

BOOK REVIEW:

THE GENESIS OF THE JAPANESE FOREIGN INVESTMENT LAW OF 1950 By Richard Rabinowitz German-Japanese Lawyers' Association Vol. 10: 1999.

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Opening Japan to foreign investment is now a 150-year-old effort. In 1853, U.S. Admiral Perry sailed into Tokyo Bay and demanded that the Japanese quasi-military government allow foreign trade.¹ The resulting interactions with the West and the ensuing trade agreements led to the downfall of the Tokugawa government in 1868 and the restoration of the Meiji Emperor as the head of the Japanese state.² During the Meiji Period (1868-1912), Japan underwent a radical transformation from a feudalistic state to a modern, industrial state. Japan adopted a Civil Code, Commercial Code, and a host of other laws heavily influenced by France and Germany.³ As such, many consider the Meiji Period to be a blossoming of Japan and an opening of its markets to the West.⁴

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¹ For two hundred and fourteen years prior to Perry's visit, the military leadership of Japan, the *bakufu*, and its leader, the *shogun*, chose to adopt a policy of seclusion from the rest of the world in order to cement its hold on power. GEORGE SANSON, A HISTORY OF JAPAN 36-45 (1987). Thus, Japan's contacts with the West were mostly limited to sporadic contacts with Dutch and Chinese traders at Nagasaki. MIKISO HANE, JAPAN: A SHORT HISTORY 46 (2000).

² The appearance of the U.S. warships created a national crisis. The *bakufu* was well aware of the possibility of subjugation by Western forces, as had occurred in China. HANE, *supra* note 1, at 60-61. Thus, in seeking advice upon whether to sign the U.S. proposed treaties, the *bakufu* solicited the views of the Imperial house and the lesser lords, who advocated against signing the treaties. *Id.* at 61. Thereafter, the *bakufu*'s fate was sealed when one of its councilors signed the United States-Japan Treaty of Amity and Commerce without Imperial consent in 1858. *Id.* Thereafter, pro-Imperial and anti-*bakufu* forces forced the *shogun*'s abdication and restoration of power to the Emperor in 1867, ostensibly to prevent a national crisis. *Id.* at 67; *see also* MILTON WALTER MEYER, JAPAN: A CONCISE HISTORY 128 (1993).

³ In 1881, Ito Hirobumi, the *de facto* political leader in the early Meiji period, was charged by the Emperor with the task of drafting a constitution for Japan. HANE, *supra* note 1, at 75. While there were supporters of the "liberal" types of constitutions, such as those found in France, Great Britain, and the United States, Ito eventually settled

In fact, the initial motivations for the Meiji Restoration were anti-West and xenophobic in nature.⁵ The “modernization” of Japan that occurred in the Meiji period was done largely to put Japan on an even playing field with the West, thus to prevent the West’s colonization of Japan. Initially, modernization had nothing to do with altruistic free and open markets. Japan’s transformation during the Meiji period was exclusively for the purpose of survival.⁶

This ultra-nationalistic perspective ultimately led to World War II, as Japan attempted to replace the West as the colonizer of Asia.⁷

On August 15, 1945, the Japanese government finally accepted the Potsdam Declaration ending World War II.⁸ The subsequent Occupation of Japan (1945-52) has been heralded as one of the modern marvels of the

on the Prussian model, thus choosing a “conservative” model of constitutional monarchy for Japan. *Id.*; see also MEYER, *supra* note 2, at 140-142.

⁴ See generally MEYER, *supra* note 2, at 149-169. See also W.G. BEASLEY, THE MODERN HISTORY OF JAPAN 134-54 (1981).

⁵ The cries of *Sonno Joi* (“revere the emperor, expel the barbarians”) reverberated throughout the periods preceding the Meiji Restoration as a symbol of resisting Western pressure to open Japanese ports. SANSOM, *supra* note 1, at 236. At the same time, these cries were deliberately fostered by those clans seeking the overthrow of the bakufu—powerful, outside lords from the Satsuma and Choshu domains. *Id.* at 241; see also MEYER, *supra* note 2, at 126-127; HANE, *supra* note 1, at 63. Leaders would later emerge from these domains and become de facto leaders during the Meiji period. HANE, *supra* note 1, at 71; MEYER, *supra* at 2, 138, 142.

⁶ Prior to the Meiji Restoration, anti-Western forces set out to attack Western vessels. As the Western powers struck back, the anti-Western factions, located predominantly in the Satsuma and Choshu domains, quickly realized that modern land and naval forces were required to protect themselves from further Western aggression. WALTER MEYER, *supra* note 2, at 126-28; HANE, *supra* note 1, at 65. Consequently, during the Meiji period, those Satsuma and Choshu leaders concentrated on building a modern navy and army. HANE, *supra* note 1, at 65, 79. Thus, whereas Japan’s modernization of its political structure was perhaps motivated by a desire to obtain better treaty terms with the Western powers, Japan’s economic modernization was done with the purpose of obtaining Western technology to develop better military technology, thereby protecting Japan from further foreign intrusion. MEYER, *supra* 2, at 128, 158.

⁷ With its military and technological power consolidated in the early 1900’s, nationalistic forces in Japan began to mourn the loss of their cultural values as a cost of Westernization. HANE, *supra* note 1, at 89. This, coupled with Japanese successes in the Sino-Japanese War (1894-95) and the Russo-Japanese War (1904-5), led to increased militaristic nationalism. *Id.* at 90-91, 107, 110; MEYER, *supra* note 2, at 192-96. As a result, Japan set out upon the course of territorial expansion, and, by the beginning of World War II, the Japanese Empire stretched from Korea to Indonesia. MEYER, *supra* note 2, at 198-200.

⁸ See MEYER *supra* note 2, at 206-07.

Twentieth Century.⁹ Nearly overnight, Japan was transformed from a militaristic state apparently hell-bent on self-destruction to a peaceful, submissive partner in the fight against communism.

This very brief description of the history that preceded the Occupation is significant in order to understand the context of Rabinowitz's new book, for one could easily argue that the West has been attempting (unsuccessfully) to open Japanese markets since 1853.

It, therefore, should come as a bit of a surprise to most American readers of this book that the so-called "closed" Japanese foreign investment system, which governed foreign investment in Japan until the 1979, was an American construct, not a Japanese one. Yet, this is precisely the thesis of Richard Rabinowitz's insightful and thoroughly researched volume regarding the history of the Japanese Foreign Investment Law.

In what can only be described as an extraordinary achievement, Rabinowitz has compiled an impressive amount of information that was heretofore known by and communicated to very few. Given the nature of the endeavor, Rabinowitz's work truly is amazing. In the Introduction, Rabinowitz apologizes for not having peer reviewers or professional editors assist in the production of this work. He astutely recognizes that this is the work's most significant defect. The result is that the reader must brave fourteen-line sentences, numerous typographical errors, and some writing that meanders. The positive side is that the reader definitely has the sense of reading very rich, fresh prose punctuated with instances of personality and intentionally humorous phraseology that may not have seen the light of day had a professional editor and large professional publication company been involved in this work's production.

Among legal scholars and practitioners, Rabinowitz himself requires no introduction. As a *junkain*, a quasi-member of the Japanese bar, Rabinowitz brings nearly fifty years of experience of studying and practicing law in Japan to this work. However, the book's biography is too modest. Rabinowitz is one of the most significant American legal practitioners in Post-War Japan. Not only is he extremely well respected in Japan, but also to anyone even remotely familiar with legal practice in Japan, Rabinowitz's name is one of the most renowned.

The book itself presents a chronological review of the development of the laws and regulations regarding foreign investment in Japan during the immediate Post-War era. Intertwined with the chronological history of the Foreign Investment Law, the book raises very serious charges regarding the competency of officials from the Supreme Command for the Allied Powers (SCAP), the Occupation force in Japan. These officials

⁹ See *id.* at 209-24.

were the ones entrusted with creating policy for foreign investment in Japan during the Occupation and the New Deal economic policies perpetuated by the Occupation.

Specifically, Chapter One of the book introduces the reader to the Foreign Investment Law of Japan and Foreign Investment Commission Establishment Law. These two rather short laws created a Commission and the general rules under which this Commission operated to oversee foreign investment in Japan until 1979. In the international push to open Japan's markets to investment and technology transfers from foreign enterprises, both Japanese and Americans have blamed this law's restrictive nature as an "impediment." Rabinowitz appears to share this view.

Chapter Two of the book is, perhaps, more laborious than it needs be. The point of the chapter appears to be to show in bright lights that the two laws at issue were introduced at the end of the legislative session in 1950 under extraordinary circumstances. Rabinowitz argues that these strange circumstances indicate that SCAP really dictated the nature and content of these two laws and the Japanese lawmakers played a very limited role.¹⁰ (In Chapter Four, however, he argues that, but for the Japanese initiative, SCAP would have likely delayed the implementation of foreign investment laws even longer.)¹¹

In Chapter Three, Rabinowitz turns to a fascinating description of the role of SCAP in governing the "economic sphere." He argues that SCAP and MacArthur personally were either disinterested in the economic and investment aspect of the Occupation or incompetent.¹² Rabinowitz makes a very interesting case for the argument that MacArthur was more interested in making a name for himself than in actually managing the economic affairs of the occupied Japanese islands. He summarizes his position at one point by saying, "The last thing one would accuse ESS [Economic and Science Section of SCAP] of as a collectively [sic] was that it was 'pro-business,' particularly American business."¹³

Chapter Three also raises a rather startling analogy: it equates the Economic Stabilization Board with the Meiji Oligarchs.¹⁴ In another part of this chapter, Rabinowitz argues that the Board should have actually been very good at their job, because many of the individuals who staffed

¹⁰ RICHARD RABINOWITZ, THE GENESIS OF THE JAPANESE FOREIGN INVESTMENT LAW OF 1950 56 (1999).

¹¹ See *infra* page 247 (discussing Chapter Four).

¹² RABINOWITZ, *supra* note 10, at 69-71.

¹³ RABINOWITZ, *supra* note 10, at 114.

¹⁴ *Id.* at 119.

the Board had specific experience in administering Manchukuo, the puppet regime Japan set up in Manchuria during World War II.¹⁵ This is an important claim as well, because most Americans believe that such high level policy makers were “purged” from the Japanese government during the Occupation when, according to Rabinowitz, they, in fact, were playing important policy functions such as staffing the Economic Stabilization Board.¹⁶

In Chapter Four, the book starts the chronology from the beginning. In this chapter, Rabinowitz argues that Post-War foreign direct investment actually commenced in 1947, some thirty months before laws regulating such commerce were promulgated. In this chapter, Rabinowitz also explicitly states that the New Deal regulators of SCAP, specifically Theodor Cohen, were opposed to foreign investment in Japan, because they saw it as a threat to their control of Japan and maybe even as a threat to the legitimacy of the Occupation itself. Rabinowitz summarizes this as follows:

Cohen’s antipathy to FI [foreign investment] is evident In his view, to allow foreigners to invest in securities would invite speculation by foreigners, whom he dismissed with the opprobrious term carpetbaggers, would heighten the potential for hostility toward the Occupation by Japanese, and, perhaps of greatest significance to Cohen, would lead to expression of opposition by foreigners involved in investment activity to the series of Occupation reforms which . . . Cohen many years later was prepared to characterize as in the image of the New Deal.¹⁷

It is also in Chapter Four where Rabinowitz lays the ground work for what appears to be an apparent twist to the plot: the Japanese government was really the motivating force behind the effort to create a foreign investment regulatory scheme, but SCAP worked hard to prevent realization of such efforts.¹⁸

Chapters Five and Six continue with a detailed description of the processes that led to the ultimate creation of the Foreign Investment Law in 1950. These chapters focus on the barriers raised to foreign investment in Japan during the period of 1948-early 1950, not by Japanese, but by

¹⁵ *Id.* at 125.

¹⁶ *Id.* at 126-33.

¹⁷ *Id.* at 150.

¹⁸ *Id.* at 190.

SCAP itself. Some of the rules are strikingly Tokugawan in tone. For example, until the end of 1948, foreign business people could come to Japan to investigate investment opportunities, but they were forbidden to actually invest.¹⁹ They could not stay more than sixty days and they could not travel more than one hundred miles from their point of entry into Japan. In 1948, these SCAP regulations were revised to allow for direct investment, but the individuals still could not travel within Japan freely and could stay only for very limited periods.²⁰

In Chapter Seven, Rabinowitz describes the transfer of regulation of foreign investment from SCAP to the Government of Japan. In 1950, the Foreign Investment Law itself was drafted and passed into law. This law is seen as a rather restrictive vehicle by which the Japanese government, until its repeal in 1979, oversaw and approved (or disapproved) each investment or transfer of technology into Japan. Most American lawyers and business people charge that the existence of this law made direct investment in Japan unduly laborious and time consuming. It is, then, interesting that this law turns out to be an American vehicle by which the economic policies of the New Dealers were carried out extraterritorially.

In the end, Rabinowitz himself describes this work as “legal archeology.”²¹ That characterization might be even more fitting than he intends. The work is in need of professional editing. The weight of the message is not affected by the typographical errors and the long sentences, but the accessibility to that message is. There is a heavy use of acronyms in place of the English language. Fortunately, a glossary is included, but the mere fact that it is necessary adds to the inaccessibility of the work. This is a very important work, an extremely significant contribution to understanding the process and adoption of law in Post-War Japan, and a profound commentary on the effects of the New Deal. However, I only wish the reader would not have to labor so intensively at this archeological dig to discover its hidden treasures.

That being said, however, this book, perhaps only because of the nature of the rather obscure publisher Rabinowitz chose, may not enjoy as large a readership as that of John Dower’s *EMBRACING DEFEAT* (1999) or William Bix’ *HIROHITO AND THE MAKING OF MODERN JAPAN* (2000). Nevertheless, this book is a must read for anyone interested in Japan’s Post-War history. I highly recommend it.

¹⁹ *Id.* at ch. 5.

²⁰ *Id.* at 314.

²¹ *Id.* at 531.