

22 Industrial Property Rights Policy in Modern Japan: An Analysis of the Political Process Involving Japan, the UK and the USA in Relation to Membership of the Paris Convention^(*)

Research Fellow: Satoshi Tsuruoka

It has been said that after the process of Westernization began during the Meiji period, Japan aimed to swiftly achieve modernization, and its proactive introduction of superior Western science and technology promoted domestic industrial development. However, little attention has been paid to how Japan subsequently sought to promote domestic industrial development and establish business overseas. In particular, with its accession to the Paris Convention in 1899, Japan began to participate in international competition in earnest, but for the most part, the detailed sequence of events leading up to this has still not been clarified. Accordingly, through the political process surrounding Japan's accession to the Paris Convention, this study seeks to clarify how modern Japan sought to promote domestic industrial development and the establishment of business overseas, amidst an international community in which intense competition was unfolding, thereby providing a model case for reference when formulating industrial property rights systems in the future. In this research, there will be a particular focus on diplomatic negotiations between Japan and the UK, and diplomatic correspondence from the UK will be used as an additional reference for the first time.

I Introduction

Hitherto, there has been little clarification of the detailed sequence of events leading up to Japan's accession to the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works in 1899, which was the first time that it had participated in an international framework focused on the protection of intellectual property rights. This is because the subject spans the realms of political science, law, political history, legal history, and technological history, and it is difficult to conduct research that draws all these fields together.

However, accession to the Paris Convention and the Berne Convention was exceedingly important, not only because it was the first time that Japan had participated in international competition, but also because of their connection to what was called *naichi zakkyo* [under which restrictions on the areas in which foreign nationals could live, travel and do business in Japan were abolished], which began within Japan the same year.

Accordingly, this study examines the sequence

of events leading up to Japan's accession to the Paris Convention and the Berne Convention in 1899, with a particular focus on negotiations with the UK—which at that time was said to be a superpower—concerning treaty revisions. Furthermore, by including and clarifying revision negotiations with the USA, which had demonstrated a friendly attitude, this study clarifies how modern Japan sought to achieve a balance between international cooperation and the pursuit of its national interests, and what kind of industrial property rights policy Japan sought to deploy amidst an international community in which intense competition was unfolding, thereby providing an example that can form a basis for the creation of industrial property rights systems in the future.

II The Raising of Problems in Treaty Revision Negotiations

1 Revision Negotiations Undertaken by Foreign Minister Inoue

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(1) The Inoue proposal and preliminary talks on treaty revisions

In September 1879, Kaoru Inoue was appointed Lord of Foreign Affairs. The following year, in May 1880, Inoue formulated a draft revision of treaty, but this did not contain any provisions concerning industrial property rights.

Subsequently, in January 1882, preliminary talks concerning treaty revisions began in Tokyo. At the 9th round of preliminary talks, in April that year, Inoue made the "*naichi kaihou* declaration", in which he stated that he was prepared to open up Japan's interior on the condition that foreign nationals were subject to Japanese law.

In response to this, at the 15th round of preliminary talks, in June the same year, the French delegate Joseph Adam Sienkiewicz submitted a proposal to establish provisions concerning industrial property rights and copyright in the draft revision. The UK also assented to this and the British submitted a request that industrial property rights be taken up in the preliminary talks.

In response to this, Inoue indicated his willingness to discuss the matter of industrial property rights separately from the revision negotiations.

(2) The period after the preliminary talks until the official talks began

The preliminary talks concluded, but exchanges took place between Japan and the world powers concerning the policy on future negotiations relating to industrial property rights.

Firstly, in December 1883, British Foreign Secretary Granville George Leveson-Gower, 2nd Earl Granville, requested that negotiations concerning industrial property rights be resumed promptly, and instructed Francis Plunkett, the new British Minister to Japan, to swiftly resume negotiations concerning industrial property rights. In response to this, in April 1884, Minister Plunkett submitted a memorandum to Japan, requesting the prompt resumption of negotiations concerning industrial property rights. However, at this point, there had been no request to discuss the matter in negotiations concerning treaty revisions, nor was there a request concerning accession to the Paris Convention or the Berne Convention, as the memorandum indicated a preference to discuss the matter bilaterally, rather than multilaterally.

Moreover, in April the same year, Germany also instructed the German Minister to Japan to discuss industrial property rights separately from the treaty revision negotiations.

On the other hand, in July that year, France requested the prompt formulation of a special agreement on industrial property rights.

In response to this, in August that year, Inoue clearly stated his agreement with the UK's opinion, but with regard to the timing of the negotiations, he indicated his preference to commence them after concluding the treaty revision negotiations.

However, France strongly objected to this, so the following year, in April 1885, Inoue consented to add a provision concerning industrial property rights to the draft treaty revision.

Whilst there were such exchanges between Japan and the world powers regarding future methods of negotiation concerning industrial property rights, from 1881, the world powers actively encouraged Japan to join the Paris Convention.

However, Japan rejected their inducements, stating that it could not join the convention because the provisions of the Paris Convention conflicted with those of the Patent Monopoly Act.

Furthermore, the world powers inquired whether Japan's laws on industrial property rights granted rights to foreign nationals, but Japan responded that it could not grant rights to foreign nationals.

(3) Treaty revision conference

In May 1886, the treaty revision conference began in Tokyo. During the first session of the conference, Inoue submitted a draft revision, but it prescribed national treatment regarding trademarks alone and did not explicitly mention accession to the Paris Convention and the Berne Convention. Accordingly, this provision was modified.

As a result, when the 25th session of the conference was held the following year, in April 1887, a draft revision was submitted that prescribed national treatment in relation to patents, trademarks and designs.

In addition, in the same month, it was decided to establish a committee to discuss matters relating to commerce; at a meeting of this committee, Plunkett disclosed that he would request Japan's accession to the Paris Convention and the Berne Convention. Moreover, France also requested that a provision regarding the Paris Convention be incorporated into the draft.

The other world powers agreed to this, as it would make the protection more reliable, but Japan opposed the move, as it feared that the protection would be extended to the names of shops, in addition to patents, trademarks and designs;

Germany also sided with Japan regarding this.

Subsequent committee meetings were held, but the British request was not implemented. The reason for this was that mutual protection of copyright was not prescribed in the treaty between Japan and the USA that had already been signed; accordingly, due to the most-favored nation status in their relationship, it was not possible to incorporate Japan's accession to the Paris Convention and the Berne Convention into the draft revision.

As a result, a modified draft was submitted in July that year, but although it prescribed national treatment regarding patents, trademarks and designs, it did not explicitly mention accession to the Paris Convention and the Berne Convention. Consequently, the UK merely instructed Plunkett to encourage Japan to join the Paris Convention and the Berne Convention.

However, Inoue subsequently began to be exposed to severe criticism regarding the draft revision, both from within the Cabinet and in the newspapers, so at the end of July that year, he was compelled to notify the world powers that the revision negotiations were postponed indefinitely, and he resigned as Foreign Minister in September the same year.

2 Revision Negotiations Undertaken by Foreign Minister Okuma

(1) The Okuma proposal and negotiations with the USA and Germany

On February 1, 1888, Shigenobu Okuma was appointed Foreign Minister. After Okuma formulated a draft revision, negotiations commenced in November and December of that year with the US and Germany, which had demonstrated a friendly attitude for some time. With regard to industrial property rights, this draft was the same as the modified draft submitted at the treaty revision conference in July 1887.

Negotiations with the USA progressed smoothly and the Japan-US Treaty of Peace, Amity, Commerce and Navigation was signed in February 1889, without any major amendments relating to industrial property rights. In other words, national treatment was prescribed in regard to patents, trademarks and designs, but there were no stipulations regarding accession to the Paris Convention or the Berne Convention.

With regard to negotiations with Germany, there were fierce negotiations around such matters as the interpretation of the most-favored nation clause, but no major modifications were made in

regard to industrial property rights and the same provision as in the aforementioned treaty between Japan and the USA was established. As a result, the Japan-Germany Treaty of Peace, Amity, Commerce and Navigation was signed in June the same year.

(2) The trademark forgery incident as a preliminary skirmish in the negotiations with the UK

At the end of 1887, a trademark forgery incident occurred between Japan and the UK. In response to this, Power Henry le Poer Trench, the British chargé d'affaires requested that Japan take steps to deal with this promptly, but in June 1888, Okuma responded that intervening in a particular case based on a request by the UK and putting a stop to an infringement by a Japanese national would be extra-legal, and that he could not intervene in this particular case because it was not considered to be an object of immediate and urgent necessity. Moreover, with regard to an inquiry from Trench concerning Japan's accession to the Paris Convention, Okuma expressly stated that Japan was declining this request.

In response to this, Trench informed the government in the UK that it was obvious that Japan had decided not to intervene in similar cases of infringement until the question of the abolition of the foreign settlements had been resolved, and advised that it should be even more cautious with regard to Okuma, as it seemed that Japan had decided to severely restrict the rights of foreign nationals.

Ultimately, although the British company that had suffered the infringement requested that the British Government apply further pressure in regard to this stance on the part of Okuma, the UK remained silent on this matter in discussions with Japan.

(3) Negotiations with the UK

Negotiations with the UK began in December 1888. When the UK received the draft revision from Okuma the following year, at the end of January 1889, it began to study the proposals forthwith.

Firstly, Sir John Henry Gibbs Bergne, Superintendent of the Treaty Department at the Foreign Office, asserted that Japan should be made to join the Paris Convention and the Berne Convention, because the issue of industrial property rights in Japan was becoming serious and progressively acquiring a greater importance.

Moreover, just as Bergne had, John Harington Gubbins, who was the secretary to the British

legation, pointed out that the damage suffered by British interests due to the lack of protection for industrial property rights in Japan had grown, particularly in recent years. He asserted that, while Japan's accession to the Paris Convention and the Berne Convention would certainly not be a bad thing, the UK must be prepared for Okuma to continue to insist on Japan's accession to these conventions taking place simultaneously with the abolition of the foreign settlements, and also to cite the fact that rights had not been granted to foreign nationals in the interior of Japan as the excuse for refusing to put a stop to infringements of trademarks and copyright by Japanese nationals, as in the recent incident.

This stance on the part of Okuma was perceived as a threat to the UK, and it made the British increasingly aware of the importance of the issue of industrial property rights.

However, negotiations with the UK subsequently stagnated for some time, due to the conflict between Japan and the UK surrounding the interpretation of the most-favored nation clause, but after the Japan-Germany Treaty of Peace, Amity, Commerce and Navigation was signed in June 1889, the UK formulated a draft response to Okuma's proposal the same month. In this, an amendment was made concerning industrial property rights, to make it conform to British patent law, but no other major modifications were made, and it did not contain any provisions concerning national treatment for patents, trademarks and designs, nor did it contain any reference to accession to the Paris Convention or Berne Convention. This was because the Foreign Secretary, the 3rd Marquess of Salisbury, stated that the UK "would be glad" if Japan were to accept accession to the Paris Convention and the Berne Convention, so it went no further than being a hopeful request.

On the other hand, Hugh Fraser demonstrated the recognition that the problem of industrial property rights in Japan was a question of special importance for the UK, and that if Japan joined the Paris Convention and the Berne Convention, it would make a major contribution to the UK's trade and industry.

Further negotiations subsequently took place between Japan and the UK, but although slight modifications were made in regard to industrial property rights, there were no major amendments and an agreement was reached on the majority of matters.

Thus, after the British side received Okuma's draft revision, great importance came to be placed

on the issue of industrial property rights in Japan, as reflected in Fraser's assertion that the problem of intellectual property rights in Japan was a "question of special importance". However, ultimately, the UK did not demand that Japan join the Paris Convention and the Berne Convention. As stated above, in addition to the fact that this issue was a desirable condition, the reasons behind this include the fact that it was difficult for Fraser to extract any further concessions from Japan and other world powers had either already concluded the signing of their revised treaties with Japan, or were moving forward with negotiations aimed at signing such treaties, so he thought that the UK should also sign the revised treaty promptly.

Thus, agreement was broadly reached between Japan and the UK regarding the other provisions as well, but negotiations came to a halt in October 1889, as a result of an assassination attempt on Okuma.

III The Development of Points of Contention in Treaty Revision Negotiations

1 Revision Negotiations Undertaken by Foreign Minister Aoki

(1) The formulation of the "Aoki memorandum"

The Yamagata Cabinet was inaugurated on December 24, 1889 and Shuzo Aoki was appointed as Foreign Minister. In February 1890, Aoki drew up a memorandum concerning the policy on negotiations relating to the treaty revision. No modifications were made in this regarding industrial property rights.

(2) Dispatch of the British proposal

At the same time, whilst Aoki was still drawing up the aforementioned memorandum, major developments were occurring on the British side. More specifically, in January 1890, Fraser made an important proposal. As well as encouraging wide-ranging concessions on the part of the UK, such as abandoning the demand for the appointment of foreign judges, he recommended that one of the policies for the negotiations should be the demand that Japan join the Paris Convention and the Berne Convention.

Fraser's proposal was broadly accepted by the British Government, so in June 1890, a draft was drawn up that explicitly prescribed Japan's accession to the Paris Convention and the Berne Convention before the abolition of consular jurisdiction. The UK then sought to conduct

negotiations based on this draft, on which the British officials had pinned such great hopes.

(3) The formulation of Aoki's modified proposal

Aoki, who had received the draft from the UK, agreed to conduct negotiations based on this draft, as it recognized Japan's demands, in the main. In September 1890, based on the British draft, Aoki formulated a modified draft that accepted accession to the Paris Convention and the Berne Convention.

However, divergent opinions continued to emerge from within the Cabinet in regard to Aoki's modified draft, and the Cabinet still had not reached a consensus by March the following year. Consequently, in mid-March, without a Cabinet decision, Aoki sent to Fraser a draft that he had already prepared, which had been modified once more. This further-amended draft prescribed national treatment in regard to patents, trademarks, designs and copyright, but the provision regarding accession to the Paris Convention and the Berne Convention had been deleted; regarding this, Aoki indicated his continued preference to conclude a bilateral agreement concerning industrial property rights.

However, the Otsu incident occurred in May that year and Aoki resigned to take responsibility for this.

2 Industrial Property Rights in the Time of Foreign Minister Enomoto

(1) "Decision on the treaty revision"

In May 1891, Takeaki Enomoto was appointed as Aoki's successor in the post of Foreign Minister. Enomoto formulated a draft revision, in which major changes could be seen concerning industrial property rights. In this draft, industrial property rights were raised as one of the points of contention in the revision negotiations. More specifically, in this draft, Enomoto stated that the protection of industrial property rights was one of the things currently being demanded in revision negotiations by the world powers and that accession to the Paris Convention and the Berne Convention could be described as the only concession on the part of Japan. He asserted that Japan should accept accession to these conventions, as it was certainly not an excessive concession, compared with the benefits that Japan would gain from treaty revision.

Moreover, at the time of Enomoto's tenure as Foreign Minister, the pros and cons of joining these

conventions had begun to be discussed in earnest, with Kaoru Inoue raising accession to the Paris Convention and the Berne Convention as a point of contention.

(2) Deliberations by the Treaty Revision Proposal Advisory Committee

In March 1892, after Enomoto's draft revision was submitted to the Cabinet, discussions within the Cabinet regarding revision negotiations resumed. As a result, an advisory committee was established to examine the draft and the first meeting of that committee was held in April that year. In addition, the question of accession to the Paris Convention and the Berne Convention began to be discussed in earnest by the committee, with Chairman of the Privy Council Hirobumi Ito stating that a decision must be made regarding this.

However, in August 1892, before the second committee meeting was held, the Matsukata Cabinet collapsed, so Enomoto resigned as Foreign Minister.

IV Decision on Accession to the Paris Convention and Misgivings on the Part of the Western Powers

1 The Start of the Mutsu Negotiations

In August 1892, the second Ito Cabinet was inaugurated and Munemitsu Mutsu was appointed Foreign Minister. The following year, in July 1893, Mutsu drew up a draft revision. In this draft, national treatment was prescribed regarding patents, trademarks and designs, but nothing was stipulated concerning accession to the Paris Convention and the Berne Convention.

Preliminary negotiations subsequently took place between Japan and the UK, but no major amendments were made regarding industrial property rights, other than amending the wording.

2 Foreign Minister Mutsu's Negotiations with the UK

Negotiations between Japan and the UK began in London at the end of December 1893. After the first day of talks, a memorandum was drawn up between Japan and the UK, in which the UK clearly presented its stance of requesting from Japan at least in regard to trademarks and copyright.

After a brief hiatus, negotiations between Japan and the UK resumed at the end of February 1894, and at the end of March that year, it was agreed to hold a committee meeting in London.

As a result, the committee began to meet in

April that year and at the first session Japan rejected the request for its accession to the Paris Convention and the Berne Convention, asserting that it wished to conclude a bilateral convention.

At the second session, the UK inquired about the British trademark forgery incident by Japanese nationals, and Japan admitted that the Japanese party was completely at fault.

At the third session, the UK suggested that it was dissatisfied with Mutsu's draft revision regarding industrial property rights.

At the fifth session, the UK formally requested that Japan join the Paris Convention and the Berne Convention. In response to this, Japan replied that it could not agree to the Berne Convention.

In regard to this situation, Mutsu, who was in Tokyo, made the decision to consent to the request to join the Paris Convention and the Berne Convention. One factor behind this was that Mutsu had an ulterior motive for wishing to speed up the conclusion of the treaty, as Sino-Japanese relations on the Korean Peninsula were becoming tense.

Amidst this situation, the sixth session of the committee took place. At this session, Japan disclosed that it would accept accession to the Paris Convention and the Berne Convention in exchange for the deletion of the words "and to pass laws giving full effect to these Conventions". It was explained that the reason for this was that passage through the Diet was required in order to enact laws. The UK accepted Japan's argument in regard to this.

Thus, in July 1894, the Anglo-Japanese Treaty of Commerce and Navigation was signed; in this, as well as prescribing national treatment for patents, trademarks and designs, it was explicitly stated that Japan would join the Paris Convention and the Berne Convention. With this, it was decided that Japan would join these conventions.

3 Foreign Minister Mutsu's Negotiations with the USA

Following the signing of the Anglo-Japanese Treaty of Commerce and Navigation, negotiations with the USA began in earnest, in September 1894. Apart from the question of migrants, these proceeded smoothly in general and the Japan-US Treaty of Commerce and Navigation was signed in November 1894. With regard to industrial property rights, the treaty established similar provisions as in the treaty between Japan and the UK, prescribing national treatment for patents, trademarks and designs, but unlike the latter treaty,

there were no stipulations regarding the Paris Convention and the Berne Convention. This was because the treaty between Japan and the UK had already prescribed accession to the Paris Convention and the Berne Convention, so this was not necessary in the subsequent treaty.

However, in regard to this, dissenting voices began to emerge from the US Senate, arguing that the treaty should expressly provide for Japan's accession to the Paris Convention and the Berne Convention, in the same way as the treaty between Japan and the UK.

Ultimately, after this amendment, the Japan-US Treaty of Commerce and Navigation was ratified in February 1895, but the fact that this kind of dissent emerged from the USA was proof that the world powers harbored misgivings concerning Japan's stance regarding the protection of industrial property rights.

Furthermore, such misgivings increasingly influenced actual business transactions and subsequent revision negotiations with powers other than the UK and the USA, particularly negotiations with Germany.

V Preparations Within Japan for Accession to the Paris Convention ---Commencement of Granting Rights to Foreign Nationals

In June 1896, after the decision was reached on Japan's accession to the Paris Convention, the Ministry of Agriculture and Commerce requested that the Ministry of Foreign Affairs conduct a study regarding industrial property rights systems in other countries, and set the ball rolling for Japan to join the convention in question. As a result, on November 20 that year, Ministry of Agriculture and Commerce Ordinance No.9, entitled "Matters Relating to the Registration of Applications by Foreign Residents and Foreign Nationals", was promulgated, which at last granted rights to foreign nationals as well.

Moreover, in September 1896, after the collapse of the second Ito Cabinet, the second Matsukata Cabinet was inaugurated. On November 12 the same year, a Committee for Preparations for the Implementation of the Convention was established, with Home Minister Sukenori Kabayama serving as the Chairman and Privy Councilor Fujimaro Tanaka as the Vice-Chairman. This committee discussed matters pertaining to the copyright and industrial property rights of foreign nationals, and, as a result, an interpretation was considered that sought to reduce the scope of

rights of foreign nationals in regard to industrial property rights and copyright. Even after deciding to join the Paris Convention and the Berne Convention, Japan still rejected an open approach based on granting rights to foreign nationals, as well and swiftly making excellent foreign technology available within Japan, thereby developing and strengthening domestic industry; instead, it sought to maintain its inward-looking state, trying to protect domestic industry by excluding foreign nationals.

IV Conclusion

From the sequence of events described above, the following observations can be made.

Firstly, Japan did not actively seek to join the Paris Convention and the Berne Convention. In other words, Japan did not begin to participate in international competition in a well-prepared state, with future overseas business expansion in mind. Consequently, after the decision to join these conventions, Japan was swiftly compelled to adopt a response predicated on defense from other countries.

Secondly, despite the fact that the possibility of opening up the country's interior had been mentioned at an early stage, throughout the negotiations concerning accession to the Paris Convention and the Berne Convention, there was no change in Japan's closed attitude to industrial property rights and copyright—the desire to protect domestic industry by excluding foreign countries—towards a more open approach, focused on developing and strengthening domestic industry by swiftly making excellent foreign technology available within Japan and, as a result, seeking to promote overseas business expansion by domestic industry.

Thirdly, for Japan, the decision on its accession to the Paris Convention and the Berne Convention through treaty revision negotiations was the result of having preserved a balance between the pursuit of the national interest and international cooperation. In other words, it was the result of achieving a balance between the pursuit of the national interest, in the form of seeking to discuss the matter at separate talks from the revision negotiations, after the conclusion of a revised treaty, in order to delay accession to the conventions as long as possible, with the objective of protecting domestic industry, and implementing international cooperation, as Japan had to respond to repeated demands from other countries for its accession to these conventions.

Fourthly, one can see that throughout the negotiations concerning accession to the Paris Convention and the Berne Convention, the Western powers were forming the impression that Japan was somehow "sly", as it was rapidly developing in technical strength and diplomatic power, but at the same time was careless about the protection of intellectual property rights. As a result, this impression influenced their diplomacy and business transactions.