

REZENSIONEN / REVIEWS

RICHARD W. RABINOWITZ,
Japan's Foreign Investment Law of 1950 : A Natural History

**Publication of the German-Japanese Lawyers' Association Vol. 19 (Hamburg 2003);
793 + XXII pp; Euro 120, ISBN 3-929-124-18-2**

The author has written two lengthy books on a subject which is largely forgotten for good reasons: The control of foreign investments in Japan by the Japanese Government. Such a control had at least a double purpose: First of all to save scarce foreign currency which was not available in sufficient quantity until a mere thirty or so years ago. Secondly the government desired to structure the Japanese industry in such a way that Japan could not only survive in spite of her lack of raw materials but become a major industrial power without again making the mistake of attempting to establish a Greater Japanese Empire as intended by the Japanese military on the one hand and without being dominated by foreign economic interests on the other. In this, the government has succeeded so far – as everybody knows – but would success not have come earlier had liberalisation not progressed so slowly?

Japan now has the highest amount of foreign currency in the world; she is the second largest industrial power with a GNP ten times or so higher than that of China although her population is only 10% of the Chinese population. Why remember the control mechanism of bygone days? And why had these books to be published in Germany by a German publisher?

Question 1: It has been argued that Japan was a developing country until forty years ago and therefore may serve as an example for other developing countries (but was Germany ten years earlier with similar shortages of foreign currency and raw materials a developing country?). Japan had, and still has, a superior bureaucracy going back into the Tokugawa period – hardly any of the present developing countries has such superb basis for success. No – Japan was not a developing country, but – like Germany – a country which had to recover her prior strength.

The author once had commended the present writer for a remark (quoted in full in the book under review) which said that we should not try to learn from Japan in order to take over some of the Japanese goodies (and there are many) but to gain a deeper understanding of Japan. *Rabinowitz* indeed has made a major contribution to such better understanding by taking up a subject which, as such, must be of minor interest now to most who are interested in Japan; he rightly denies that his book is a guide book for use in other circumstances.

Question 2: Of course it looks as if the books have been published in the wrong country and by the wrong publisher. I at first shared this opinion when I bought the books. But since the American law community seemingly has abandoned its former interest in Japanese law the remaining institution for such endeavour worldwide seems to be the German Japanese Lawyers' Association (DJJV). And since this Association has extended its activities into the English speaking (or understanding) world, the publication of the book in Germany and by the DJJV is a natural act of necessity and not of second choice. Its publication is in the interest of both the author and the Association: the author has his work of many years, if not of a lifetime, published by a specialized institution (which happens to be German) while the association can pursue its dedication to spread knowledge about Japanese law and related matters.

The work under review here is the second volume which consists of nearly 800 pages in small print; some of the sentences might have been envied by *Thomas Mann* for their length. Roughly one third of the book is reserved for footnotes in even smaller print. The author reminds us that these footnotes are not of lesser importance than the main body of the text. He must have been aware, however, that he might not have been able to attract enough readers who will even attempt to read the book in full length. I for one do not recommend doing this before having read two parts of the book which actually form the skeleton of the book: The introductory remarks of less than 100 pages and the conclusion of about 50 pages. Those who do not want to invest time in reading 150 pages, should read only the conclusions. Some readers, however, then may become interested enough to read the main part of the work to gain a fuller understanding.

The author tells us that there are three main parts: The first part deals with the structure of the control system as devised by GoJ (the list of abbreviations is long and will have to be consulted quite often – GoJ of course means Government of Japan) and to a lesser point by the Americans. Here the topic is the FIL – Foreign Investment Law – with collaterals – ordinances and case law and the like. The second part deals with modifications of FIL over a period of some years and why they have been made. Thus, no still shots in this section but a running movie over time. And the third part discusses the legal implications of the FIL processes which should be important to any good lawyer who analyses what he has practiced in the past in great volume and obviously with considerable success.

Some aspects of the implementation of the law as also taken up by *Rabinowitz*: Since I was involved in work similar to that of the author – though on a much smaller scale – I tried to find out what he has to say about applications rejected by the authorities. He says that this point officially was never even discussed; the great hurdle was the act of acceptance as evidenced by an acceptance stamp; applications not accepted were not rejected in legal terms. This explains why applications could not be sent in by mail. They had to be presented in person and this was possible only after preliminary clearance which, however, was not part of the official procedure (but an important element of the decision making process – *nemawashi*).

On the role of the Japanese administration the author observes that the traditional division into legislative, executive and judiciary functions should be amended in the Japanese system to include a separate administrative function where the bureaucrats not only are actively involved in the legislation but also in the interpretation of the laws which then function more or less as a guideline only. He even believes that the legislative and executive powers would recede into the background while the judiciary power would disappear enabling the bureaucracy to rule with great intelligence and diligence.

The author describes in some detail the benefits of the anterior examination of facts by the bureaucracy to eliminate the necessity of posterior adjudication by the courts; he might have found a parallel in the Cabinet Legislation Bureau which examines whether laws to be passed by parliament are in infringement of the constitution. This is part of the reason why the Japanese Supreme Court plays only a very minor role in the interpretation of the Japanese constitution and why there are only minor transgressions of the constitution.

One of the conclusions by the author is that law is less significant (he writes “*substantially* less significant”) in the generation and maintenance of societies than many believe. He mentions the late *Dan F. Henderson*, who believed that in Japan law is replaced to a considerable extent by social governance. He could have mentioned also *Murakami Jun'ichi*, the former Todai law professor, who is very active in the discourse between law scholars in Japan and Germany and who also believes in the priority of social norms against the norms of the law.

The book is like a house full of treasures; I hate to admit that I did not find all of them – the length of the book and its structure was too big an obstacle. But from time to time I will take up the book again and certainly find some other treasures; if others would do likewise I would be very happy.

Rabinowitz called me a sapient lawyer – I had to look up the word *sapient* which is, however, not listed in my Duden/Oxford dictionary. The New Oxford Dictionary of English gives a definition: *wise* or *attempting to appear wise*. *Rabinowitz* will no doubt explain to me what he meant after having read this review.

Peter Rodatz