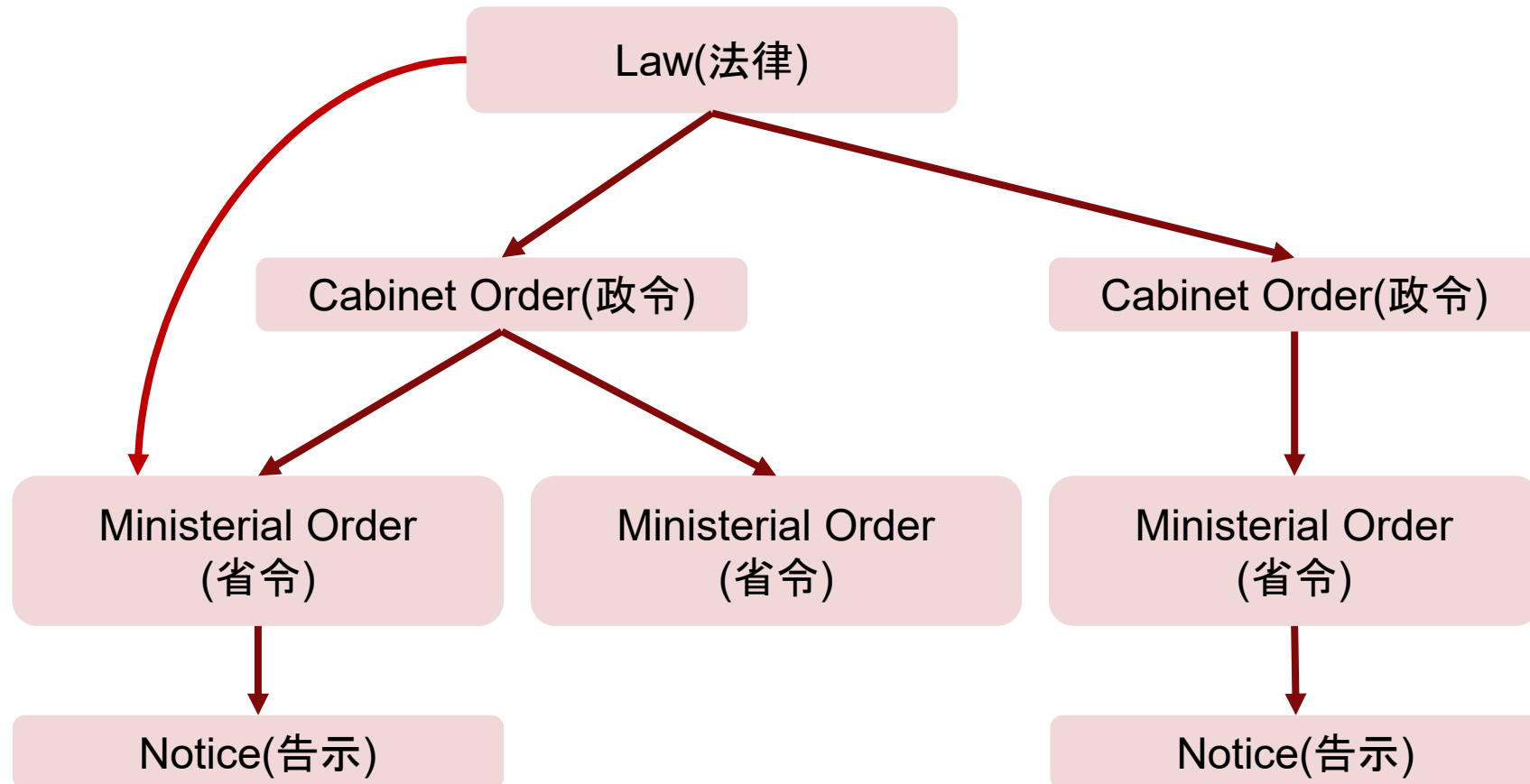


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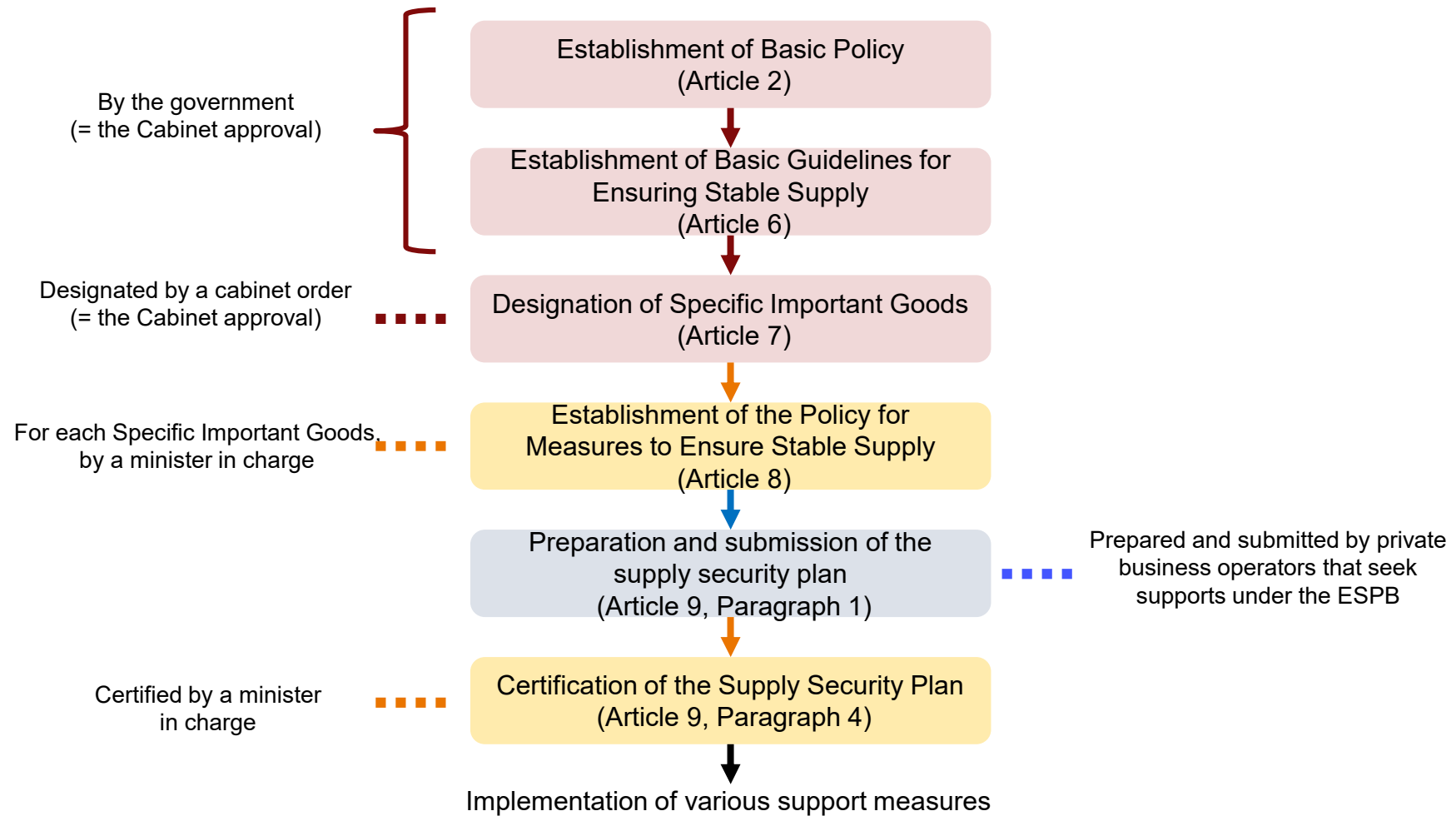
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Outline of Resilient Supply Chain



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

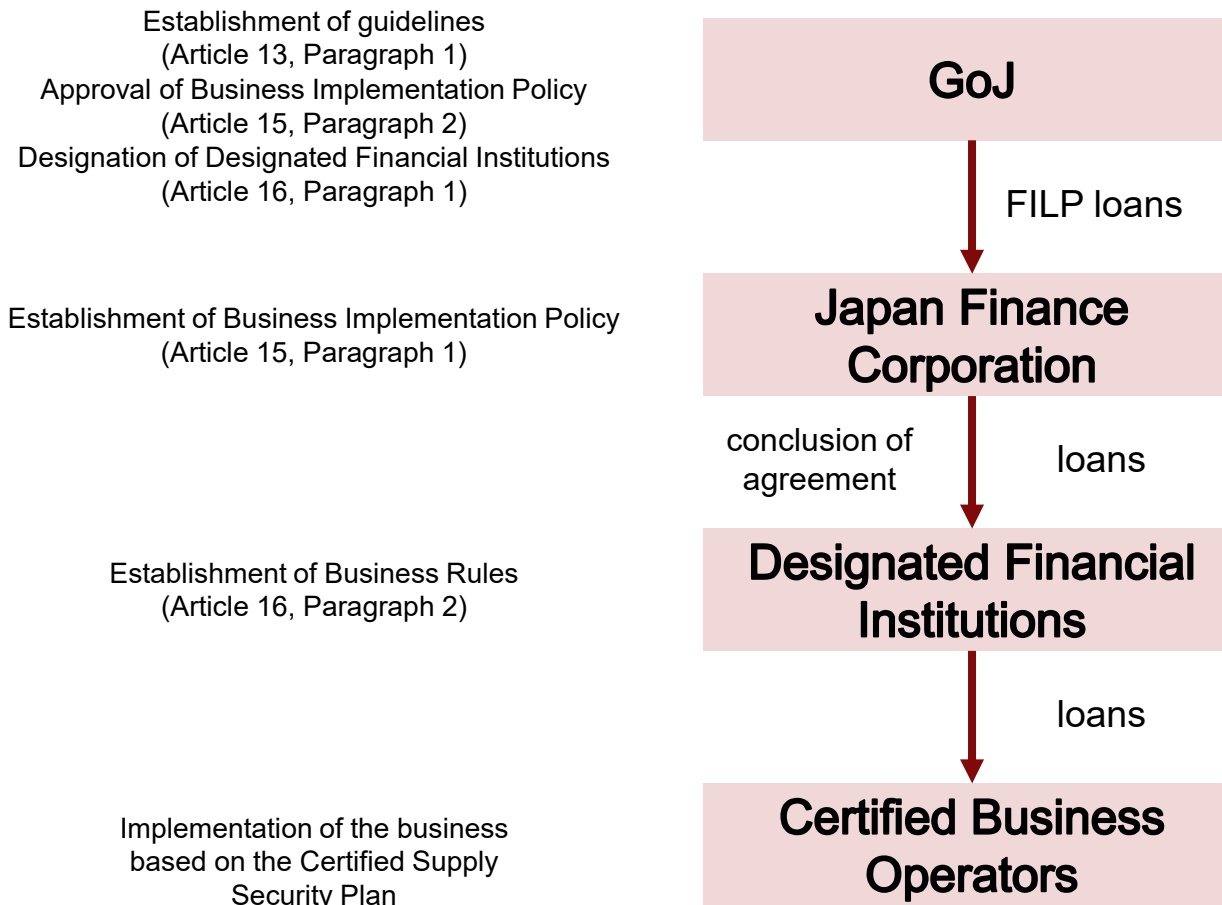
Things that, in the case of excessive dependence or potential dependence on foreign sources, in order to prevent a situation in which the safety of the nation and its citizens is impaired due to actions taken by foreign forces, measures shall be taken to strengthen their supply chain, such as (i) development 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



(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

Insurance limit			+	Separate limit	
Ordinary insurance	Cooperation	200 million yen		200 million yen	
	Association	400 million yen		400 million yen	
Unsecured insurance	80,000,000 yen			80,000,000 yen	
Special small-lot insurance	12,500,000 yen			12,500,000 yen	

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

Insurance limit			➔	Expanded limit	
Overseas investment-related insurance New business development insurance	Cooperation	200 million yen		400 million yen	
	Association	400 million yen		600 million yen	

(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

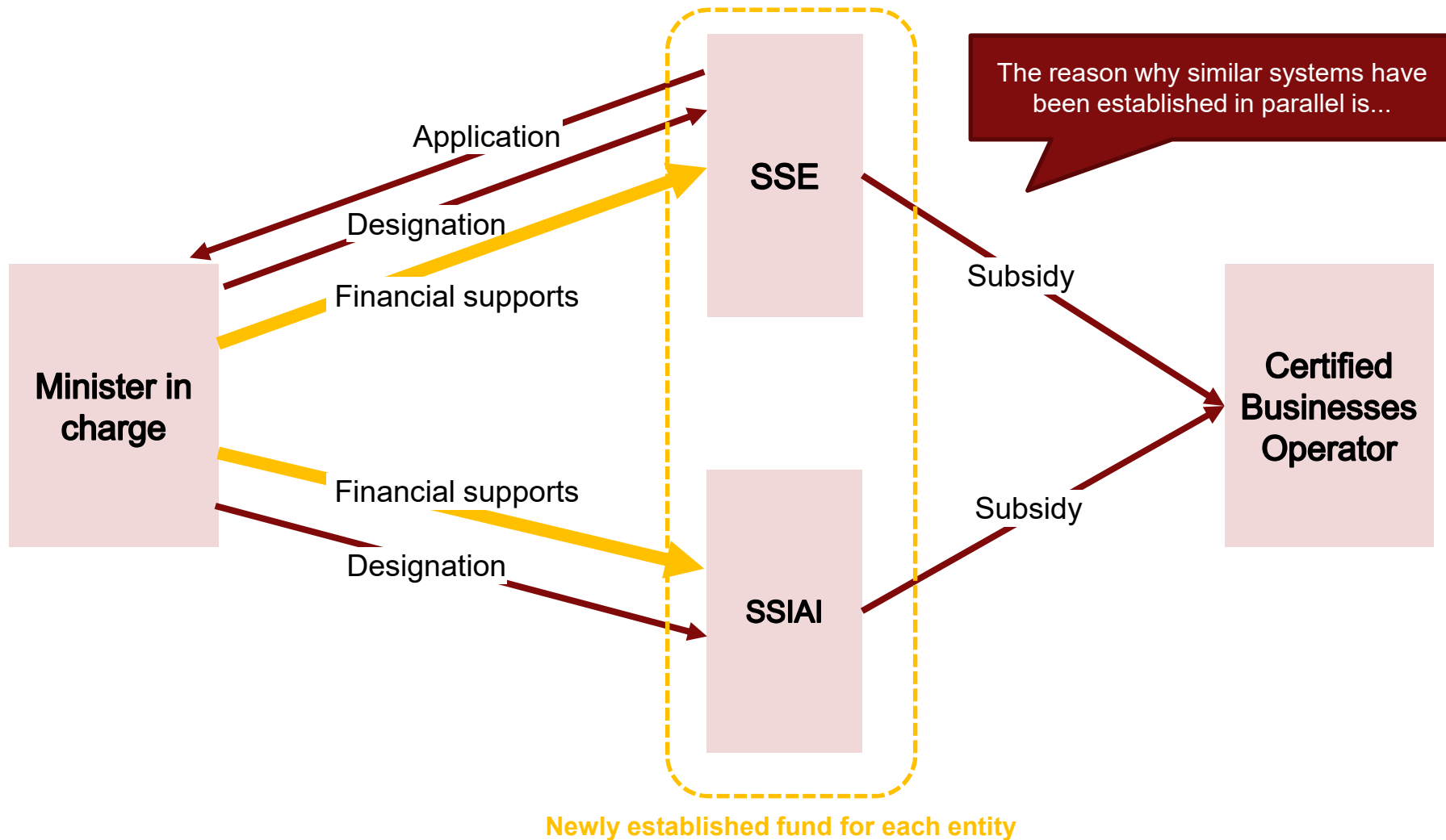
- The minister in charge may request an investigation if he or she believes that there is sufficient evidence to take anti-dumping (AD), subsidy countervailing duty (CVD) or safeguard (SG) measures.
- An investigation may be initiated ex officio when there is sufficient evidence of substantial damage 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.



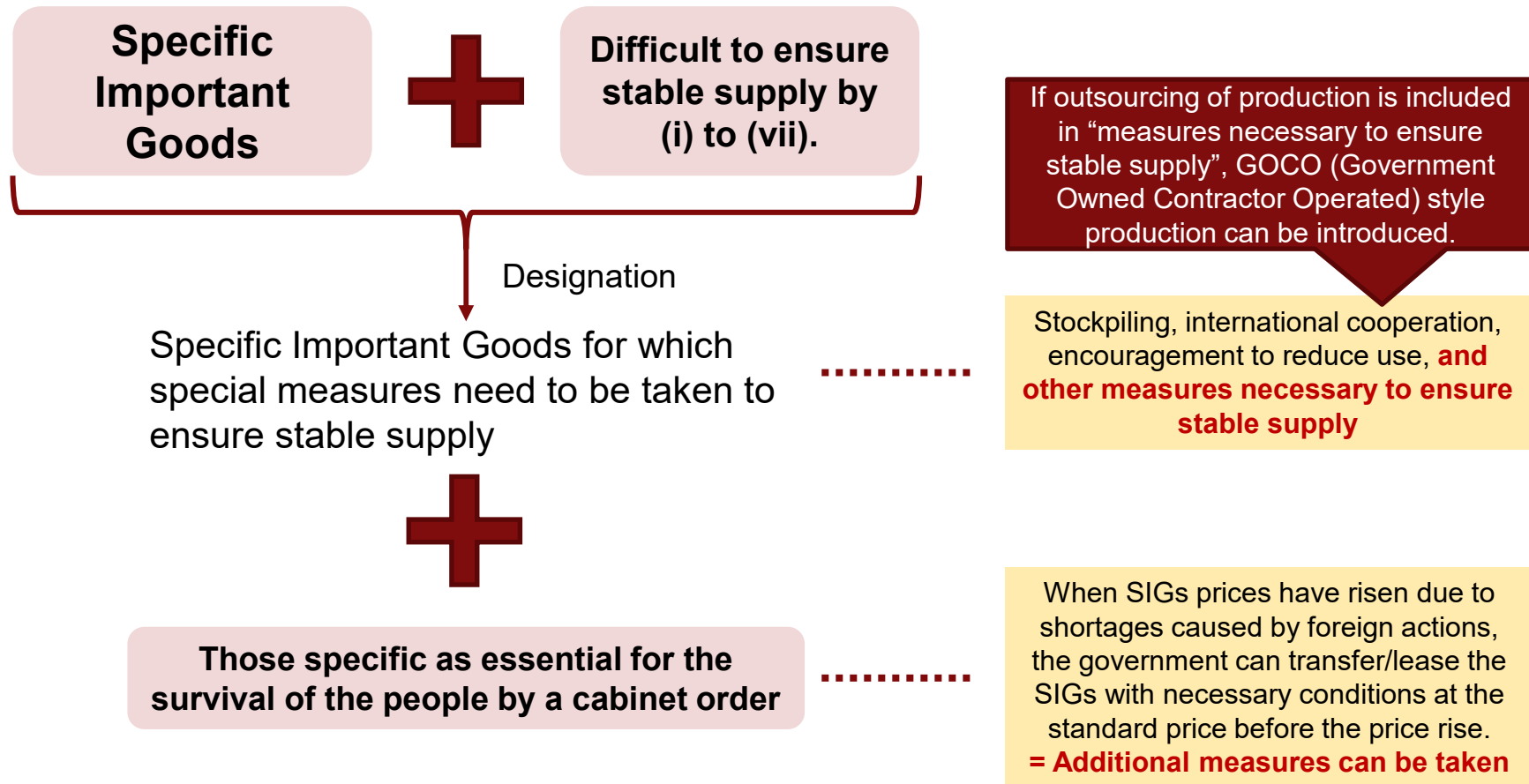
It is not clear if this provision works from the following reasons:

- 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



(viii) Support for SIGs for which special measures need to 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).

#	Scope of measures	Target of the measure	Required actions	Penalties
Para 1	To the extent necessary to implement the Resilient Supply Chain part	Individuals, corporation or or other organizations engaged in production, import or sale of goods pertaining to the business under the jurisdiction of a minister in charge	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	Effort obligation No penalties
Para 2	To the extent necessary to implement the Measure No.(v)	Individuals, corporation or or other organizations engaged in production, import or sale of goods pertaining to the business under the jurisdiction of a minister in charge	Submission of necessary reports or materials concerning matters necessary for the Measure No.(v)	
Para 4	To the extent necessary to implement the Resilient Supply Chain part	Certified Business Operators	Submission of necessary reports or materials concerning the satus of implementation of the Certified Supply Security Plan and other necessary matters	Maximum 300,000 yen fine
Para 5	To the extent necessary to implement the Resilient Supply Chain part	Designated Financial Institutions	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	Maximum 300,000 yen fine
Para 6	To the extent necessary to implement the Resilient Supply Chain part	Stable Supply Securing Support Entities	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	
Para 7	To the extent necessary to implement the Resilient Supply Chain part	Managers to whom the government outsourced operation of facilities by Article 45	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	

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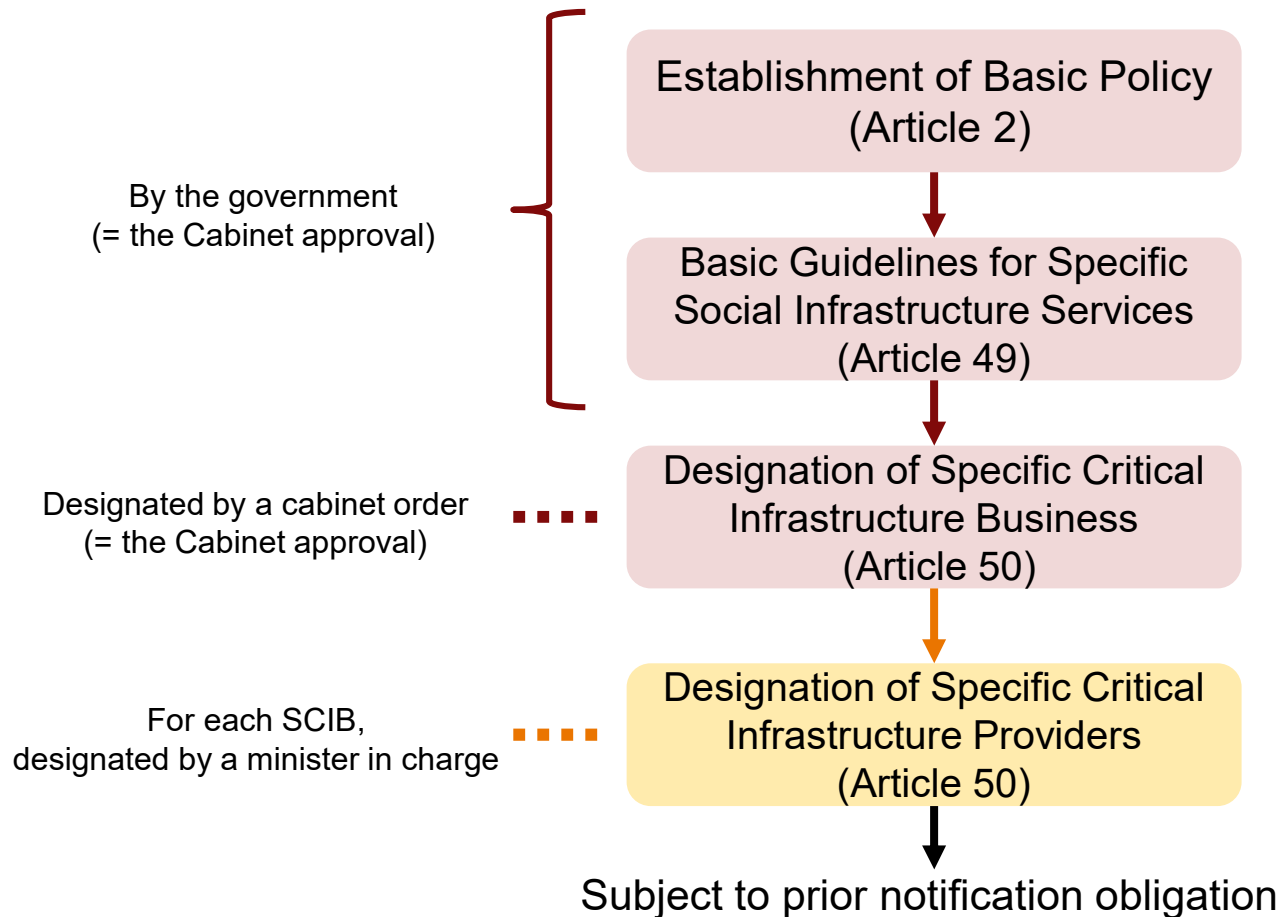
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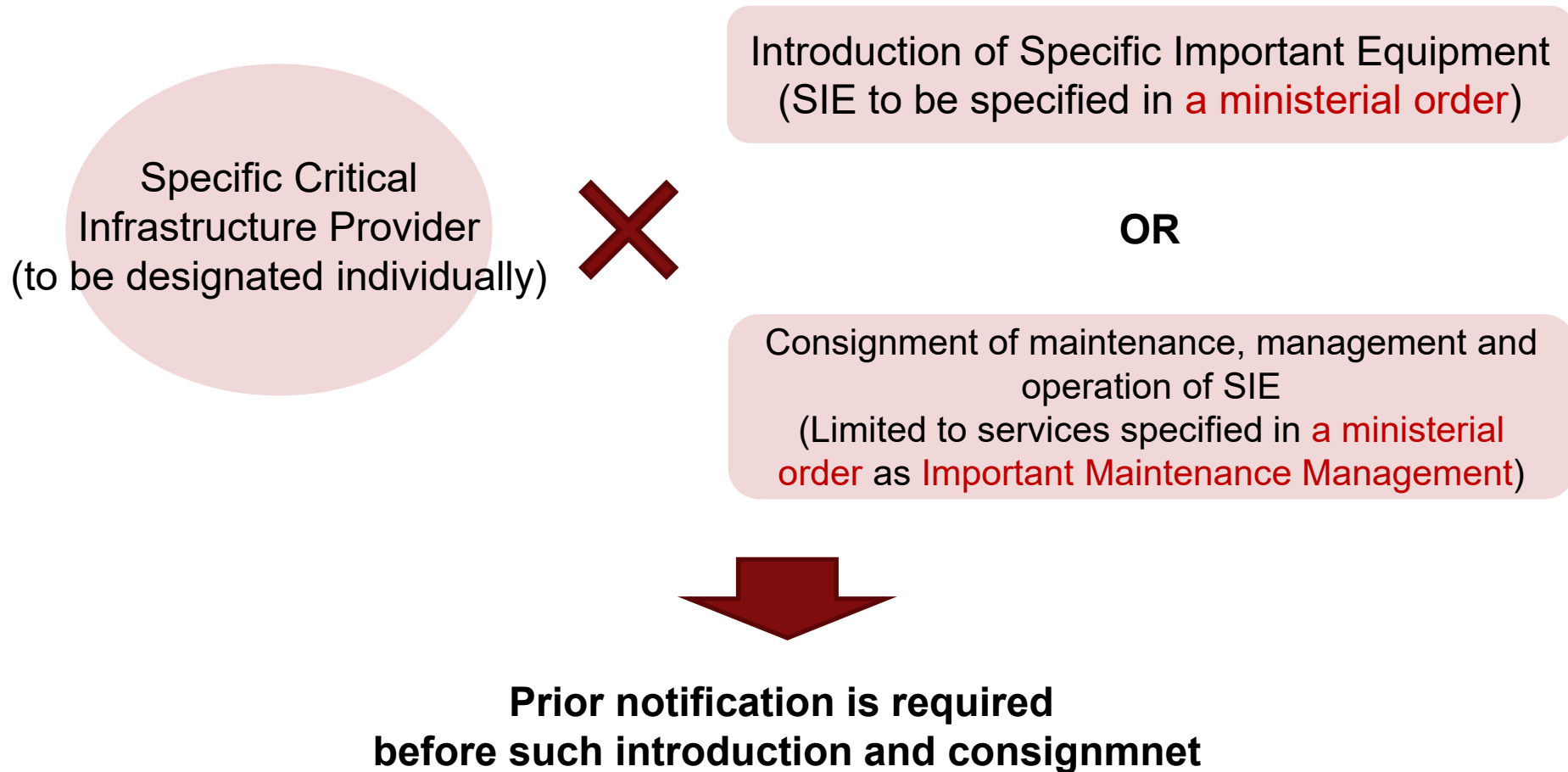
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Outline of Security of Critical Infrastructure



Overview of prior notification system



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.

**Specific Critical
Infrastructure Business**



**Specific Critical
Infrastructure Provider**

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**.

#1	Electricity business
#2	Gas business
#3	Petroleum refining and oil /gas import business
#4	Water supply business
#5	Railroad business
#6	Cargo trucking business
#7	Freight forwarding business and tramper service business
#8	International air transportation business and domestic scheduled air transportation business
#9	Airport business and airport concession business
#10	Telecommunication business
#11	Core broadcasting business
#12	Postal businessservice
#13	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.
#14	Issuer of credit cards

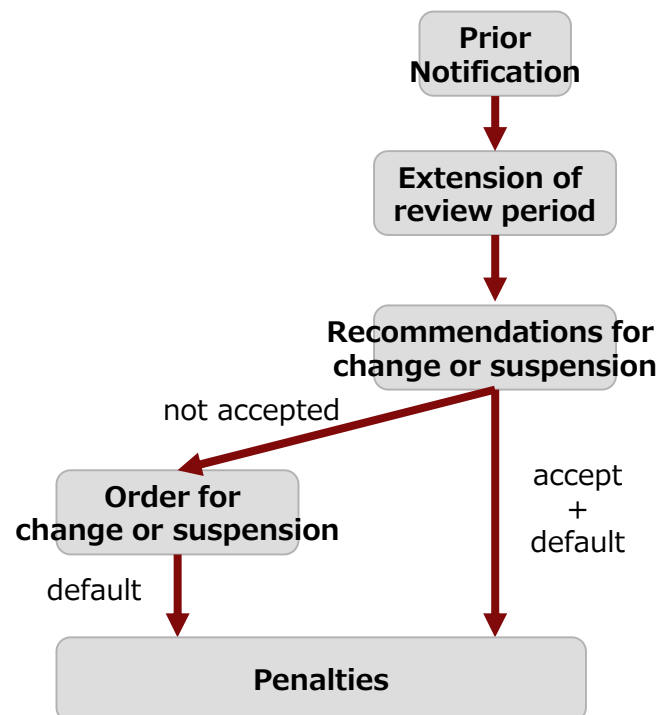
Contents of the prior notification

- 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.



- 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**.

foreign actions with respect to the introduction of SIE or the consignment of IMM that interfere with the stable supply of SCIB

- 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

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

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).

#	Scope of measures	Target of the measure	Required actions	Penalties
Para 1	To the extent necessary to designate SCIP	Persons engaged in SCIB	Submission of necessary reports or materials concerning SCIB	Maximum 300,000 yen fine
Para 2	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 order in changes of circumstances.	SCIP	Submission of necessary reports or materials concerning SCIB On-site inspection, and questions and inspection of books, documents and other objects concerning SCIB	Maximum 300,000 yen fine

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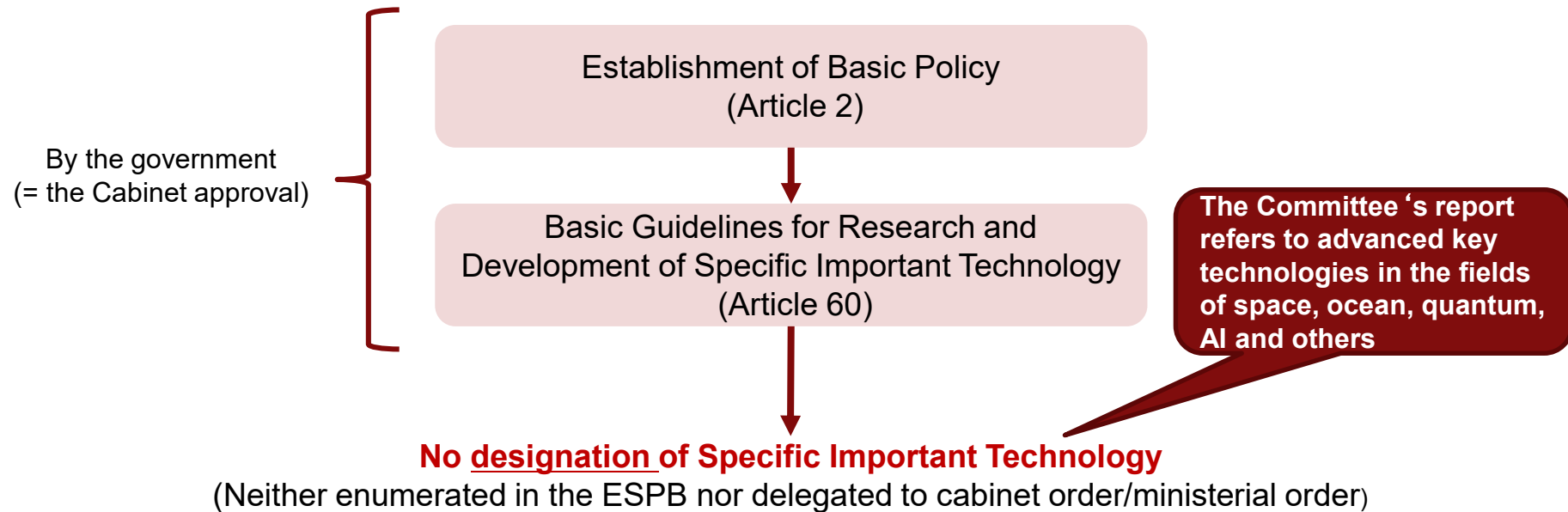
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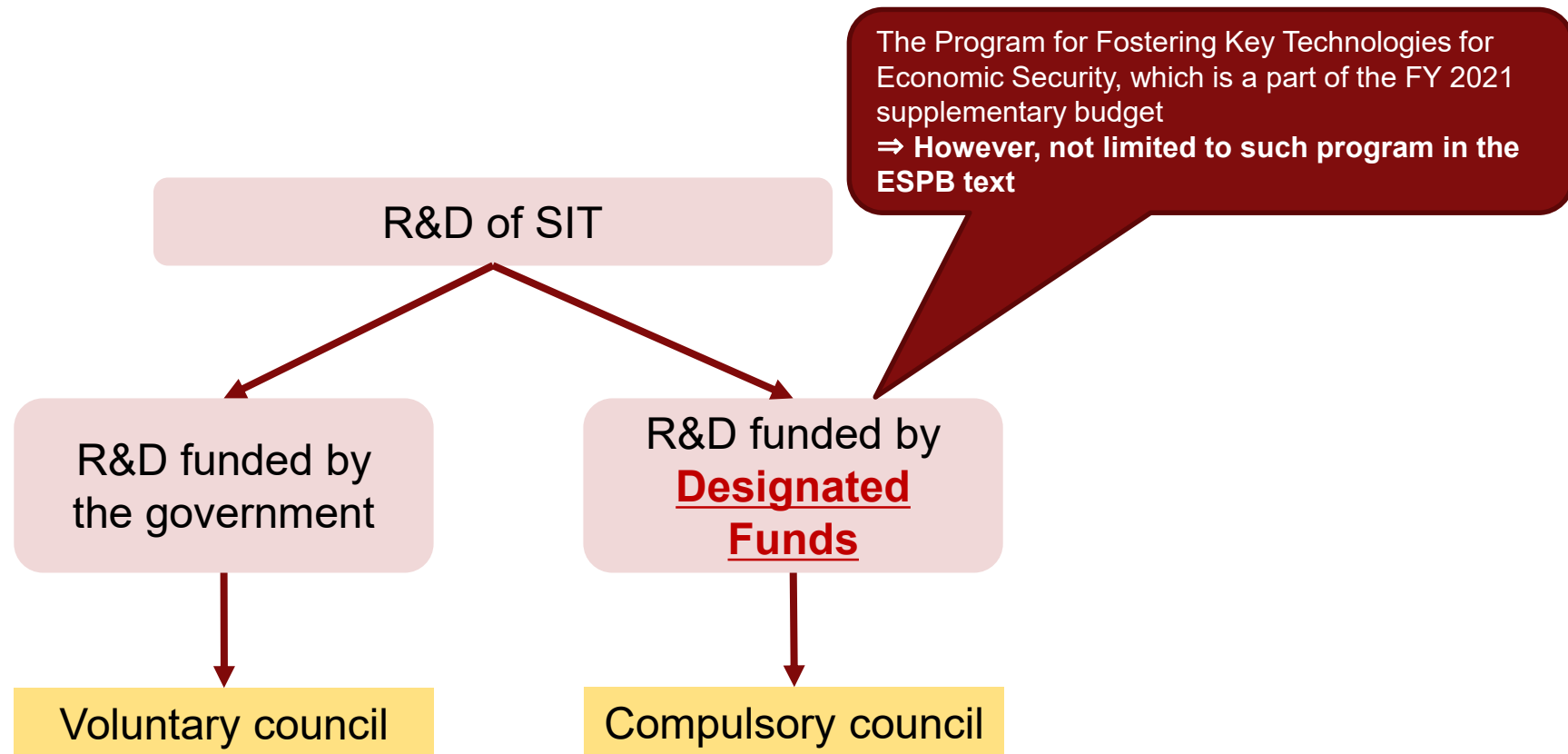
Outline of Reinforcement of Technological Base



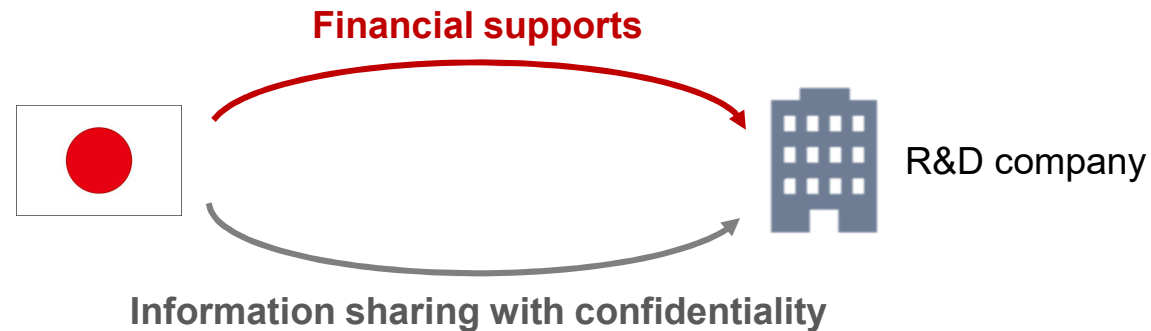
Specific Important Technology ("SIT")

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

Establishment of councils for R&D



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)

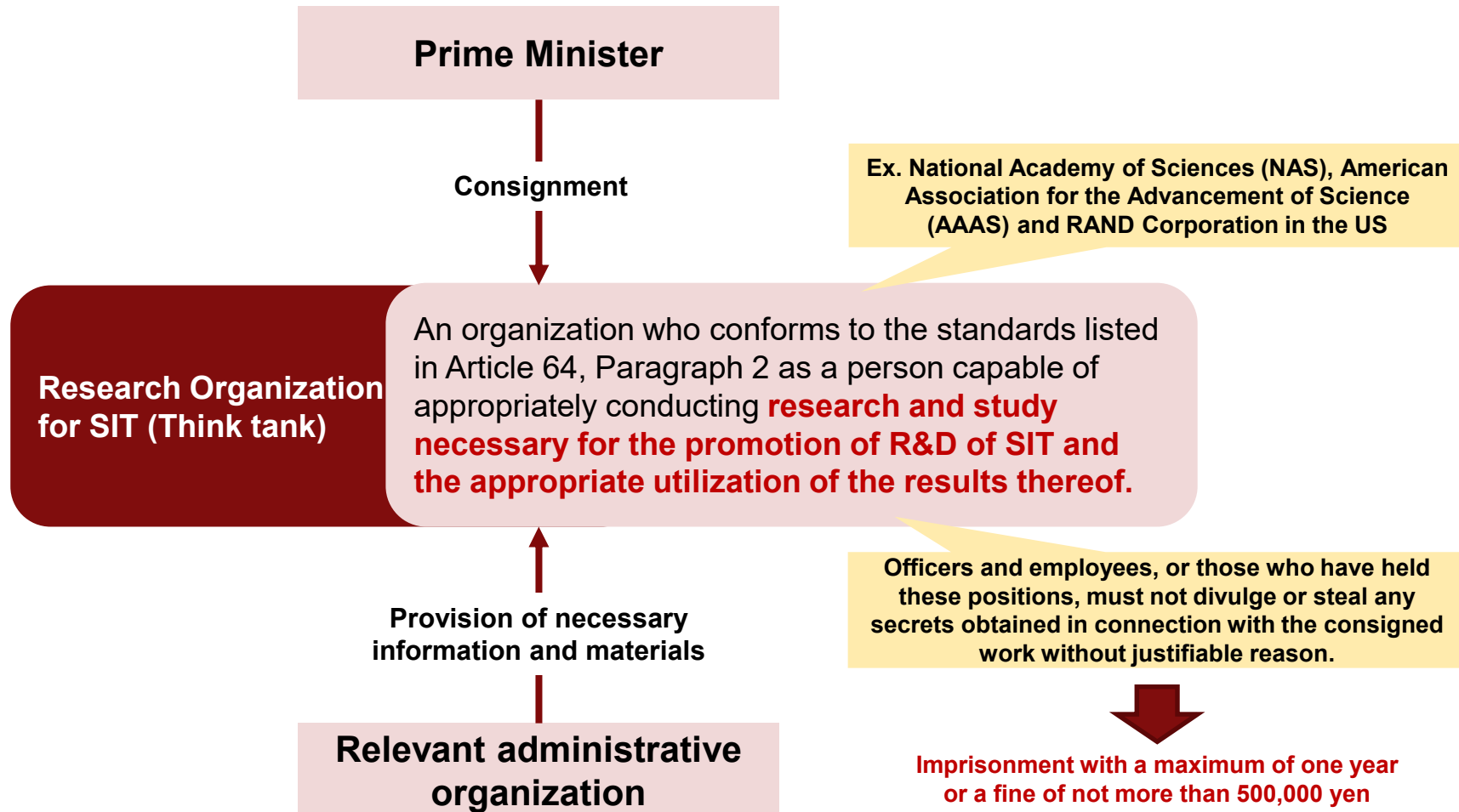


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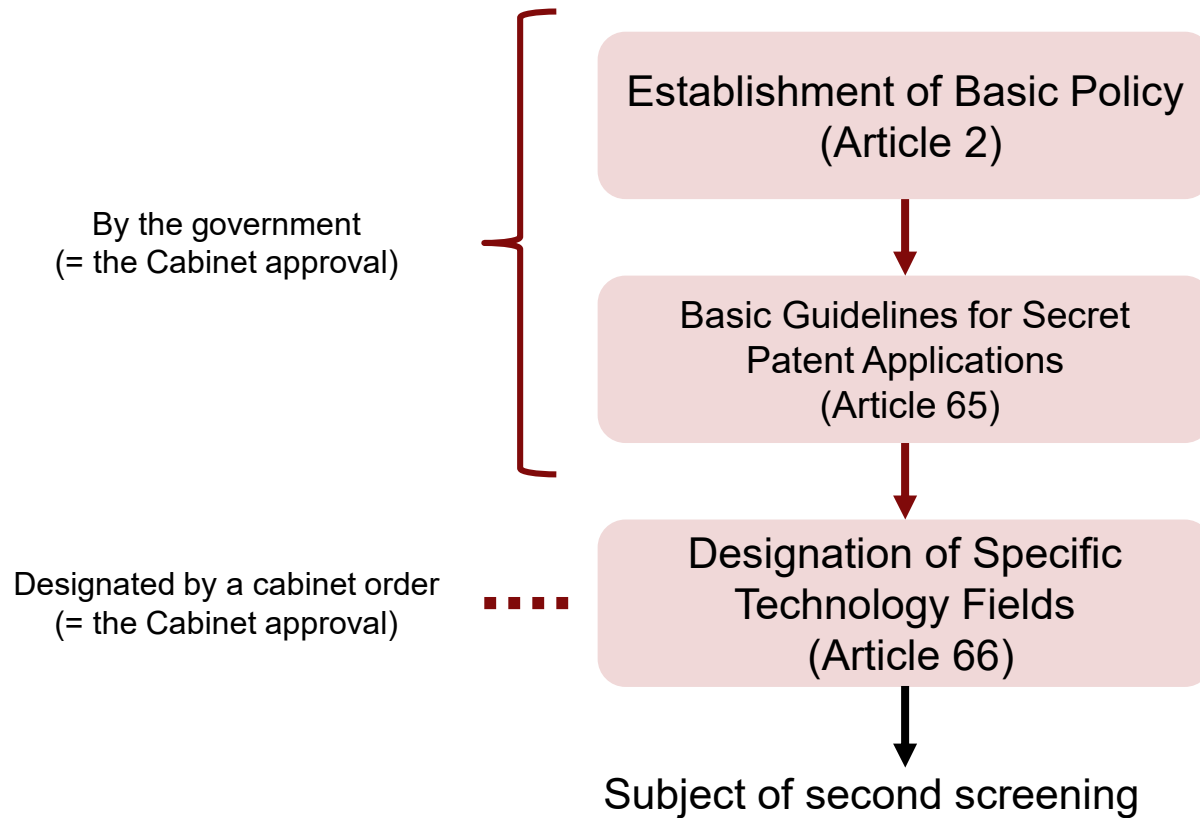
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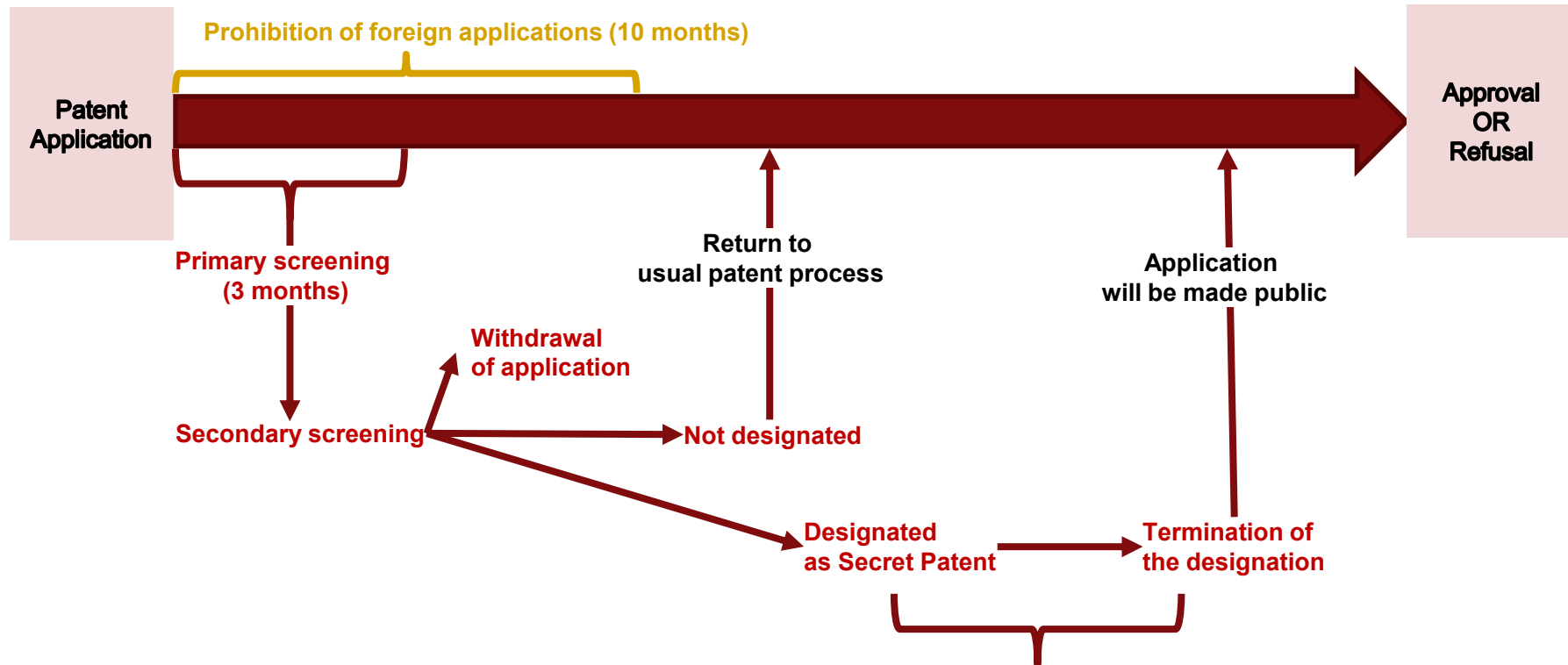
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Outline of Secret Patents

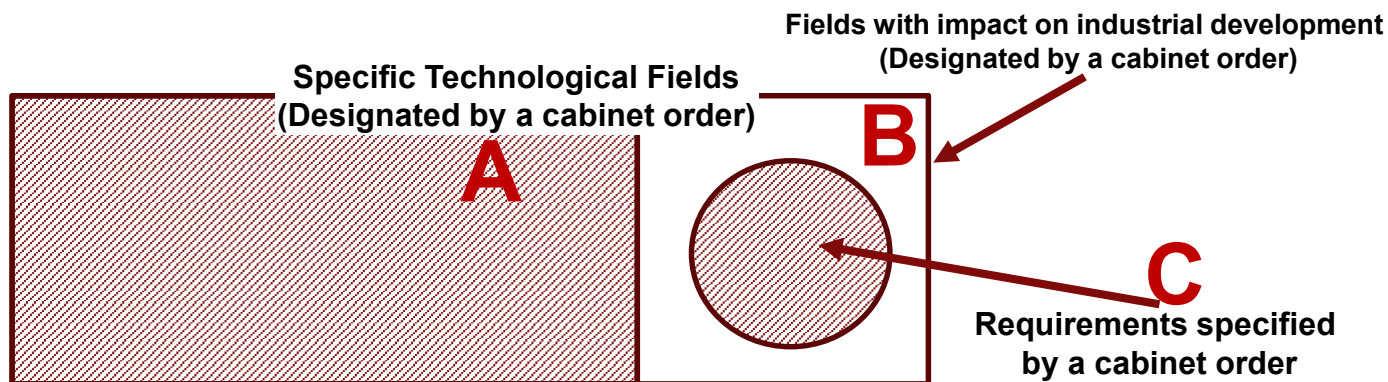
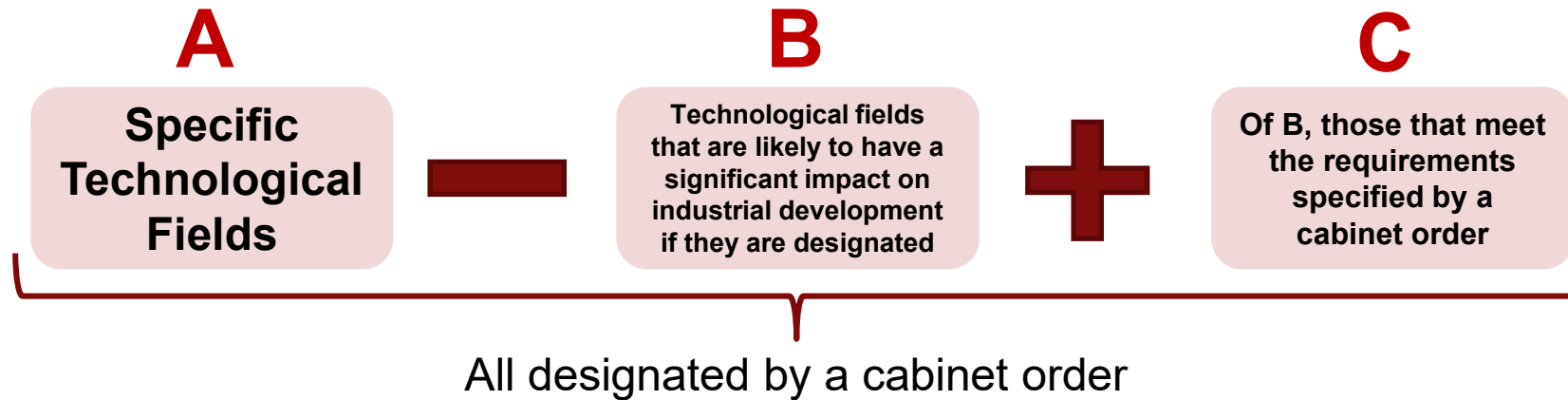


Flow of secret patents



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

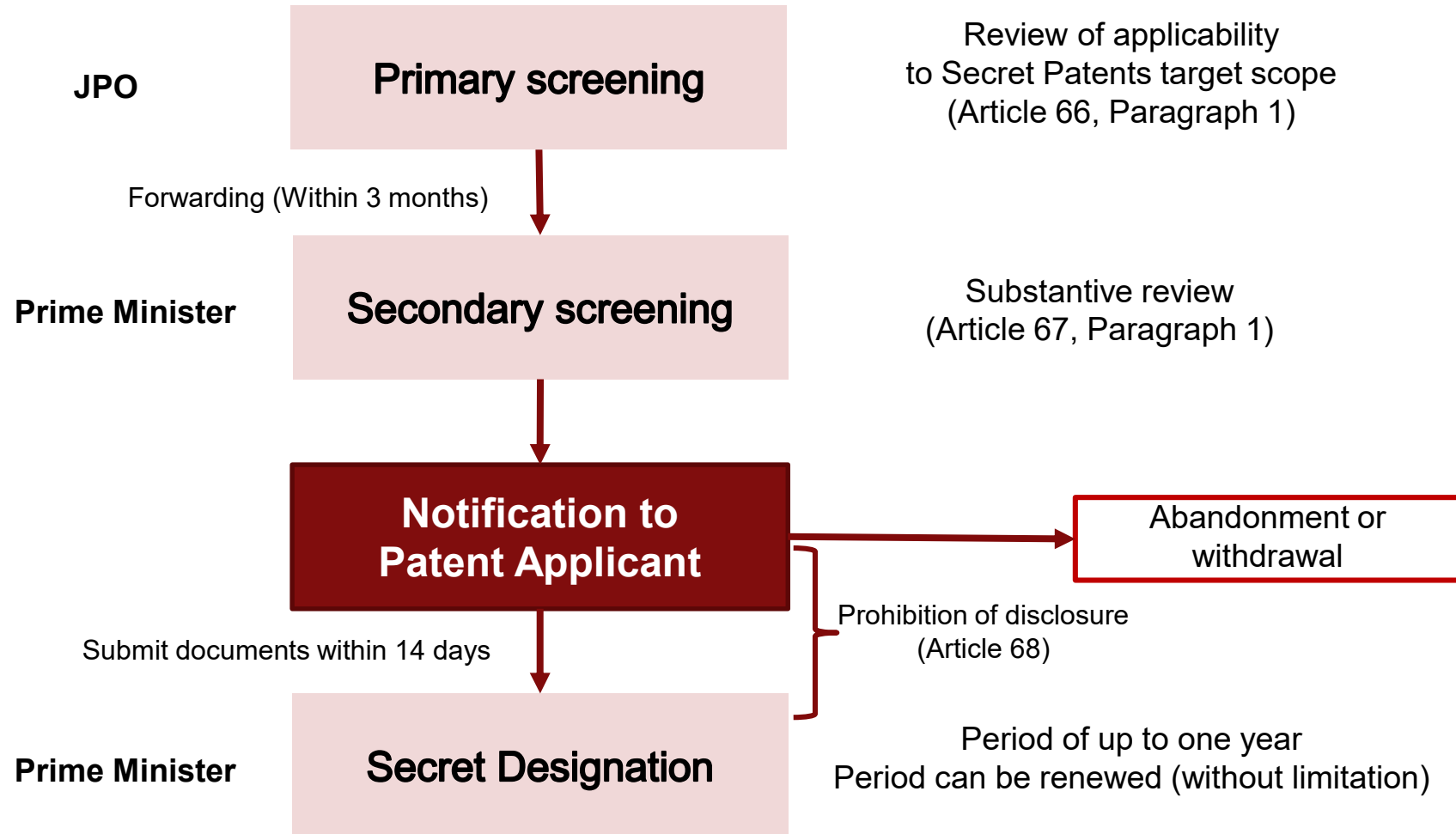
Subject fields of secret patents



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



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.

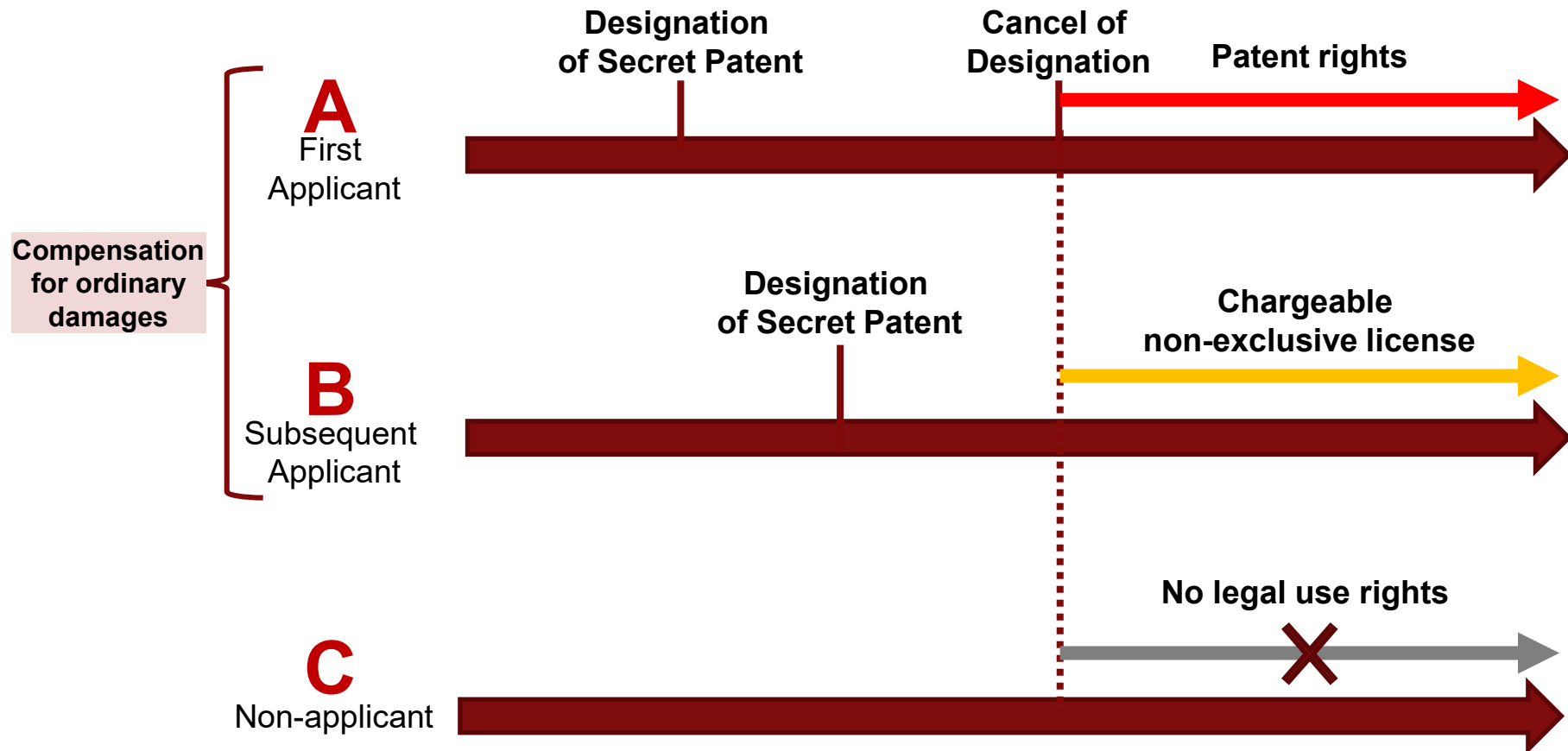
(4) Proper management of secret patent (Article 75)

- 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)



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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VI. Tips for companies doing businesses in Japan

For your eyes only

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Shintaro Okawa

Bar Admissions:

Admitted in Japan, 2016
Daini Tokyo Bar Association

Languages:

Japanese, English and Spanish

Biography

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)
- "Business Law: Latest Updates and Practices in Business and Human Rights - Including the Australian Modern Slavery Act and Practices in M&A" (Accounting & Auditing Journal, 2019)

Background

- The University of Tokyo (LL.B., 2015)
- The Ministry of Economy, Trade and Industry : the Trade Control Policy Division; Security Trade Control Policy Division; International Investment Control Office; and the Economic Security Office (2019-2021)



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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 FIRRMA 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