

# Exhibit 5

## Foreign direct investment, public order and national security: Lessons from the case of J Power<sup>1</sup>

Noboru Kashiwagi\*  
Chuo Law School

### 1. The Development of the Case

J Power is a stock company established under the laws of Japan.<sup>2</sup> It was established as a government-owned company in accordance with the Promotion of Electric Power Development Act of 1952 ("EPDA").<sup>3</sup> The purpose of J Power is to increase the electric power supply through the development of sources of electric power in accordance with the basic plan of development prepared by the Minister of Economy, Trade and Industry.<sup>4</sup> At the beginning, J Power was owned by the government, with a controlling stake of 66.69 per cent of shares, more than the ratio required for passing a special resolution.<sup>5</sup> That meant that J Power was effectively under the sole control of the government. The remaining 33.31 per cent of shares were held by nine regional electric power companies. J Power was established in order to construct the power plants and dams that the nine regional power companies could not afford to after the destruction of facilities during World War II. These regional power companies did not have enough capital to do so. In 1997, the government decided to privatize J Power. So, in 2004, it was listed on the Tokyo Stock Exchange and the government sold all of its stock. At present, 42.51 per cent of its outstanding shares are held by financial institutions, 36.67 per cent by foreign companies, 11.08 per cent by other companies, and 8.43 per cent by individuals.<sup>6</sup> J Power is currently constructing power plants in Japan and also helping the construction of power plants in developing countries, in addition to investing in companies that own electric power plants in developed countries. One director vice-president and one director of J Power are former officials of the Ministry of Economy, Trade and Industry. Two out of five statutory auditors are former officials of the Ministry of Finance.

The Children's Investment Master Fund, a Cayman entity, that was presumably established as a vehicle for the Children's Investment Fund Management (U.K.) LLP (jointly referred to as "TCI"), acquired 9.9 per cent of shares in J Power. Then, it tried to increase its holding of shares up to 20 per cent. In order for a foreign investor to acquire more than 10 per cent of the outstanding shares of a

\*Professor of Law, Chuo Law School. Emeritus Professor, the University of Tokyo.

<sup>1</sup> The author owes a debt to Kojou Makoto, *TCI fandoniyou J Power kabushiki no Shutoku* (The Acquisition of Shares of J Power by TCI), 337 Hogaku Kyoshitsu Oct. 2008, 8. Regarding the history of Foreign Direct Investment in Japan, see Richard W. Rabinowitz, *The Genesis of The Japanese Foreign Investment Law of 1950*, 10 Publication of the German-Japanese Lawyers' Association (1998); Richard W. Rabinowitz, *Japan's Foreign Investment Law of 1950: A Natural History*, 19 Publication of the German-Japanese Lawyers' Association (2003).

<sup>2</sup> The word "company" is the English translation of the Japanese *kabushiki kaisha* that corresponds to a business company, public company, Aktien Gesellschaft or Société Anonyme.

<sup>3</sup> *Dengen Kaihatsu Sokushin Ho* (Act No. 283 of 1952) This Act was repealed in 2003 by Act No. 92 of 2003.

<sup>4</sup> Section 13 of EPDA.

<sup>5</sup> A special resolution requires a positive vote of not less than two-thirds of those present at the general meeting. Sec. 343 of the Commercial Code then effective.

<sup>6</sup> See: [http://www.jpowers.co.jp/annual\\_rep/ann01000.html](http://www.jpowers.co.jp/annual_rep/ann01000.html), visited on 27 December 2008.

particular Japanese company conducting a designated business, the investor has to give prior notice of the acquisition to the Minister of Finance and the specific minister with jurisdiction over the business. Public Notice No. 1 of the Cabinet Office and other various ministries dated 7 September 2007 lists various businesses in which foreign investment may be likely to harm national security or public order. Among them, the business of operating electric power plants, electric booster stations and electric business places is designated in Annex 2 as one of these designated businesses. Therefore, TCI had to notify the government of the intended acquisition of more than 10 per cent of J Power's shares. It did this on 15 January 2008, stating that it intended to acquire between 10 and 20 per cent of J Power's shares.

The Minister of Finance and the minister with jurisdiction may investigate the notified acquisition of shares, to determine if the investment may be harmful to national security or public order and safety.<sup>7</sup> In this case, the Ministry of Finance and Ministry of Economy, Trade and Industry ("METI") were the ministries with jurisdiction.

After extending the stay period, the Ministry of Finance and METI recommended TCI to abandon the intended acquisition of J Power's share on 16 April 2008, in accordance with Article 27 (5) of the Foreign Exchange and Foreign Trade Act. On 25 April, TCI gave notice of its intention not to accept the recommendation. On the same day, TCI was given an opportunity to explain the reasons why the intended transactions should be approved. TCI submitted its explanation on 8 May. On 13 May 2008, the Ministry of Finance and METI jointly ordered TCI to abandon the acquisition of more than 10 per cent of J Power's outstanding shares. The reasons for the order were explained by both ministries as follows:<sup>8</sup>

- (a) The electric utility business has been designated as a business in which foreign investment is subject to prior notification based on the perspective of the "maintenance of public order" and other reasons, from the beginning of the creation of the framework for inward direct investment under the Foreign Exchange and Foreign Trade Act. The standard is widely and internationally accepted under Article 3 of OECD Code of Liberalisation of Capital Movements;
- (b) J Power plays a central role in Japan's nuclear fuel recycling system with the construction of the Oma Nuclear Power Plant, and a role in maintaining the network of electric power distribution; and (c) a role as a wholeseller of electric power by owning basic power generation facilities.

The Oma Nuclear Power Plant receives plutonium obtained by reprocessing spent nuclear fuel from the regional electric power utility companies, and uses it in its thermal furnace. It is expected to occupy a central position in the national policy on the recycling of nuclear fuel. Considering the important roles that J Power is expected to perform in the national policy on nuclear energy and nuclear fuel recycling, the Minister of Finance and METI examined the possible effects of the acquisition of J Power's shares and the exercise of the shareholder

<sup>7</sup> Article 27 (3) of Foreign Exchange and Foreign Trade Act (Act No. 228 of 1 December 1949). An English translation is appended at the end of this article.

<sup>8</sup> See: <https://www.mof.go.jp/jouhou/kokkinn/tci20080513-02.htm>, visited on 28 December 2008.

rights by TCI upon the management of J Power, the planning, operation and maintenance of nuclear power plants, and the national policy regarding the stable supply of electric power and recycling of nuclear power and nuclear fuel.

As regards the likelihood of disturbance to the maintenance of public order, TCI practices as one of its policies aggressive actions towards the company in which it has invested in order to increase the shareholder value, such as attempting to influence the management of the company and solicit proxies. According to information submitted by TCI with regard to a case concerning a company listed on the German Security Exchange, it was recognized that TCI had succeeded in changing the management of the company in which TCI had invested, even though its shareholdings were about 10 per cent.

TCI submitted various proposals to the management of J Power openly or privately, such as the request that J Power sets the Return on Equity (ROE) target as at least 10 per cent and the Return on Assets (ROA) target as at least 4 per cent, and that the management should be held accountable for the achievement of such targets. TCI suggested ideas to improve management, such as the appointment of independent outside directors in order to strengthen the corporate governance of J Power, but was silent as regards any possible harm to the Oma nuclear power plant, future investment in infrastructure and possible damage to the financial strength of J Power.

Mainly for these reasons, both ministers concluded that it was likely that TCI will influence the management of J Power and the planning, operation and maintenance of infrastructures including electrical power cables and nuclear power plants, thereby influencing the stable supply of electric power and the national policy on nuclear power and nuclear fuel recycling.

While TCI proposed to set up performance targets for the operation of J Power and for the management to be accountable for the achievement of such targets, TCI did not disclose the concrete methods of achieving such targets. Therefore, both ministers decided that if the proposed share acquisition by TCI was realized, it was likely to directly or indirectly influence national policy regarding the stable supply of electric power, nuclear power and nuclear fuel recycling, with the possibility of a freezing of, or a large delay in, the construction of the Oma nuclear power plant or a possible reduction in capital spending on infrastructure and/or maintenance expenses.

## **2. Regulations on Foreign Direct Investment into Japan**

Those who give notice to the government may not make the intended investment until thirty days from the notification have expired (Article 27(3) of the Foreign Exchange and Foreign Trade Act). The Minister of Finance and the minister with jurisdiction over the business involved may extend the thirty-day period for up to four months, if they believe it necessary to examine whether the intended investment will impair national security, disturb the maintenance of public order or the protection of public safety, or bring about a significantly adverse effect to the smooth management of the Japanese economy.

After the examination, the Minister of Finance and the minister with jurisdiction over the business related to the proposed investment may recommend that the

person who submitted the notification make modifications to or abandon the proposed investment, after obtaining the opinion of the Council for Customs and Foreign Exchange, if they believe that: (i) the investment will impair national security; (ii) the maintenance of public order or the protection of public safety will be disturbed, or (iii) a significant adverse effect will be brought to the smooth management of the Japanese economy.<sup>9</sup>

The person who received the recommendation must give notice to the Minister of Finance and minister with jurisdiction over the business related to the proposed investment, to accept the recommendation or not within ten days after the receipt of the recommendation.<sup>10</sup>

If the person does not accept the recommendation or fails to give notice of acceptance or non-acceptance, the Minister of Finance and the minister with jurisdiction may order the modifications or the abandonment of the proposed investment.<sup>11</sup>

There is no definition of the words “public order,” nor the words “national security” in the Foreign Exchange and Foreign Trade Act, nor in related statutes, regulations and cabinet or ministerial orders. The government appears to have regarded the businesses listed in Annex 1, attached to the Public Notice No. 1 of the Cabinet Office and other ministries of 7 September 2007, as being related to national safety and those listed in Annex 2 as being related to, among other things, public order. This is clear in Appendix 2<sup>12</sup> to the press release on the order to abandon the inward direct investment,<sup>13</sup> which explains that Japan has restricted inward direct investment related to the electric utility business as it concerns “public order”, in compliance with the OECD Code of Liberalisation of Capital Movements. Appendix 2 also lists the following businesses as similarly restricted for reasons of public order: gas and heat utilities, communication, broadcasting, water supply, railroad and the transportation of public passengers. Concerning national security, it lists manufacturing businesses related to arms and weapons, airplanes, nuclear power and space development. Concerning public safety, it lists manufacturing of bio-drug products and security businesses. In addition to the restricted businesses in accordance with the OECD Code, it states that Japan restricts certain businesses from inward direct investment for reasons unique to Japan. Such examples listed include: agriculture and fishery, oil, leather industry, leather product industry, air transportation and ocean transportation. The OECD Code of Liberalisation of Capital Movements does not contain a definition of “public order,” “national security” or “public safety.” Article 3 simply states that the provisions of the Code shall not prevent a Member from taking action that it considers necessary for the maintenance of public order or the protection of public health, morals and safety.

<sup>9</sup> Article 27(5) of Foreign Exchange and Foreign Trade Act, *supra*, note 7.

<sup>10</sup> *ditto*, (7)

<sup>11</sup> *ditto*, (10)

<sup>12</sup> See: [http://www.mof.go.jp/jouhou/kokkin/tci.betten2\\_20080513.pdf](http://www.mof.go.jp/jouhou/kokkin/tci.betten2_20080513.pdf), visited on 28 December 2008.

<sup>13</sup> See: <http://www.mof.go.jp/jouhou/kokkin/tci20080513-01.htm>, visited on 28 December 2008. The words “inward direct investment” mean an investment by a foreign investor in assets in Japan including the acquisition of the stock of a Japanese company.

### 3. The Meaning of "Public Order"

As explained, attachment 2 entitled Supplemental Materials and attached to the Ministry of Finance and METI's press release dated 13 May<sup>14</sup> indicates manufacturing and other businesses related to arms and weapons, airplanes, atomic power and space development, as businesses that affect "national security." It further indicates businesses related to electric, gas and water utilities, heat supply, communication, broadcasting, railroad operation, and public passenger transportation as businesses affecting "public order." It also indicates businesses relating to bio-drug production and security services as businesses affecting "public safety." In the case of J Power, its business relates to nuclear energy and electric power supply. Therefore, it seems to the author, that the business of J Power relates not only to public order but also to national security. However, all the documents released by the government on the internet concerning TCI's notification only deal with public order.

Public order ("*oyake no chitsujo*") is not a defined term. It is used in Article 90 of the Civil Code as follows: "A juristic act with any purpose which is against public order and good morals is void."<sup>15</sup> In the interpretation of Article 90, the words "public order" and "good morals" have been understood together without separating the two. According to the Legal Dictionary, public order means the general interest of a nation or society, and good morals means the general ethical belief of a society. Both expressions overlap to a large extent. Therefore, both expressions taken together mean ethical norms required to maintain a general social order.<sup>16</sup> In the context of civil law, the words "public order and good morals" are understood to connote some ethical value. But in the case of TCI, no ethical problem is included.

At a conference of the Society of Japanese International Economic Law, a prominent professor who is an expert on public international law pointed out that there is a slight difference in the meaning of "public order" in public law. However, the author could not find a clear definition of "public order" in the context of public law in Japan.

The press release of 13 May 2008 rebuts the arguments presented by TCI. It states: "...with regard to international commitments, considering that it is allowed to restrict the (foreign investment) in case it is likely to hinder "public order" under Article 3 of the OECD Code of Liberalisation of Capital Movements,<sup>17</sup> this order to abandon is consistent with the existing international rules for the liberalization of inward investments. " There is no definition of "public order" in the Code.

It is not clear how the government understands the meaning of "public order." The business of electric power supply is included in Annex 2 to the 1980 Order

<sup>14</sup> See: <http://www.mof.go.jp/jouhou/kokkinn/tci20080513-01.htm>, visited on 28 December 2008.

<sup>15</sup> From Translations of Laws and Regulations by Cabinet Secretariat, <http://www.cas.go.jp/jp/seisaku/hourei/data/CC1.pdf>

<sup>16</sup> Akio Takeuchi and others ed., *New Law Dictionary* 3<sup>rd</sup> ed., Yuhikaku 1989, pp. 86-87.

<sup>17</sup> Article 3 Public Order and Security

The provisions of this Code shall not prevent a Member from taking action which it considers necessary for:

i) the maintenance of public order or the protection of public health, morals and safety;

No. 1 of Cabinet Secretariat and other ministries regarding Inward Investment. If a foreign investor intends to acquire more than 10 per cent of shares of any one of these listed businesses, it must give prior notice to Ministry of Finance and the ministry with jurisdiction. The list in Annex 2 includes various categories of businesses that have to be examined not only from the perspective of public order but also with various other aspects in mind. However, these aspects are not specified and the list in Annex 2 is a hodgepodge. It lists 129 categories of businesses without indicating the reason for the listing. Therefore, it is not possible to know what kind of business relates to public order in the government's eyes.

In the General Agreement on Tariffs and Trade (GATT) of 1947, there is no reference to the words "public order." However, the General Agreement on Trade in Services ("GATS") states that:

*Article XIV*

*General Exceptions*

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:

- (a) necessary to protect public morals or to maintain public order (5);

Footnote 5 states that the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society. However, there is no definition of the words "public order" in the text of GATS. There has been a case fought over the interpretation of "public order" in connection with internet gambling restrictions introduced by the U.S.:

"The U.S.-Gambling decision broadly defined the public-morals exception as "standards of right and wrong conduct maintained by or on behalf of a community or nation." In that case, the Appellate Body upheld the arbitration panel's decision that laws enacted by the United States to combat internet gambling were intended and designed to protect the public morals and maintain public order by targeting certain undesirable social side effects of online gambling, including underage gambling."<sup>18</sup>

In conjunction with the interpretation of Non-Precluded Measures in Bilateral Investment Treaties (BIT), William W. Burke-White and Andreas von Staden wrote:

"the term ("public order") is rarely defined and may have divergent meanings within domestic legal orders. In domestic law, particularly civil law states, public order often appears under its domestic linguistic labels "ordre public," "orden publico," or "öffentliche Ordnung." Some BITs expand the already potentially broad concept of public order by including a separate reference to "law" as a permissible objective. For example, the BIT between China and BLEU adds defense of the state law to the

<sup>18</sup> Destiny Duron Deas, Note: THE COSTS OF PERCEIVED HYPOCRISY: THE IMPACT OF U.S. TREATMENT OF FOREIGN ACQUISITIONS OF DOMESTIC ENTERPRISES, 57 Duke L.J. 1795, 1821.

maintenance of public order as permissible objectives.”<sup>19</sup>

Moreover:

“None of the tribunals ... fully define the contours of the permissible objectives of “essential security” and “public order.””<sup>20</sup> “(T)he term “public order” may have one meaning in a treaty between two civil law states and a very different meaning in a treaty between two common law states. Some may find this range of valid interpretations of similar terms troubling, but it is both appropriate and necessary given that a goal of treaty interpretation is, even within the framework of the Vienna Convention, to give effect to the intent of the parties which entered into the treaty instrument.”<sup>21</sup>

Furthermore, Interpretations of the “public order” objective in international contexts similarly suggest a range of possible interpretations of the term. The OECD Draft Convention on the Protection of Foreign Property contained a “public order” type exception, providing in Article 6 that derogations from its substantive provisions would be permissible if a state party was, *inter alia*, “involved in war, hostilities or other grave national emergency due to force majeure or provoked by unforeseen circumstances or threatening its essential security interests.” The commentary provided a few illustrative examples that emphasize security-related aspects of public order, such as “civil wars, riots, or other wide spread civil disturbances” as well as natural disasters, including “storm damage, earthquakes, volcanic eruptions etc. ... with effects on a national scale.” The commentary suggests by way of reference that the exception was apparently intended to be reflective of the necessity defense under customary law, but some of the examples appear to go far beyond the normal applications of the customary defense. The ultimately unsuccessful Multilateral Agreement on Investment (MAI) also included a “public order” exception. In a footnote, the draft explained that “the public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.” There remained disagreement among negotiating states, however, on what would qualify as a “fundamental interest.” There appears to have been consensus that the application of a state’s criminal laws, anti-terrorist measures, and money-laundering regulations would fall under the “public order” heading, but there was no agreement as to how much broader the exception should be.”<sup>22</sup>

#### 4. The Inconsistency of Government Policy

Don Wallace, Jr. and David B. Bailey claim in connection with the interpretation of GATT Article XX, GATS Article VI, and the proposed MAI Article VI, that these exceptions for “public order” and police powers seem to be the key area of contention and public order is vulnerable to being exaggerated beyond reasonable bounds.<sup>23</sup> The biggest problem of this kind of vague and ambiguous

<sup>19</sup> William W. Burke-White and Andreas von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties*, 48. *Va. J. Int’l L.* 307, 333.

<sup>20</sup> *ditto*, 337.

<sup>21</sup> *ditto*, 340-341.

<sup>22</sup> *ditto*, 358-359.

<sup>23</sup> Don Wallace, Jr. and David B. Bailey, *The Inevitability of National Treatment of Foreign Direct Investment with Increasingly Few and Narrow Exceptions*, 31 *Cornell Int’l L.J.* 615,625.

expression as a criterion for the restriction of foreign direct investment is that such vagueness or ambiguity is open to abuse by protectionist and other interest groups. With regard to the similarly vague notion of "national security," it has been pointed out that the risk of this lack of a clear definition is that it could be exploited by a future protectionist-minded presidential administration to block transactions that would normally not be deemed to be national security threats.<sup>24</sup>

The power of protectionists is strong in Japan. Moreover, there may be incentives for high-ranking government officers to keep private companies under their supervision and control. In many cases, high-ranking officials who leave the government take positions in private companies that they once supervised. Such private companies expect these former officials to influence the supervising government office. Government offices can also benefit by securing positions for senior retiring officials. In Japan, this practice of senior bureaucrats retiring into key jobs in the private sector in fields closely related to their government roles is called "descent from heaven" (*amakudari*).

Because there is no clear and objective criteria of "public order", the reasons for the order to abandon the acquisition of shares by TCI were not persuasive at all.

The reasons for the order to abandon were: (i) TCI's requests to set up ROE and ROA targets of J Power; (ii) the appointment of independent outside directors and TCI's failure to explain why the acquisition by TCI is not harmful to the operation of the Oma Power Plant; and (iii) TCI's failure to explain the actual measures to be taken to prevent TCI from hindering national policy regarding a stable supply of electricity, nuclear power and nuclear fuel recycling.

As a shareholder of a business corporation in the private sector, it is quite natural to request the management to set operational targets for ROE and ROA. Figures of 10 per cent for ROE and 4 per cent for ROA as requested by TCI are not unreasonable. The basic idea of corporate governance is that the shareholders are allowed to try to maximize the shareholder value. In this respect, the request to appoint independent outside directors is also perfectly reasonable. Appointment of outside directors is quite popular in Japan especially among listed large companies. Moreover, these requests may well be proposed by existing shareholders. These requests are not unique to TCI but are to the benefit of all shareholders in general and there is a valid argument that these proposals enhance the shareholder value as a whole. The failure to explain the actual measures to be taken to avoid hindering national policy does not provide evidence of the likelihood of any such hindrance. It would also be extremely difficult to make an assurance of future inaction.

The Ministry of Finance and Ministry of Economy, Trade and Industry explained how the procedures for the examination of the notified acquisition of shares were transparent and fair.<sup>25</sup> At least six members of the Special Committee for the Foreign Exchange Branch of the Council for Tariffs and Foreign Exchange seem to be neutral, judging by the gist of their available discussion.<sup>26</sup>

<sup>24</sup> Matthew R. Byrne, NOTE: Protecting National Security and Promoting Foreign Investment: Maintaining the Exon-Florio Balance, 67 Ohio St. L.J. 849,890.

<sup>25</sup> 3 (3) of Annex No. 1 "With respect to the Order to Abandon" attached to the press release of 13 May 2008.

The Special Committee at its second meeting<sup>27</sup> explained the reason for disapproval in Paragraph 4. It states: "4. If the additional acquisition of shares by TCI is completed, depending upon the actions taken by TCI as a major shareholder, we cannot deny the possibility of an unpredictable influence upon the planning, operation and maintenance of infrastructures in Japan including power lines and upon national nuclear power and fuel recycling, even if we consider the proposals submitted by TCI." Then, it concludes "5. Considering the above, we recognize that there is a likelihood of the impairment of the public order. Therefore, we request the government to take appropriate measures." Paragraph 1 states the importance of inward direct investment to Japan. Paragraph 2 explains the reason why restrictions based on the maintenance of public order are allowed. Paragraph 3 explains how J Power is important to Japan.

The reason stated in Paragraph 4 applies to every acquisition of J Power's shares. Every kind of acquisition of shares with voting rights involves the possibility of affecting the management of the company. This is not a likelihood but rather the fundamental power given to shareholders of a company. No specific reason unique to the proposed acquisition of J Power's shares by TCI is given. After reading the gist of the discussion, the author could not find any persuasive argument for why TCI's investment had to be abandoned, especially when 36 per cent of outstanding J Power shares are already held by foreign shareholders and J Power is a completely privatized company listed in the first section of the Tokyo Stock Exchange. The reason why only the gist of the meeting was published, as is stated in a note to the documentation, was because it related to a specific investment. The author does not believe this to be a sufficient reason.

In the United States, Congress has a keen interest in the examination procedures of the Committee on Foreign Investment in the United States (CFIUS) under the Exon-Florio amendment to protect "national security" from certain foreign investments. In contrast, the Japanese Diet seems to have little interest in the procedures for the examination of investments. Other people in Japan also seem to have little interest in the processes related to the control of inward direct investments.

## 5. The Real Reason for Disapproval of the Investment

Restriction of foreign direct investment is premised upon the belief that foreigners and foreign corporations are not patriotic and tend to harm the interest of the host country. The validity of this premise needs to be examined carefully.

If this premise is true, it may be reasonable for the Japanese government to try to protect a Japanese company operating nuclear power plants and performing a vital role in the operation of nuclear recycling. The question that then arises is why did the Japanese government allow J Power to be privatized and make it a listed company thereby allowing foreigners to own 36 per cent of shares? What if the Japanese shareholders of J Power requested the same proposals, such as

<sup>26</sup> <http://www.mof.go.jp/singikai/kanzegaita/gijiyosi/a200415.htm>, visited on 30 December 2008.

<sup>27</sup> <http://www.mof.go.jp/singikai/kanzegaita/tosin/gaishibukaiiken.pdf>, visited on 6 January 2009. Also the gist of the first meeting can be found at <http://www.mof.go.jp/singikai/kanzegaita/gijiyosi/a200411.htm>, visited on 6 January 2009.

setting ROE and ROA targets or the appointment of outside directors? This is perfectly possible. The government might have expected more passive shareholders who were only interested in the ups and downs of the stock price, rather than more activist shareholders.

It is likely that the reason for the order to abandon the TCI proposal was based on the threat to national security but not public order. However, Annex 1 attached to the Public Notice No. 1 of the Cabinet Office and other ministries of 7 September 2007 lists only manufacturing businesses as those affecting national security. It is quite possible that J Power does not engage in manufacturing business.

The most appropriate means of protecting J Power and other businesses that affect national security or have a vital role in the maintenance of public order, is the requirement for these companies to be Japanese, owned and operated by Japanese citizens only.

For example, the Atomic Energy Act of 1954 of the United States, 42 U.S.C. Sec. 2133 (d) states that:

Limitations. .... No license may be issued to an alien<sup>42</sup> or any corporation or other entity if the Commission knows or has reason to believe it is owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government. In any event, no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

Or, the Federal Aviation Act of 1958 U.S.C., which defines a citizen of the United States and excludes foreigners from engaging in various aviation businesses:

(15) "citizen of the United States" means--

- (A) an individual who is a citizen of the United States;
- (B) a partnership each of whose partners is an individual who is a citizen of the United States; or
- (C) a corporation or association organized under the laws of the United States or a State, the District of Columbia, or a territory or possession of the United States, of which the president and at least two-thirds of the board of directors and other managing officers are citizens of the United States, which is under the actual control of citizens of the United States, and in which at least 75 per cent of the voting interest is owned or controlled by persons that are citizens of the United States.

The Japanese government should have enacted a similar statute if it genuinely wanted to protect J Power from foreign ownership. In this case, it seems to the author that the government tried to recover from its past mistake of privatizing J Power without anticipating activist foreign shareholders. Necessity makes for bad law.

## 6. Conclusion

It may be reasonable to restrict foreign investment into nuclear power plants in

light of its sensitive nature and the examples of other countries. However, it is not consistent with the complete privatization of J Power. If the government wanted J Power to follow its policies irrespective of the legitimate exercise of shareholders' rights to maximize the shareholder value as they like, it should not have privatized J Power completely. Because of this inconsistency, the government's reasoning behind the order to abandon the acquisition is not persuasive and it smacks of a lack of both transparency and fairness. Even though the outcome might be appropriate, the inconsistency, poor reasoning and lack of transparency will further discourage foreign investment into Japan.

The Japanese government may have noticed this mistake. *Nihon Keizai Shimbun* (Japan Financial Paper) reported on December 28, 2008 as follows:

The government will review the regulations of foreign direct investment into Japan regarding all kinds of businesses, in order to increase investment. ... Present Foreign Exchange Control Act requires the foreign investors to apply prior permission of the government if they try to acquire not less than 10% of outstanding shares of domestic companies engaging in certain kinds of businesses including electric power supply, manufacturing of arms and nuclear power. ... The Act encompasses broad areas of businesses including agriculture, forestry, fishery, rail road, and a part of manufacturing — not only those directly affecting national security. For this reason, it was criticized so that the scope and reasons of restrictions should be clearer. Each ministry will review the scope of regulated businesses. If each ministry intends to continue the restriction on foreign investment, it will offer reasons for restrictions that may be persuasive to foreign investors.<sup>28</sup>

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<sup>28</sup> The government will consider if it should review the restrictions on foreign direct investments under Foreign Exchange Control Act, *Nihon Keizai Shimbun* December 28, 2008 (Sunday) page 3.