

20 Industrial Property Rights Policy in Modern Japan

– From 1894 to 1911 –^(*)

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In July 1894, as a result of revisions to the so-called unequal treaties, Japan's accession to the Paris Convention was secured. This finally made Japan a member of the international community. Since then, what developments have occurred in Japan in terms of industrial property rights? As a matter of fact, after signing said Convention, Japan encountered many problems related to industrial property rights in the course of negotiations with Western countries and had to struggle to solve them.

This research will examine the types of problems related to industrial property rights that occurred between Western countries (particularly the U.K. and Germany) and Japan, which had greatly raised its international status by securing accession to the Paris Convention and undergoing the First Sino-Japanese War and the Russo-Japanese War. This research will also analyze, based on historical materials on Japan, the U.K., and Germany, how Japan tried to solve those problems through diplomatic negotiations. Furthermore, this research will reveal how Japan had tried to establish a system to balance national interests and international cooperation as a member of the international community.

I Introduction

The signing of the Anglo-Japanese Commerce and Navigation Treaty in July 1894 secured 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. This finally made Japan a member of the international community in the field of intellectual property rights as well.

However, the signing of these conventions did not necessarily solve all of the industrial property right-related problems that existed between Japan and Western countries. Rather, subsequently, a series of new problems related to industrial property rights occurred between Japan and Western countries, especially the U.K. and Germany.

On the other hand, against this backdrop, Japan reached a major turning point in international politics: the *First Sino-Japanese War*, which broke out in August 1894, and the *Russo-Japanese War*, which broke out in February 1904. These two wars greatly changed Japan's international status.

Therefore, a study on the history since July 1894 would allow us to understand how Japan, which had newly become a member of the international community and had successfully raised its international status, dealt with

problems related to industrial property rights caused by the introduction of many advanced technologies from Western countries from the perspective of a balance between the policy to pursue national interests and the policy to pursue international cooperation (more specifically, how Japan has formed such policies). It would also give us valuable insight into what policies on industrial property rights Japan, as a member of the international community, should take in the future, especially toward emerging countries, which are undergoing rapid economic development, in order to maintain a balance between the policy to pursue national interests and the policy to pursue international cooperation.

However, this part of Japanese history has not been analyzed sufficiently.

Therefore, this research will focus on the history after the signing of the Anglo-Japanese Treaty of Commerce and Navigation in July 1894, analyze, mostly from a diplomatic perspective, what problems emerged with regard to industrial property rights and what solutions were sought between Japan, whose accession to the Paris Convention was secured, and Western countries, especially, the U.K. and Germany; and it will reveal how Japan was trying to establish a system to balance national interests and international cooperation as a member of the international community.

(*) This is an English translation of the summary of the report published under the Industrial Property Research Promotion Project FY2012 entrusted by the Japan Patent Office. IIP is entirely responsible for any errors in expression or description of the translation. When any ambiguity is found in the English translation, the original Japanese text shall be prevailing.

II Industrial Property Rights and the Japan-Germany Commerce and Navigation Treaty

1 Leading up to the signing of the Japan-Germany Commerce and Navigation Treaty

(1) Commencement of negotiations between Japan and Germany

In August 1892, the second Ito Cabinet led by Prime Minister Hirobumi Ito was formed. Munemitsu Mutsu was appointed as foreign minister. Foreign Minister Mutsu signed the Anglo-Japanese Treaty of Commerce and Navigation in July 1894 and instructed Japanese Ambassador Aoki Shuuzo in Germany to immediately begin negotiations with Germany.

Ambassador Aoki replied that the German Federal Foreign Office did not receive a report from German Ambassador Freiherr von Gutschmid in Japan and that Germany was still hesitant to prompt the commencement of the Japan-Germany negotiations.

Therefore, Foreign Minister Mutsu and German Ambassador Gutschmid had a meeting in Tokyo, after which, Ambassador Gutschmid prepared a report. The German Federal Foreign Office received his report on December 14, 1894 and began negotiations with Japan in January 1895.

(2) Gutschmid's report

In the report, German Ambassador Gutschmid stated as follows.

First, he pointed out that, although the Anglo-Japanese Commerce and Navigation Treaty was an equal bilateral treaty, it had some problems with such matters as coastal trade, consular jurisdiction, land ownership and consulate's authority.

He also pointed out that, when the Japan-Germany Commerce and Navigation Treaty was signed in 1889, it was Germany's intention to liberate Japan in phases, except for the issue of tariffs, and that this was a crucial point that led to the difference between the success of the Anglo-Japanese Commerce and Navigation Treaty and the failure of the Japan-Germany Commerce and Navigation Treaty signed in 1889. He proposed that Germany should not conduct negotiations based on the Japan-Germany Commerce and Navigation Treaty but based on the Anglo-Japanese Commerce and Navigation Treaty. He warned that Japan, which had clearly

shown its military power in the First Sino-Japanese War, would take a stronger position against Germany.

Ambassador Gutschmid proposed the following negotiation policies for individual issues: (i) demand for compensation for the complete relinquishment of consular jurisdiction, (ii) a consistent request for land ownership, especially mortgage, (iii) scrapping of the restrictions on coastal trade, reconsideration of the tariff rates and clarification of taxes on foreigners' residential areas, (iv) relinquishment of a special agreement concluded under the Japan-Germany treaty signed in 1889, and (v) maintenance of the heritage and guardian system, the provision concerning marriage and the consular agreement. With regard to intellectual property rights, he pointed out the problem that Article 17 of the Anglo-Japanese Commerce and Navigation Treaty protects Germany's interest only to a certain extent.

Finally, he proposed that Germany should conclude a special agreement on particular subjects such as intellectual property rights, conclude a protocol on tariffs and conclude a memorandum on Japan's promises concerning legal codes, etc.

Having received this report, the German Federal Foreign Office accepted many of his proposals and started Japan-Germany negotiations.

(3) Presentation of Germany's proposal and Japan's response

In January 1895, Japan-Germany negotiations commenced in Berlin between Ambassador Aoki and the German Foreign Secretary, Adolf Hermann Freiherr Marschall von Bieberstein. In the negotiations, Germany requested the signing of a special treaty on protection for industrial property rights. Japan accepted this request on the condition that the special treaty would not take effect before the relinquishment of consular jurisdiction.

Also, they negotiated proposals on tariffs and the consular treaty. One year later, in February 1896, industrial property rights reemerged as a negotiation agenda. In the negotiations, Germany demanded the addition of a paragraph specifying that "The subjects of each of the two countries shall enjoy in the other protection of inventions, patterns, and models, trade and manufacture marks, firm and other commercial names upon fulfillment of conditions prescribed by law. This agreement shall immediately take effect upon the

exchange of ratifications of present treaty." In comparison with the Anglo-Japanese Commerce and Navigation Treaty and the Japan-U.S. Commerce and Navigation Treaty, which were previously signed, this provision was more advantageous to Germany in the sense that only Germany, ahead of the U.K. and the United States, can obtain protection for industrial property rights in Japan, more specifically, immediately after the exchange of ratifications.

Having received this request, Ambassador Aoki interpreted that this provision would allow Japan to immediately restore jurisdiction over industrial property rights and proposed to accept this request. Acting Foreign Minister Kinmochi Saionji accepted the proposal. Despite his skepticism toward the statements made by Ambassador Aoki, Acting Foreign Minister Saionji did not clearly instruct Ambassador Aoki to check this point by referring to the explicit provision.

In the end, Acting Foreign Minister Saionji failed to seek follow-up information from Ambassador Aoki about this matter before Japan-Germany negotiations got under way.

(4) Signing of the Japan-Germany Commerce and Navigation Treaty

On April 4, 1896, the Japan-Germany Commerce and Navigation Treaty was signed. Regarding industrial property rights, Article 17 specified that the principle of national treatment shall apply to the protection of industrial property rights and that, if the legally prescribed conditions are fulfilled, Germans shall be given protection for industrial property rights in Japan.

Article 21 specified that Article 17 shall take effect immediately after the exchange of ratifications. Moreover, Section 4 of the Protocol referred to the signing of a special treaty due to the fact that Germany had not signed the Paris Convention.

However, regarding the issue of consular jurisdiction, it was specified that Germany would agree to the relinquishment of consular jurisdiction only if Germany's consular jurisdiction is relinquished simultaneously with the relinquishment of the consular jurisdiction of other Western countries. In short, these provisions were written in such a way that they could be interpreted that only Germany could gain protection for industrial property rights in Japan immediately after the exchange of ratifications, while, as far as Germany's consular jurisdiction over industrial property rights was concerned, Japan would not restore jurisdiction

over industrial property rights until July 1899, when the consular jurisdiction of other Western countries would be relinquished.

On this matter, Ambassador Aoki emphasized that Article 17 could be interpreted as stating that Japan was authorized to exercise its jurisdiction and that Germany had already agreed on this point in the bilateral negotiations.

However, Acting Foreign Minister Saionji was not convinced by Ambassador Aoki's explanation and expressed his concern that, under the principle of most favored nation treatment, not only Germany but also other Western countries would gain protection for industrial property rights in Japan without allowing Japan to restore its jurisdiction over industrial property rights.

2 Period between the signing of the Treaty and the exchange of ratifications

(1) Dispute in Japan regarding additional negotiations

Against this background, in May 1896, Foreign Minister Mutsu, who returned to his job, instructed Ambassador Aoki to check the explicit provision to ensure that Japan was to restore jurisdiction over industrial property rights. However, Ambassador Aoki refuted this instruction.

Foreign Minister Kinmochi Saionji, who was newly appointed as a foreign minister to replace Mutsu, gave similar instruction to Ambassador Aoki in late June of the same year. At the time, Foreign Minister Saionji instructed Ambassador Aoki to check whether Germany had agreed to Japan's restoration of the following types of jurisdiction: (i) the patent office's purely administrative and practical jurisdiction that is limited to patent grant, refusal, revocation, etc., (ii) the court's jurisdiction over German people residing in Japan as far as the enforcement of Japanese laws concerning industrial property rights is concerned, and (iii) the court's jurisdiction covering only German people requesting protection.

As a result, in late July of the year, Ambassador Aoki reported that, although it would be impossible to newly establish such provisions, Germany secretly indicated that it would agree to Japan's restoration of jurisdiction over industrial property rights if such jurisdiction only covered German people requesting protection for industrial property rights.

However, Foreign Minister Saionji was not

satisfied with the report from Ambassador Aoki. Since it subsequently became evident that Japan and Germany had a different interpretation as to their "agreed points" concerning Article 17, Foreign Minister Saionji instructed Ambassador Aoki, in late August of the year, to delay the exchange of ratifications.

(2) Realization of the difference between Japan and Germany

Germany started sensing that something was wrong in August 1896. From early August, Foreign Minister Saionji, First Vice Minister of Foreign Affairs Komura, and German Ambassador Gutschmid started having meetings in Tokyo. In these meetings, Germany argued that (i) the administrative disposition of industrial property rights should be determined based on Japanese law, (ii) the treaty does not have any provision specifying that Japan has any specific type of jurisdiction, and (iii) it is impossible to relinquish jurisdiction over industrial property rights since it would violate the Constitution and such relinquishment had not been discussed in the course of the negotiations.

These meetings made it clear that there was a difference between Japan and Germany with regard to the interpretation of the "agreed points" on Article 17. While Japan requested confirmation on the content of the report prepared by Ambassador Aoki, Germany demanded immediate exchange of ratifications. However, the second Ito Cabinet collapsed in mid-September, and Foreign Minister Saionji resigned as a result.

(3) Dissatisfaction of Germany about Article 17

Meanwhile, dissatisfaction was expressed within Germany with regard to Article 17. In July 1896, a meeting was held in Berlin between the German Federal Ministry of the Interior and the German commerce and industrial community with regard to the Japan-Germany Commerce and Navigation Treaty. In the meeting, committee members voiced their opinion that, since the current provision could not exclude Japanese trademarks similar to German trademarks, it would be necessary to put more pressure on Japan.

In response, the German Federal Ministry of the Interior made two proposals to the German Federal Foreign Office: (i) filing requests for revocation under Article 2, paragraph (3) and Article 10 of the Japanese Trademark Regulations

and filing trademark applications under Article 17 of the Japan-Germany Commerce and Navigation Treaty and (ii) analogically applying Article 7 of the Germany-Austria Treaty on Patents, etc.

The German Federal Foreign Office decided to accept the first proposal. It actually started following the application procedure and expressed its intention to take legal action.

(4) Additional negotiations conducted by Foreign Minister Okuma

On September 18, 1896, when the second Matsukata Cabinet was established, Shigenobu Okuma was appointed as foreign minister. In October of the same year, in order to move the negotiation with Germany forward, Foreign Minister Okuma decided to use the same technique as the one adopted to solve a problem related to the Hunting Act. In other words, Foreign Minister Okuma made a proposal to German Ambassador Gutschmid that Japan would recognize Germany's consular jurisdiction in Japan even after the exchange of ratifications and, in exchange, that the consular court should obey Japanese law when it comes to any disputes concerning industrial property rights.

However, Germany rejected Okuma's proposal on the grounds of its domestic law. Consequently, Foreign Minister Okuma decided to discontinue negotiations with Germany and to exchange ratifications because he expected that there would be few infringement cases where Germans infringe Japanese trademarks in reality. He also decided to give other Western countries the same benefits as those given to Germany under the principle of most favored nation treatment.

In a subsequent meeting held in November of the same year, German Ambassador Gutschmid declared that the content of the report prepared by Ambassador Aoki was unacceptable. Although Foreign Minister Okuma had expressed his intention to solve this problem in the course of negotiations for the signing of a special treaty based on the content of the report, he had to accept Germany's stance again.

(5) Other countries' reaction to the exchange of ratifications

In connection with the scheduled exchange of ratifications of the Japan-Germany Commerce and Navigation Treaty, the following developments were observed in other countries.

First, Germany started pressuring Japan not to give other Western countries, under the

principle of most favored nation, the same benefits as it gave to Germany. This was because of Germany's intention to enter the Japanese market under more advantageous conditions than those applied to other Western countries. In particular, Germany paid attention to the actions of the United Kingdom. At the same time, Germany steadily registered its industrial property rights and made preparations for infringement lawsuits.

Meanwhile, the United States and Russia became greatly interested in the issue of Article 17. The United States suggested that it would take legal action in the future.

On the other hand, when this problem was reported by the mass media in Japan, it aroused nationalism. A negative view was expressed against the protection of foreigners' industrial property rights.

(6) Exchange of ratifications of the Japan-Germany Commerce and Navigation Treaty

On November 18, 1896, the exchange of ratifications of the Japan-Germany Commerce and Navigation Treaty took place. Before coming to this point, the problem became complicated due largely to (i) the unclear instructions given by Foreign Minister Saionji, (ii) Ambassador Aoki's behavior, (iii) the difficulty in communication by telegram, and (iv) the worsening of Germany's feelings towards Japan.

Regarding (i), although a written confirmation should have been obtained regarding the point that Japan would recover the jurisdiction over industrial property rights immediately after the exchange of ratifications, Foreign Minister Saionji replied, "I suggest, but do not insist," to obtain such written confirmation in response to Ambassador Aoki's report. As for (ii), Ambassador Aoki did not have a complete understanding of the jurisdiction over industrial property rights and simply conveyed Germany's arguments. Regarding (iii), misunderstandings were easily caused by telegrams, which, unlike letters, required communications in English and placed limits on the amount of information communicated. Regarding (iv), even before the commencement of negotiations between Japan and Germany, Germany's feelings toward Japan had been deteriorating significantly. This was further aggravated by the Article 17 issue and the delay in the exchange of ratifications, making it difficult for Germany to accept Japan's requests.

III Japan-U.K. Relationships Concerning Industrial Property Rights

1 Anglo-Japanese protocol concerning mutual protection of patents, trademarks, and designs

(1) Reaction of the U.K. toward the Japan-Germany Commerce and Navigation Treaty

Meanwhile, having seen the results of the Japan-Germany negotiations as described above, the U.K. immediately took action. One week after the signing of the Japan-Germany Commerce and Navigation Treaty, on April 10, 1896, the U.K. prepared an English translation of the Japan-Germany Commerce and Navigation Treaty. In late April of the year, the British Foreign Office notified the British Board of Trade of the differences between the Anglo-Japanese Commerce and Navigation Treaty and the Japan-Germany Commerce and Navigation Treaty from the perspective of industrial property rights.

In response to a request from the British Board of Trade, British Foreign Secretary the 3rd Marquis of Salisbury instructed British Minister E. Satow in Japan to conduct further research.

In response, British Minister Satow presented his view, in October of the same year, that it would be desirable to make a claim under the principle of most favored nation. He proposed, in November of that year, that, since Japan permitted the filing of German applications, while refusing British applications, the U.K. should immediately make a claim under the principle of most favored nation.

Consequently, at the end of November, the British Foreign Office, with the consent of the British Board of Trade, instructed British Minister Satow in Japan to immediately make a claim under the principle of most favored nation.

(2) Japan-U.K. negotiations concerning the timing for commencement of mutual protection

In this situation, in mid-December of the same year, the British Board of Trade proposed that, in order to obtain mutual protection for industrial property rights, it would be easiest and most desirable if Japan were to sign the Paris Convention, because a special agreement with Japan and an Order in Council were required under the Patents, Designs, and Trade Marks Act, 1883.

In response to this proposal, British Minister

Satow argued that such a proposal would not be regarded as desirable in this situation. In response, the British Foreign Office proposed the immediate implementation of Article 17, which would eliminate the need for an Order in Council. The British Foreign Office prioritized obtaining protection for British industrial property rights in Japan over solving the issue of jurisdiction over industrial property rights. The British Foreign Office chose an option that would allow the earliest and most efficient accomplishment of this goal.

Consequently, the British Board of Trade agreed to the British Foreign Office's proposal. As a result of the negotiations between Japan and the U.K., mutual protection began in January 4, 1897.

(3) Japan-U.K. negotiations on consular jurisdiction

Meanwhile, regarding the issue of consular jurisdiction over industrial property rights, in November 1896, Foreign Minister Okuma proposed to British Minister Satow that Japan would recognize British consular jurisdiction in Japan and, in exchange, requested that the consular court should apply Japanese law by analogy.

In response, at the end of January 1897, British Foreign Secretary Salisbury notified Japanese Minister Takaaki Kato to the U.K. that, if Japan agreed not to apply Japanese law to British citizens as long as Japanese law was not enforced on the citizens of other Western countries, the U.K. would agree to relinquish jurisdiction over industrial property rights. In other words, the U.K. refused to return to Japan the jurisdiction over industrial property rights in practice. However, the U.K., which used to demand the unconditional application of the principle of most favored nation, agreed to participate in negotiations with Japan in view of British domestic law.

Consequently, negotiations between Japan and the U.K. began in London. In February 1897, Minister Kato sent a draft protocol. Japan and the U.K. roughly agreed to the draft. Subsequently, Japan and the U.K. had negotiations on modifications of wording, etc. On October 20 of the same year, Japan and the U.K. signed a protocol on mutual protection for patents, designs and trademarks.

2 Negotiations between Japan and the U.K. at international conferences

(1) Conference to revise the Paris Convention

In December 1900, the third conference to revise the Paris Convention was held in Brussels. Since this conference, Japan has become a full-fledged member. In this conference, Japan did not express any opposition except for the issue of the Madrid Protocol.

In May 1911, the fourth conference to revise the Paris Convention was held in Washington. In this conference, Japan once again expressed its stance of non-participation in the Madrid Protocol. Japan was able to express its opinions on other issues as well. Gradually, Japan started strongly claiming its own interests in international conferences.

(2) British proposal for international unification

In September 1905, the U.K. made a proposal for unification of multiple countries' legal systems for industrial property rights, in other words, unification of the provisions on the non-use of a patent and the provisions on trademark registration.

However, Japan refused the proposal on the grounds that it was not in line with Japanese policies, although those policies have been criticized by Western countries.

3 Negotiations between Japan and the U.K. on the Anglo-Japanese Commerce and Navigation Treaty

(1) Preparation of the Komura draft

In July 1908, Prime Minister Taro Katsura's second Cabinet was established. Jutarō Komura was appointed as foreign minister. In preparation for the 1911 revision of the Anglo-Japanese Commerce and Navigation Treaty, which was signed in July 1894, Foreign Minister Komura decided to prepare a draft revision.

The Komura draft prepared at the end of January 1910 did not contain a provision concerning industrial property rights because it was found unnecessary based on the fact that Japan had already signed the Paris Convention.

Komura's draft was approved at a Cabinet meeting in February of the same year. In early March of that year, Foreign Minister Komura instructed Minister Takaaki Kato to the U.K. to commence negotiations with the U.K.

(2) Submission of the British draft and Japan's response

In late April 1910, Japan and the U.K. commenced negotiations in London. Regarding industrial property rights, the U.K. requested the reason for not establishing a provision on industrial property rights in the Komura draft and demanded the establishment of a provision on trade name protection.

Although U.K.-Japan negotiations were initially conducted based on the Komura draft, strong oppositions to that draft were heard within the U.K., and thus the U.K. decided to prepare one of its own. From early July of that year, U.K.-Japan negotiations were conducted based on the newly prepared British draft.

The British draft proposed the establishment of a new provision specifying the application of the principle of national treatment to the protection of industrial property rights, i.e., patents, trademarks, trade names and designs. However, Japan requested the removal of this provision by arguing that it was unnecessary because Japan had signed the Paris Convention.

(3) Compromise proposed by Japan

Japan's aforementioned argument did not easily convince the U.K. In February 1911, Foreign Minister Komura slightly modified Article 17 of the 1894 Anglo-Japanese Commerce and Navigation Treaty and proposed to include the modified Article in the new Anglo-Japanese Commerce and Navigation Treaty.

On the other hand, the U.K. proposed that it would accept Japan's request for removal of the provision as long as Japan clearly stated in the meeting's minutes that it would not withdraw from the Paris Convention. In the end, Japan and the U.K. agreed to state in the meeting minutes that Japan would not withdraw from the Paris Convention in exchange for removing this provision.

(4) British request for the right to seek revocation and Japan's reply

Also, the U.K. newly included in the aforementioned British draft a provision that permitted third parties to seek revocation of industrial property rights such as patents.

In response, Foreign Minister Komura expressed his intention to oppose the British draft on the grounds that it would allow the filing of a request for revocation in a wider range of cases. However, he made a compromise by saying that Japan would agree to the British draft if the

U.K. was not convinced by Japan's counterargument. Consequently, Japan and the U.K. continued negotiations based on the British draft.

(5) Signing of the Anglo-Japanese Commerce and Navigation Treaty

On April 3, 1911, Japan and the U.K. signed the Anglo-Japanese Commerce and Navigation Treaty. The two countries agreed to include in the Treaty a new provision on industrial property rights, i.e., Article 1, item (vi), to permit third parties to seek revocation of patents, etc., and to state in the attached minutes that, if either Japan or the U.K. hoped to withdraw from the Paris Convention, the two countries were to conclude an agreement on mutual protection for industrial property rights.

IV Conclusion

So far, the proceeding chapters have described the history since the signing of the Anglo-Japanese Commerce and Navigation Treaty in July 1894, i.e., the history since Japan's accession to the Paris Convention was secured. By studying this history, we have learned the following.

First, having gone through the First Sino-Japanese War and the Russo-Japanese War, Japan started claiming its national interests with regard to the issues concerning industrial property rights in a more aggressive manner, making a shift toward policies to pursue national interests.

Second, "opening the door to Japan" with respect to industrial property rights took place earlier than initially scheduled. As a result of the negotiations between Japan and Germany, Japan had to immediately "open the door to Japan" as far as industrial property rights were concerned. Therefore, Japan did not have sufficient time to make necessary preparations either internally or externally.

Third, the developments observed in the field of industrial property rights in Japan since 1894 is the process that was necessary for Japan to become a member of the international community. The negotiations between Japan and Germany marked the "opening the door to Japan" when it came to industrial property rights. In this sense, the decision of Japan's accession to the Paris Convention made in July 1894 did not mark the final resolution of the problem but the beginning of Japan's participation in the

international community as a full-fledged member.

Fourth, it is reasonable to conclude that, like the U.K., Germany always played an important function in determining the course of the negotiations for revision of treaties and that, especially with regard to industrial property rights, Germany played an extremely important role in view of the fact that the result of the Japan-Germany negotiations greatly influenced the future course of Japan.

In this way, since July 1894, when it came to industrial property rights, the history of Japan has been nothing but smooth. As a result of the signing of the Japan-Germany Commerce and Navigation Treaty, Japan was forced to "open the door to Japan" in an unexpected manner before recovering consular jurisdiction over industrial property rights. This was the beginning of Japan's hardship. However, having undergone the First Sino-Japanese War and the Russo-Japanese War, Japan enhanced its international status and gradually implemented policies to protect its international property rights from other countries, while accepting requests from the international community to the minimum extent.

This history may be regarded as a process in which Japan gradually became a member of the international community and pursued the establishment and harmonization of systems through communications with the international community, while taking advantage of its rising international status and demanding that the international community do the same.