

15 Industrial Property Rights and Treaty Revisions in Modern Japan - Diplomacy and Domestic Affairs - (*)

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In 1899, Japan acceded to the Paris Conventions and the Berne Conventions. Details of the process that led up to this have begun to emerge in recent years, primarily focusing on the diplomatic aspects.

However, little information has emerged so far about domestic affairs, in terms of what kind of domestic problems Japan and Western countries faced in relation to industrial property rights in this process.

Accordingly, this study examines industrial property rights in modern Japan in terms of diplomacy and domestic affairs to clarify what kind of problems concerning industrial property rights emerged between Japan and Western countries – above all, the UK and Germany, which played a leading role in the treaty revision negotiations – in the process leading up to Japan’s accession to these conventions in 1899.

I Introduction

In 1899, Japan acceded to the Paris Conventions and the Berne Conventions. Details of the process that led up to this have begun to emerge in recent years, primarily focusing on the diplomatic aspects.

However, such studies have revealed little about the domestic affairs behind the diplomatic negotiations, in terms of what kind of domestic problems Japan and Western countries faced in relation to industrial property rights.

Rather than being confined to negotiations concerning industrial property rights, diplomatic negotiations are mostly conducted on the basis of the domestic situation (domestic affairs) in each country, so in order to further analyze and examine diplomatic negotiations, it is important to gain an insight into the domestic situations (domestic affairs) in those countries.

At the same time, quite a few studies of industrial property rights in modern Japan carried out hitherto have referred to the process of enacting such legislation as the Trade Marks Regulations and the Patent Regulations.

However, none of these studies have given much consideration to political factors in modern Japan, so it is difficult to discern the relationship between industrial property rights and political factors in modern Japan.

Accordingly, taking into account the outcomes of these studies, this study examines industrial property rights in modern Japan from the perspective of political science, in terms of

diplomacy and domestic affairs to clarify what kind of problems concerning industrial property rights emerged between Japan and Western countries – above all, the UK and Germany, which played a leading role in the treaty revision negotiations – in the process leading up to Japan’s accession to these conventions in 1899.

II The Formation of the Meiji Government and Industrial Property Rights

1 Vacillating between the Reward Theory and the Patent Theory

(1) Deliberations in Kogi-sho

In December 1867, the monarchy was restored and the new Meiji government was formed. Under the Meiji government, industrial property rights were discussed in Kogi-sho (the legislature at that time) as early as March 1869 and since the government’s formation there had been high hopes that industrial property rights might help to promote new domestic industries, so it began to explore the enactment of industrial property rights legislation.

(2) Establishment of Minbu-sho

The offices of the Meiji government were reorganized in July 1869, resulting in the establishment of Minbu-sho (the Ministry of Popular Affairs) and Okura-sho (the Ministry of Finance). Minbu-sho and the Ministry of Finance were merged about a month later and, as a result,

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the expanded mega-ministry began to promote various policies aimed at modernization, including industrial property rights.

In the first half of 1870, the establishment of organization which was named Hougen-kyoku as part of the expanded mega-ministry was proposed. This proposal was not adopted, but the granting of rewards and patent rights to inventors, and of exclusive rights to the authors and translators of books were prescribed, with the reward theory (which involves granting a reward to a person who has created a useful invention) and the patent theory (which involves granting exclusive patent rights to a person who has created a useful invention) operating concomitantly.

In June that year, proposals for the codes, rules and regulations concerning rewards for inventions were submitted by the expanded merged ministry. None of these proposals were adopted either, but the reward theory and the patent theory continued to operate in tandem; in addition, it was stipulated that exclusive permission would be granted to the person who was first to import and work a foreign technology, and the copying of inventions was prohibited. As well as protecting inventors, the ulterior motive of the Meiji government in doing this was to ensure that technologies from Western countries were introduced as soon as possible.

The Meiji government did not adopt any of these proposals, but proposals for industrial property rights legislation were repeatedly made and there were high hopes for industrial property rights as one of the policies aimed at revitalizing domestic industry. The figures behind these proposals included such former retainers of the shogunate as Shibusawa Eiichi, who was also knowledgeable about industrial property rights.

(3) The establishment of Koku-syo and the formulation of the Summary Rules of Monopoly by Minbu-sho

While the expanded merged ministry was split once more into two separate ministries in July 1870, Koku-syo(the Ministry of Engineering) was established as a new ministry in October that year, to take charge of administrative matters concerning the promotion of engineering. However, Koku-syo was launched without an adequate organizational system having been put in place, so after it was first established, Minbu-sho continued to handle the administration of industry promotion on its behalf, and the Industrial Property Rights Bill was

submitted by Minbu-sho in March 1871.

Under this bill, there was a shift in policy, moving away from the reward theory and the patent theory operating in tandem; the reward theory was expurgated and the patent theory became clear-cut. Moreover, stringent restrictions on copying were abolished and the copying of outstanding technologies from Western countries and within Japan was encouraged, reflecting the intention of Minbu-sho to develop domestic industry without delay.

On April 7 that year, the bill was promulgated as Senbai-ryaku-kisoku(the Rules of Patent), following some revisions of the wording.

(4) The transition to the reward theory and the abolition of Senbai-ryaku-kisoku

Although the Summary Rules of Monopoly were promulgated in April 1871, moves to revise them were already beginning to emerge within Minbu-sho around that time. In July 1871, Minbu-sho switched its policy away from the patent theory and began considering implementing policies based on the reward theory once again.

However, a reorganization of government offices was carried out in July 1871, resulting in Minbu-sho being subsumed into the Ministry of Finance and abolished altogether. In October that year, Koku-syo took over responsibility for the Summary Rules of Monopoly, which had previously been under the jurisdiction of Minbu-sho.

At the same time, once Koku-syo inherited Senbai-ryaku-kisoku from Minbu-sho, the same kind of moves began to be seen there as well. In January 1872, Koku-syo decided to abolish Senbai-ryaku-kisoku that it had inherited from Minbu-sho and establish new rules about such matters as the patenting of inventions, as well as implementing policies based on the reward theory.

As a result, in March 1872, Koku-syo abolished Senbai-ryaku-kisoku on the grounds that it was still too early to enforce them, as they had many adverse effects, while yielding little in the way of benefit, but this was already the established policy of Koku-syo.

However, the abolition of Senbai-ryaku-kisoku was an interim measure on the part of Koku-syo, and as well as implementing policies based on the reward theory, it indicated that it intended to enact a new law based on this in the future, so at that point it was still willing to enact industrial property rights legislation.

2 Conflict within the Meiji Government Concerning Industrial Property Rights

(1) Kobu-syo after the abolition of Senbai-ryaku-kisoku

After the abolition of Senbai-ryaku-kisoku, Kobu-syo appears to have implemented policies based on the reward theory, but it demonstrated a negative attitude toward the enactment of a new law on industrial property rights, just as it had at the time that it abolished Senbai-ryaku-kisoku, taking the stance that such a law would have numerous adverse effects, while yielding few benefits, so it was too early to bring it into force.

Moreover, in January 1873, the Ministry of Finance inquired about industrial property rights, and Kobu-syo was not actively opposed to the Ministry of Finance handling them.

Furthermore, Naimu-syo (the Ministry of Interior) was established in November 1873 and a department with jurisdiction over industrial property rights was established within the ministry the following March; Kobu-syo's department handling industrial property rights had been abolished the previous November, while references to industrial property rights were deleted from Kobu-syo's regulations concerning the disposition of business in November 1875. Thus, the latter ministry demonstrated a readiness to make concessions to other ministries as well.

(2) Establishment of the Ministry of Interior

In October 1873, the Meiji government conducted another reshuffle of personnel, appointing Ito Hirobumi to the Minister of Kobu-syo, Okuma Shigenobu to the Minister of Finance, and Terashima Munenori to the Minister of Foreign Affairs. A month later, in November, the Ministry of Interior was established and Okubo Toshimichi was appointed to the Minister of Interior.

In March 1874, a new department with jurisdiction over industrial property rights was established in the Ministry of Interior and it implemented policies based on both the reward theory and the patent theory.

However, this meant that industrial property rights were being handled not only by Kobu-syo and the Ministry of Finance, but also by the Ministry of Interior, with some overlaps in their respective jurisdictions.

(3) Closer relations between the Ministry of Finance and the Ministry of Interior

At the same time, having become aware of the isolation of Kobu-syo in relation to industrial property rights, the Ministry of Finance initially sought to act in concert with it, but after Okuma Shigenobu was appointed Minister of Finance in October 1873 and the Ministry of Interior was established the following month, new moves began to be seen.

In May 1874, having already become aware of the isolation of Kobu-syo, the Ministry of Finance was formulating a bill on industrial property rights, but after coordinating with the Ministry of Interior, it actually submitted a different bill on industrial property rights instead of the one it had originally been working on. As a result, the Ministry of Finance moved to exclude Kobu-syo, while showing signs of a closer relationship with the Ministry of Interior.

(4) Growing dissatisfaction with Kobu-syo

Kobu-syo objected to the bill submitted by the Ministry of Finance on the grounds that domestic industry was still underdeveloped and the bill would yield little benefit, while having many adverse effects. In light of this, in July 1874, the Meiji government decided to postpone the bill for the time being and acknowledged that Kobu-syo had jurisdiction over industrial property rights.

However, at the same time, dissatisfaction was beginning to be expressed within the Meiji government over Kobu-syo's continuing failure to try to enact industrial property rights legislation.

Initially, many in the Meiji government were of the same opinion as Kobu-syo concerning the enactment of industrial property rights legislation, regarding the technological level within Japan as being still too low and believing that enacting such a law under such circumstances would have many adverse effects. However, from around mid-1874, those accepting the necessity of enacting industrial property rights legislation became progressively more visible and in August that year, this faction went as far as clearly indicating that industrial property rights legislation should be enacted as soon as possible, with increasing dissatisfaction with Kobu-syo being expressed.

(5) The Ministry of Finance and the Ministry of Interior go on the offensive

Amid this situation, aiming to regain lost ground, the Ministry of Finance asserted in

January 1875 that industrial property rights should be placed under its own jurisdiction.

However, the Meiji government ultimately dismissed this proposal; in September 1875, the Ministry of Interior deleted references to patent rights from its regulations concerning the disposition of business, while in January 1876, it deleted references to rewards, thereby granting concessions in relation to jurisdiction over patent rights.

Moreover, after Minister of Interior Okubo had inquired about jurisdiction over industrial property rights in December 1875, the Meiji government eventually acknowledged Kobu-syo's jurisdiction over patent rights in May 1876.

However, on the other hand, trademarks were added to the matters under the jurisdiction of the Ministry of Interior in September 1875 and, as a result, it started working on a bill concerning trademarks, compiling the draft in 1876.

At the same time, the Ministry of Finance continued to demonstrate a positive attitude toward the enactment of industrial property rights legislation. This was in response to requests from the industrial sector. Moreover, in December 1878, jurisdiction over administrative matters concerning trademarks was transferred to the Ministry of Finance from the Ministry of Interior, so it began working on a bill on trademarks, which it completed in December 1880.

Thus, whereas Kobu-syo continued to stall on enacting industrial property rights legislation, the Ministry of Interior and the Ministry of Finance demonstrated a more proactive stance and mounted an offensive. Subsequently, the Ministry of Interior made gradual concessions to Kobu-syo, but the Ministry of Finance maintained its proactive stance and the feud over jurisdiction carried on until the establishment of Nou-syoumu-syo (the Ministry of Agriculture and Commerce) in 1881.

III The treaty Revision negotiations and Industrial Property Rights

1 The treaty Revision negotiations by Undertaken by Foreign Minister Terashima and Industrial Property Rights

(1) Conclusion of an agreement between Japan and the U.S.A.

Terashima Munenori was appointed Minister of Foreign Affairs in October 1873. Terashima lost

no time in getting to work on treaty revision negotiations, starting in June 1876 with negotiations between Japan and the U.S.A. As a result, an agreement between Japan and the U.S.A. was signed in July 1878, which didn't contain provisions concerning industrial property rights.

(2) Establishment of the Bureau for Treaty Revision

In April 1874, with a view to conducting treaty revision negotiations, Terashima established the Bureau for Treaty Revision and began to consider the legislative process for treaty revision. In response, the Ministry of Interior also began to consider the legislative process required in order to revise treaties and, in December that year, pointed out the necessity of enacting industrial property rights legislation without delay, so deliberations concerning the enactment of such a law began, due in part to the need for treaty revision negotiations.

2 The treaty Revision negotiations by Undertaken by Foreign Minister Inoue and Industrial Property Rights

(1) Inclusion in treaty revision negotiations

Inoue Kaoru was appointed Minister of Foreign Affairs in September 1879. Inoue embarked upon treaty revision negotiations and held preliminary talks on such revisions in January 1882. At these preliminary talks, the participating countries submitted a proposal to include provisions concerning the protection of industrial property rights.

After the preliminary talks ended, Japan and Western countries negotiated the format of the negotiations concerning industrial property rights and in April 1885, the Japanese government consented to conduct negotiations on industrial property rights as part of the treaty revision negotiations.

(2) Establishment of the Ministry of Agriculture and Commerce and enactment of laws on industrial property rights

The Ministry of Agriculture and Commerce was established in April 1881 and industrial property rights were placed under its jurisdiction. In response to this, the Ministry of Agriculture and Commerce set to work on enacting laws on industrial property rights, with Takahashi Korekiyo playing a central role in this. The Trade

Marks Regulations was enacted in June 1884, while the Patent Regulations was enacted in April 1885.

(3) Cases of infringement and the response by Japan and the UK

In September 1883, a complaint was received from the UK that Japanese had infringed British trademarks. The Japanese Ministry of Foreign Affairs investigated the matter and despite the fact that the country had already made the transition to the principle of *nulla poena sine lege* (no penalty without a law) with the enactment of the Criminal Code in 1882 and there were no express provisions concerning infringements of foreign trademarks, it was decided to crack down on the infringement via supralegal means, due to a desire to maintain good Anglo-Japanese relations during the treaty revision negotiations.

Moreover, in July 1884, after the enactment of the Trade Marks Regulations, a new complaint was received from the UK that Japanese had infringed British trademarks. Although the Trade Marks Regulations was not yet being applied to foreigners, the Japanese government decided to deal with this infringement via supralegal means as well, attaching importance to the country's relationship with the UK during the treaty revision negotiations.

In response, the UK conveyed its gratitude to the Japanese government and British dissatisfaction with Japan over the protection of industrial property rights diminished.

(4) Cases of infringement and the response by Japan and Germany

On the other hand, although Germany expressed high praise for the Japanese government's stance on cases of infringement, when infringements of German trademarks by Japanese became frequent occurrences, another response on the part of Germany began to be seen.

In response to an infringement of a German trademark by Japanese, the Japanese government decided in February 1886 to take action, as it had in response to the British cases, regardless of the existence or otherwise of express provisions.

However, in Germany, the opinion was expressed that provisions concerning the protection of industrial property rights should be included in treaty revision negotiations. The German Foreign Ministry had indicated that its policy was that negotiations concerning industrial property rights should take place separately, after

treaties had been revised, but although calls to incorporate the issue into treaty revision negotiations were not that widespread, the infringements involving Japan and Germany resulted in growing moves by Germany toward a change of policy in its treaty revision negotiations.

(5) The treaty revision conference and the resignation of Foreign Minister Inoue

The treaty revision conference was held in May 1886. A draft that prescribed protection for industrial property rights was to be formulated at this conference, but opposition on the part of both Japan and Germany meant that nothing was stipulated concerning Japan's accession to the Paris and Berne Conventions.

3 The treaty Revision negotiations by Undertaken by Foreign Minister Okuma and Industrial Property Rights

(1) The conclusion of the Japan-U.S. and Japan-Germany Treaties of Peace, Amity, Commerce and Navigation

Okuma Shigenobu was appointed Minister of Foreign Affairs on February 1, 1888. Having altered the existing policy on negotiations, Okuma embarked upon treaty revision negotiations, starting with negotiations with the U.S.A. and Germany, which had demonstrated a friendly attitude for some time.

As a result, the Japan-U.S. Treaty of Peace, Amity, Commerce and Navigation was concluded in February 1889, while the Japan-Germany Treaty of Peace, Amity, Commerce and Navigation was concluded in June that year.

Moreover, a broad consensus was reached between Japan and the UK in around October 1889 and their treaty revision negotiations began to proceed smoothly, but just as with the Inoue proposal, the Okuma proposal was the focus of a backlash within Japan, as it did not achieve the abolition of extraterritoriality, so treaty revision negotiations were broken off once more.

(2) Cases of infringement and the response by Japan, the UK, and Germany

At the end of December 1887, a complaint was received from the UK that Japanese had infringed British trademarks.

Okuma rejected the British request on the grounds that it was not possible to take action via supralegal means in the way that the Japanese government had done hitherto. As a result, the

UK's sense of caution regarding Okuma's attitude increased.

Subsequently, in December 1888, a complaint was received from Germany that Japanese had infringed German trademarks.

In January 1889, while Okuma replied that the issue could not be dealt with on the basis of executive power, just as he had told the UK, he appeared better-disposed to Germany, stating that he wished the local government to deal with the matter.

Although Germany continued to be satisfied with the Japanese government's response, a report was compiled in Germany in September 1889, concerning the infringement of trademarks by Japanese. This report stated that there was currently a massive influx of Japanese products into China and there were many infringements arising from this. As well as noting the growing sense of caution about Japanese industrials, the report pointed out the risk of a large number of infringements that could affect Germany's key industries in future. In addition, this report stated that it was not possible to address the situation under the existing treaty between Japan and Germany, due to changes relating to extraterritoriality and trade between the two countries, and argued that a new Japan-Germany treaty should be concluded without delay.

Thus, although there was satisfaction in Germany concerning the Japanese government's handling of the infringements that had occurred to date, there was a growing awareness of problems relating to industrial property rights, giving rise to a heightening sense of crisis.

(3) The development and limits of the legal system around industrial property rights

In July 1888, Inoue Kaoru was appointed to the Minister of Agriculture and Commerce. As well as the enactment and revision of laws on industrial property rights and the development of a legal system surrounding such rights, the organization of the Patents Bureau was enhanced under Inoue, through such initiatives as increases in the number of staff and the construction of premises for the bureau.

However, at the same time, dissatisfaction over such moves by the Patents Bureau grew and the number of staff was subsequently cut, resulting in the bureau being forced to move out from its newly-built premises due to the reduction in its scale.

Furthermore, Takahashi Korekiyo, who had

played a key role up to that point, resigned as chief of the Patents Bureau in October 1889 and his successors were exposed to difficulties arising from understaffing.

4 The Beginning of Mixed Residence in the Interior and Industrial Property Rights

(1) Concessions by Germany

The second Yamagata Cabinet was inaugurated in November 1898. Aoki Shuzo was appointed to the Minister of Foreign Affairs and he began to work on a solution to problems relating to industrial property rights, which had been an outstanding issue between Japan and Germany since the conclusion of the Japan-Germany Treaty of Commerce and Navigation in 1896.

In July 1897, the German Ministry of Interior (Reichsministerium des Innern) formulated a draft of a special treaty on industrial property rights between Japan and Germany, which had been prescribed in the Japan-Germany Treaty of Commerce and Navigation, but the German Patent Office (Reichspatentamt) objected to this draft on the grounds that it actually exposed German trademarks to danger.

Accordingly, in May 1899, the German Ministry of Interior asked the German Ministry of Foreign Affairs to rescind the draft and inform Japan that as Germany was expected to accede to the Paris Convention in the near future, there was no need for a special treaty. Thus, Germany made a concession on the issue of a special treaty and no proposal was made concerning discussions.

(2) Cases of infringement and the response by Japan, Germany, and the UK

In July 1897, a formal request was submitted to the German Ministry of Interior, seeking political intervention to protect German trademarks. In response to this, the German Ministry of Interior proposed to the German Ministry of Foreign Affairs in September 1898 that it should enter into negotiations with the Japanese government concerning each incident, so it was decided that negotiations with the Japanese government would take place, with assistance from the UK as well.

As a result, negotiations between Japan, Germany and the UK took place in December that year, but Germany and the UK were compelled to make unilateral concessions in the face of the

hardline stance adopted by the Japanese government, and proceedings were suffused with a sense of defeat.

and developed countries.

IV Conclusion

In the process leading up to Japan's accession to the Paris Conventions and the Berne Conventions in 1899, the following problems emerged in modern Japan with Western countries in relation to industrial property rights: (1) conflict within the Japanese government concerning the enactment of industrial property rights legislation; (2) the failure to resolve this conflict immediately, resulting in its dragging on until the establishment of the Ministry of Agriculture and Commerce in 1881; (3) a lack of smooth progress in putting in place a legal system concerning industrial property rights; (4) a large number of counterfeit goods and numerous infringements resulting from the delay in enacting industrial property rights legislation; (5) the emergence of problems in granting rights to foreign nationals after the enactment of laws on industrial property rights; (6) demands for Japan to accede to the Paris Conventions and the Berne Conventions; and (7) the emergence of problems relating to industrial property rights after mixed residence in the interior began.

As a result of the Japanese government's positioning of industrial property rights as a low priority, these issues encouraged numerous infringements and ultimately brought about a situation in which each infringement developed into a diplomatic issue, rendering the government unable to deal with them adequately.

Moreover, although the Japanese government initially did its utmost to respond to the requests of Western countries concerning infringements of industrial property rights, it subsequently went as far as using them as a means of diplomacy, with the result that it succeeded in eliciting concessions from the UK and Germany.

Such examples from modern Japan would seem to demonstrate how difficult it is to achieve compatibility between modernization and the protection of industrial property rights, so there is a risk that similar problems will occur in emerging nations in future. Accordingly, this suggests that in order to be prepared for such problems, it is necessary to consider adequate response measures, while also examining approaches to the protection of industrial property rights that will benefit both developing