

## ANGLO-JAPANESE TRADEMARK CONFLICT IN CHINA AND THE BIRTH OF THE CHINESE TRADEMARK LAW (1923), 1906–26

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Despite being enthusiastic about China's remarkable economic growth since 1979, many firms from developed countries and their governments are concerned that China still lacks an effective commercial code to deal with disputes between Chinese and foreign firms. Although the Chinese government joined the World Trade Organization and promised to respect universal commercial rules and customs, it has still not yet established its own legal system to deal with Sino-foreign civil and commercial disputes. Therefore, the process of how Chinese civil law and its commercial code are being realized remains of interest.

One of the most striking commercial issues that occurs between China and developed countries is how to protect the intellectual property of foreign firms in China. Since many foreign firms have had their trademarks and patents infringed by Chinese firms, they have requested that their governments negotiate with the Chinese authorities to establish an effective regulatory system to protect their intellectual property. As intellectual property rights became an increasingly hot issue, a number of specialists in Chinese law in English-speaking countries noticed that there was a precedent for such a system in the Republican period: the trademark law of 1923.<sup>1</sup> However, since they have mainly been interested in the current situation and in future developments, they have left aside historical questions regarding the stipulations of the earlier law and to what extent it was effective.

The promulgation of the Chinese trademark law in 1923 was the outcome of long negotiations between the Chinese government, the Japanese government and Western governments led by the British government, and was intended to settle trademark infringement disputes caused by Chinese merchants from the 1890s.<sup>2</sup> Only recently have a number of Chinese researchers started to look into this question.<sup>3</sup> However, since they have only consulted Chinese documents, they have not fully revealed the historical context of the promulgation of the law and its far-reaching effects.<sup>4</sup> In order to reveal the complete process behind the first trademark law of 1923, researchers also need to consult sources from Japan and Britain, the two major foreign governments whose commercial poli-

1 See William P. Alford, *To Steal a Book is an Elegant Offence: Intellectual Property Law in Chinese Civilization* (Palo Alto: Stanford University Press, 1995), pp.41–55; Leah Chan Grinvald, "Making Much Ado About Theory: The Chinese Trademark Law," *Michigan Telecommunications and Technology Law Review* 15.1(2008): 53–106, at p.73.

2 This article is a part of my research concerning "the development of the foreign trademark protection system in Republican China," for which research funds were provided from Waseda University in 2004, the Seimeikai (清明会) Fund in 2005 and the Japanese Ministry of Education and Science in 2006 (No.A06114600).

3 Foreign trademark infringement by Chinese merchants was raised as an item on the agenda for the first time during the negotiations between Great Britain and China for the revision of the treaty of Tianjin in 1902. This process was dealt with in Li Yongsheng, *Qingmo zhongwai xiuding shangye jaoshe yanjiu* [Study of the Negotiation of Sino-foreign Commercial Treaty Revision in late Qing Period] (Tianjin: Nankai daxue chubanshe, 2005), pp.272–77.

4 Zhao Yukun, "Minguo shiqi de shangbiao lifa yu shangbiao baohu" [Registration and Protection on Trademarks in the Period of Republic of China] *Lishi dang'an* [Historical Archives] August 2003.3: 119–24, 133, at pp.120–1; Zuo Xuchu, *Zhongguo shangbiao falishi: Jin xiandai bufen* [History of Chinese Trademark Law: The Modern Era] (Beijing: Zhishi chanquan chubanshe: 2005) Chapter 3.



**Figure 1**

"Crocodile" Brand of Sir Elkanah Armitage & Sons Ltd. Source: Manchester Guardian, July 3, 1908 re-quoted from FO228/2608 John N. Jordan to FO No. 378, Aug. 21, 1908.

cies most influenced the Chinese government at the time. In this article unpublished material such as Chinese government records in the Institute of Modern History (hereafter *IMH*), Academia Sinica, the records of the Japanese Ministry of Foreign Affairs (*Nihon Gaimushō Kiroku* [hereafter *NGK*]), the British government's unpublished diplomatic records in the National Archive (FO228)<sup>5</sup> and the *North-China Herald* (hereafter *NCH*) has been used. By doing so this article attempts to reveal the complete process of the promulgation of the 1923 trademark law in the context of Anglo-Japanese demands to establish a favorable trademark registration system for foreign firms, as well as to examine how the Chinese government responded to these demands and how foreign firms in China reacted to the 1923 trademark law.<sup>6</sup>

### *Anglo-Japanese Conflicts, 1902-06*

Anglo-Japanese conflicts surrounding the establishment of the trademark registration system started when Japanese firms challenged Western (particularly British) firms, which had been taking the lion's share of the import market in China from the early twentieth century onwards. Due to the relatively primitive level of their technology compared to companies from Western countries, Japanese industrial firms could not compete with Western firms by selling better quality goods at cheaper prices in China. Instead, they engaged in manufacturing counterfeits of the goods of Western firms and thereby infringed on their trademarks, and in this they were supported by the Japanese government. Despite strong protests from the French government and frequent requests from Great Britain and Switzerland, the Japanese government refused to become party to the Madrid Arrangement for the Suppression of False and Misleading Indications of Origin. In a letter of October 1910 from the Japanese Minister of Foreign Affairs,

Komura Jutarō 小村寿太郎, to the Japanese Minister of Agriculture and Commerce, Ōura Kanetake 大浦兼武, this attitude is explained as follows:

Japanese industry is still at the stage of copying and imitation. Average domestic consumers prefer foreign products, for which reason a number of domestic producers label their goods misleadingly as foreign. Japanese industry is still in its infancy and has little experience with exporting, so confidence in its products is low and it is very difficult to find markets for goods labelled "made in Japan" therefore misleading indications of origin are not infrequent. For these reasons, to join the Agreement and to adopt the aforementioned Acts would be of very little practical use for promoting the Japanese economy, but would rather be an impediment.<sup>7</sup>

At the same time, however, due to China's own "stage of copying and imitation," Japanese industrial firms themselves suffered trademark infringement by Chinese manufacturers, who produced and sold counterfeits with forged trademarks. In order to justify their manufacturing counterfeits of Western products and yet prohibiting Chinese merchants from copying Japanese products, the most advantageous method for Japan would have been to transfer its own trademark law into China, based on the principle of first-to-file. Such an attempt came about when the Ministry of Commerce of the Qing 清 central government asked the Japanese government to help it to introduce a trademark law according to the treaties of commerce and navigation with Great Britain, the US and Japan from 1902 to 1903. The Japanese government sent two members of their Patent Bureau staff to design the

<sup>5</sup> Permission for the reproduction and quotation of unpublished crown-copyright material in this article has been granted by the Controller of Her Majesty's Stationery Office.

<sup>6</sup> This article is an enlarged version of my Chinese paper, "Cong waiguo shili laikan de zhongguo shangbiao fa (1923) de yiyi [Significance of Chinese Trademark Law (1923) Seen From the Foreign Powers' Side – yiriben • yingguo weizhongxin,] [Especially with Japan and Great Britain] presented to Zhongguo shangye shi zhi luntan [Chinese Business History Forum], University of Hong Kong, 28 November 2008.

<sup>7</sup> Tokkyo chō [Japanese Patent Bureau] ed, *Tokkyo seido 70 nen shi* [70 Years of the Patent System] (Tokyo: Tokkyo chō, 1955), pp.103–4.

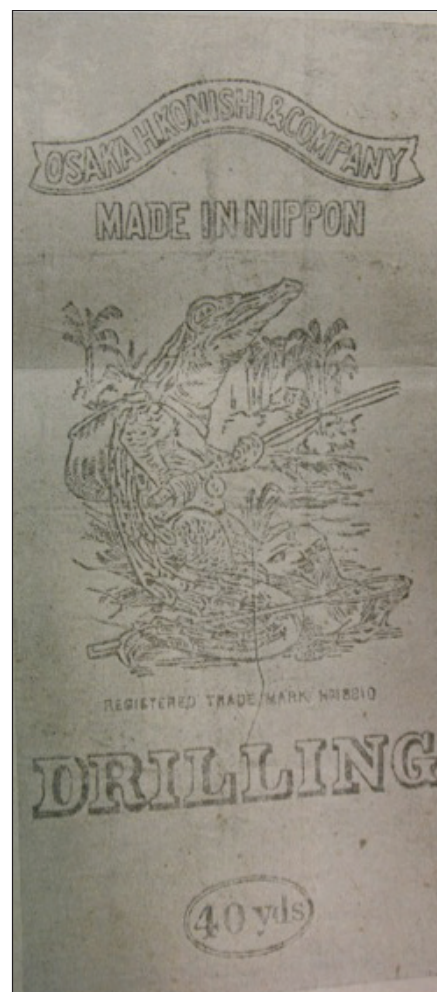
Provisional Code of Trademark Registration (*Shangbiao zhuce shiban zhangzheng* 商標註冊試辦章程) in 1905. Just before their departure to China, the Minister of Agriculture and Commerce, Kiyoura Keigo 清浦奎吾, instructed them to transfer the first-to-file principle into the Qing code.

Assuming that the Provisional Code of Trademark Registration would be quickly put into force, the Japanese government urged Japanese firms in China to carry out a provisional registration procedure at the Maritime Customs in Shanghai 上海 and Tianjin 天津, where trademark bureaus had been established according to the treaties of commerce and navigation with the above three countries. If the arrangement had played out as they had hoped, Japanese firms would have ensured the legitimacy of their provisionally registered trademarks (many of which included forgeries or counterfeits), prior to the registration of the genuine trademarks of Western firms, which had been used in China from before the 1890s.

Western ministries and firms, led by the British, fiercely opposed the plan. Due to their protests, the Qing government postponed putting the Provisional Code of Trademark Registration into force in 1906.<sup>8</sup> What made the British government and firms aware of the intentions of their Japanese counterparts was the 1906 trademark infringement case *Sir Elkanah Armitage & Sons Ltd. v. Konishi Hanbei* 小西半兵衛. This had started when Alexander Ross & Co., an agent company of Armitages (a Manchester cotton firm) in Japan, discovered that a forgery of their “Crocodile” trademark (see Figure 1) had been registered with the Japanese Patent Bureau. The British firm had registered its “Crocodile” trademark in 1886 at the British Trademark Bureau (no. 49375), and used it on drilling products exported to China. Alexander Ross & Co. engaged Hutchison & Co., the agent of Sir Elkanah Armitage & Sons Ltd. in Yokohama 横浜, to investigate the case.<sup>9</sup>

Konishi Hanbei, who registered the forgery of the “Crocodile” trademark, was a prominent cotton goods manufacturer in Osaka 大阪. After registering his own “Wanijirushi” 鱈印 trademark (see Figure 2) with the Japanese Patent Bureau in 1903, he applied for provisional registration in China in the following year immediately after the Provisional Code of Trademark Registration was put into force. He put this trademark on low-class T-cloth cotton goods for export to Korea and northern China via a Chinese immigrant dealer in Kobe 神戸, earning approximately 300 to 400 thousand *yen* per year.<sup>10</sup>

Rejecting the demand to withdraw both the registration in Japan and the provisional registration of the Wanijirushi trademark in China, Konishi threatened to banish goods with the Crocodile trademark from the import goods market in China unless Sir Elkanah Armitage & Sons Ltd. bought the right to use his own trademark at a high price.<sup>11</sup> His defiant attitude was based upon Article 10 of the Japanese trademark law of 1899, which stipulated that any trademark which had been used for three years with no protest from any other party since registration became irrevocable and could not be rendered invalid. In response, the British side stiffened its attitude. Based on a request from the Manchester Chamber of Commerce through the British government, in May 1907 Henry Crofton Lowther, the British ambassador in Japan, demanded from the Japanese government that it would declare the registration of Konishi’s trademark invalid and prevent Japanese merchants from registering similar forgeries, even if that meant amending the trademark law.<sup>12</sup>



**Figure 2**

*Konishi Hanbei's  
“Wanijirushi 鱈印” brand*

Source: Manchester Guardian,  
July 3, 1908 in  
FO228/2608 John N. Jordan to FO  
No. 378, Aug. 21, 1908.

8 The full detail of the process was dealt with in my Japanese article, “Kōsho shinseiki shōhyō hogo seido no zasetu to nichiei tairitsu” [“Anglo-Japanese Conflict and the Failure of the Trademark Registration Law during the *Guangxu* New Policy Period”] *Shakai-Keizaisbigaku* [Socio-Economic History], 74.3 (Sept. 2008): 3–22.

9 NGK 3.5.6.2. Official No.52 Nagataki Hisakichi 永瀧久吉 to Hayashi Tadasu 林董, with Enclosures, 10 February 1906; FO228/2605 Enclosure in Mr. Hosie’s Despatch, Separate, of 2 November 1906.

10 NGK 3.5.6.2. Enclosure in No.212: Oda Hajime 織田一 to Ishii Kikujirō 石井菊次郎, 28 June 1907; *ibid.*, No.629 Nagataki Hisakichi to Katō Takaaki 加藤高明, 2 March 1906.

- 11 FO228/2605 Sir Elkanah Armitage & Sons Ltd. to the Secretary, Manchester Chamber of Commerce, 2 October 1906; *ibid.*, Alexander Hosie to John N. Jordan, 2 November 1906.
- 12 FO228/2605 D45/06 John N. Jordan to Sir E. Grey No.469, Nov. 13, 1906; *ibid.* F2768 T.W.P. Bloomfield (Board of Trade) to the Under Secretary of State, Foreign Office, 30 March 1907; *NGK* 3.5.6.2. Henry Crofton Lowther to Viscount Tadashi Hayasu No.54, 27 May 1907.
- 13 *NGK* 3.5.6.2. Official No.69 Nagasaki Hisakichi to Katō Takaaki, Mar. 1, 1906; *ibid.* Enclosure in Official No.212: Oda Hajime to Ishii Kikujirō, 28 June 1907; *ibid.* Hayashi Foreign Minister to the British Ambassador in Japan, 23 July 1907; FO228/2606 Sir Claude MacDonald to Sir E. Grey, No.167, 1 August 1907.
- 14 *NGK* 3.5.6.2. Claude M. MacDonald to Count Tadashi Hayashi, Mar. 24, 1908; FO228/2607 S. F. Crowe to Alexander Hosie, 2 April 1908.
- 15 *NGK* 3.5.6.2. Takasaki Chikaaki 高崎親章 to Nakamatsu Morio 中松盛雄, 22 April 1908; *ibid.* Matsuoka Yasutake 松岡康毅 to Hayashi Tadasu, June 22, 1908; *ibid.* Hayashi, Ministry of Foreign Affairs to the British Ambassador in Japan, Sept. 29, 1908; *ibid.* Konishi Hanbei to Ogiwara Morikazu 荻原守一, Sept. 29, 1908; *ibid.* Ōura Kanetake 大浦兼武 to Count Komura Jutarō 小村寿太郎, Minister of Foreign Affairs, 15 December 1908; FO228/2607 D. Claude MacDonald to John N. Jordan May 13, 1908; FO228/2608 Claude MacDonald to Edward Grey, No.274, 22 October 1908.
- 16 FO228/2606 Memorandum. Trademarks (Reference to Foreign Office Circular Commercial 18503 of 27 June 1907).
- 17 FO228/2606 Memorandum. Trademarks. (Reference to Foreign Office Circular Commercial 18503 of 27 June 1907).
- 18 FO228/2751 Encl. 1 in Tokyo No.256: Memorandum. Japanese Trademarks in Japan, written by E. F. Crowe, 23 April 1917.
- 19 "Stealing the Hong Names of Foreign Firms," *The Kobe Herald* cited in *NGK* 3.5.6.2. 3 June 1907; "Trademarks in China," *NCH* 21 June 1907, p.719; 23 August 1907, pp.417–18; "Trademarks," *ibid.*, 23 August 1907, pp.437–38; 13 December 1907, pp.629–30; "Trademark Frauds," *The Japan Times*, 30 November 1907, cited in FO228/2606; "Trademarks in China: Manchester Marks Pirated," *The Manchester Guardian*, 3 July 1908 cited in FO228/2608; "Trademarks: Piracy in the Far East," *ibid.*, 3 July 1908 cited in *NGK* 3.5.6.2. Enclosure in Official No.447, 18 November 1908.

The Japanese government responded in a rather complicated way. Although it officially turned down the request referring to Article 10 of the Japanese trademark law, it was clearly aware that Konishi's trademark was a forgery of the Crocodile. Two months later, the Japanese government suggested to the British ambassador that Sir Elkanah Armitage & Sons Ltd. request that Konishi's trademark be rendered invalid according to other articles of the Japanese trademark law.<sup>13</sup> Through an unidentified member of staff named simply "Adachi," the Japanese Ministry of Foreign Affairs clandestinely advised the British ambassador on how to render the registration of the Wanijirushi trademark invalid based on Article 2, Section 3 and Article 11, Section 1 of the same law. These two articles provided for the refusal of registration of any trademarks designed to deceive the public or which contained any misrepresentation as to the place of origin. Therefore, if Sir Elkanah Armitage & Sons Ltd. could produce evidence to prove that Konishi's Wanijirushi trademark was not appropriate and was in fact intended to deceive the public, and if the Japanese Trademark Bureau could confirm the claim on examination, the bureau would cancel the registered mark no matter how long it might have been registered.<sup>14</sup> The British side followed this advice.

Seeing the British side preparing to take action as it had advised, the Japanese government approached Konishi through the Governor of Osaka. By pointing out the "bad effect on Japan's foreign trade as a whole," the government asked him to withdraw his trademark. Konishi eventually agreed on the condition that Sir Elkanah Armitage & Sons Ltd. would also withdraw their lawsuit. Both parties agreed, and the case was settled at the end of 1908.<sup>15</sup>

### *Anglo-Japanese Negotiations, 1907–09*

Dealing with the Armitage case, in 1907 and 1908 British diplomats in China and Japan discovered that many other forgeries or counterfeits of the products of Western firms were manufactured in Japan and exported to China via Chinese dealers (see Table 1). These diplomats also revealed more details concerning Japanese trademark infringement. One memorandum pointed out that since so many Japanese trademarks were worded in foreign languages, especially English, even poor imitations might be able to deceive purchasers since a mere resemblance would make them think they were looking at the original product. However, since these imitations were so inaccurate, they might be considered remote enough from the original to evade the operation of the trademark law.<sup>16</sup> Therefore, the author of this memorandum proposed that it should be obligatory to state the name of the country of origin on Japanese products that used a foreign language on their trademark, in order to prevent deception.<sup>17</sup> Another memorandum, which was written ten years later, pointed out that the Japanese were "extraordinarily deficient both in artistic conception and in imagination," and that, "the well designed and well conceived marks are of foreign origin, while the Japanese ones are crude and ugly to a degree which is almost inconceivable."<sup>18</sup>

Apart from investigations by British diplomats, British newspapers in Japan and China harshly criticized the Japanese government. They claimed that the Japanese government allowed Japanese firms to manufacture counterfeits of Western firms' goods by avoiding the mutually concluded convention with the British and other Western governments to protect the trademarks of their nations in China and Korea.<sup>19</sup> Facing such fierce criticism, the Japanese Ministry of Foreign Affairs instructed the consulates in Tianjin

**Table 1**

List of Japanese-made forgeries discovered by British consulate in China

<i>Place &amp; commodity</i>	<i>Manufacturer</i>	<i>Nationality</i>
<b>Hankou</b>		
Tape-measure	J.Chesterman	British
Cream & Glycerine	Breidenbach	British
Rose tooth-powder	Mouson & Co.	German
Savon à la Rose	Mouson & Co.	German
Angelica Violet Glycerine Soap	G. Taussig	Austrian
Jugendborn Scent	Ferd Mühlens	German
Lily of the Valley Scent	Ferd Mühlens	German
Scent	J. Firaud Fils	French
Luxtor Cream	Vibert Frères	French
Scent	Géléé Frères	French
<i>Source: FO228/2606 Hugh Fraser to John Jordan No.89, Nov. 11, 1907</i>		
<b>Tianjin</b>		
Underwear	Unknown	American
Air gun	Unknown	American
Lantern	Unknown	British
Russet Cream	Unknown	Unknown
<i>Source: FO228/2606 Enlosure in Consul-General Hopkins No.66 of November 14/1907</i>		
<b>Shanghai</b>		
Cheling, 3 Joss	Ilbert & Co.	
Stag	Reiss 6 Co.	
Crocodile	Sir Elkanah Armitage & Sons	
Empress & Attendants, Chinese Wine Cup 2	Scott Harding Co.	
Crab	Jardine Matheson & Co. Ltd	
Tea carrier	James Greaves Cotton Co.	
Man & Fish, Woman & Frog, Stags, Man & Tiger, Kirin	Ward Probst & Co.	
<i>Source: FO228/2606 Encl. in Consul-General Sir P. Warren's No.141 of 16 Dec. 1907</i>		
<b>Dalian</b>		
The Transparent Black Soap	Samson & Co.	
Lime Juice & Glycerine	John Grosnell & Co.	
Worcester Sauce		
CAW'S INK, Black	No specific firm	
Stephen's Blue Black Ink		
H. C. Stephen's Strongset Mucilage		
Lime Cream & Glycerine		

- 20 NGK 3.5.6.2. Hayashi Tadasu to Consul-General Nagasaki, No.113; Hayashi Tadasu to Consul-General Katō, No.86, 3 July 1907.
- 21 NGK 3.5.6.2. Official No.269, Ozaki Nobumori to Hayashi Tadasu, 30 July 1907.
- 22 When the British government made the same proposal to Japan in 1905, the Japanese government refused it. See FO17/1727 The Marquiss of Lansdowne to Sir Ernest Satow No.254, 13 November 1905.
- 23 FO228/2606 Secretary of China Association to H. M. Under Secretary of State for Foreign Affairs, 25 July 1907; *ibid.*, E. Grey to Sir J. N. Jordan No.304, 30 July 1907; *ibid.*, E. Grey to Sir Claude MacDonald No.185, 10 September 1907.
- 24 "The New Orders in Council," *NCH* 6 September 1907: pp.542–43 "Order in Council," *NCH* 6 September 1907: pp.558–60.
- 25 FO228/2606 F.A. Campbell to Honorary Secretary to the China Association, 12 September 1907.
- 26 See my "Kōsho shinseiki shōhyō hogo seido no zassetsu to nichiei tairitsu," pp.17–18.
- 27 FO228/2606 D34/07 Sir Claude MacDonald to JNJ Telegram No.4, 29 October 1907; *ibid.*, Enclosure 2 in Sir C. MacDonald's No.241 of 29 October 1907.
- 28 FO228/2606 D20/07 Sir John N. Jordan to Mr. Lowther, June 1, 1907; *ibid.*, Claude M. MacDonald to Sir Edward Grey No.241, 29 October 1907.
- 29 FO228/2606 Enclosure 4 in Sir Claude MacDonald's No.241 of 28 & 29 October 1907.

and Shanghai to investigate the matter.<sup>20</sup> In response, the diplomat Ozaki Nobumori 尾崎洵盛 reported from Shanghai that the importation of forgeries or counterfeits started when "cunning Chinese merchants" found several Japanese goods whose trademarks were coincidentally similar to those of Western firms. They then commissioned Osaka manufacturers (who, Ozaki claimed were "poor and thoughtless") to produce the goods. The manufacturers in turn registered the trademarks of these counterfeits with the Japanese Patent Bureau under their names. As a result, according to Ozaki, even though this import trade was completely arranged and controlled by Chinese merchants, the Japanese manufacturers took the blame.<sup>21</sup>

Ozaki's analysis cannot have been entirely true. As had become clear in the Armitage case, the Japanese manufacturer Konishi Hanbei was neither poor nor thoughtless. If Konishi had simply been an agent of "a cunning Chinese merchant", as claimed by Ozaki, the Japanese Ministry of Foreign Affairs would have recorded the name of the Chinese merchant to prove his innocence. In fact, no relevant documents of the case recorded any detailed personal information about Konishi's Chinese business partners living in Kobe.

Worried about this situation, the British Foreign Office decided to resurrect their once-failed plan for an Anglo-Japanese mutual convention to protect the trademarks of their respective nations in China and Korea, as requested by the China Association and Board of Trade in September 1907.<sup>22</sup> Thus, it directed the British ambassador in Japan to propose this course of action to the Japanese government.<sup>23</sup> In preparation, the British government revised the Order in Council of 1904, so that British consuls and consular courts in China and Korea could sue non-British subjects whose governments had signed mutual conventions with the British government to protect trademarks, patents and designs in China and Korea. If the British government succeeded in signing a mutual convention with the Japanese government, British consuls and consular courts in China and Korea could punish any Japanese firms that infringed on the intellectual property of the British, according to laws such as the Merchandise Marks Act of 1887, the Patents, Designs, and Trademarks Act, 1905 etc.<sup>24</sup> In addition, Sir Edward Grey directed Sir Claude MacDonald, the British ambassador in Japan, to inform all British merchants and firms in East Asia to register their trademarks with the Japanese Patent Bureau so that no Japanese or Chinese firm could infringe on their trademarks.<sup>25</sup>

However, once again the Japanese government did not follow the course that the British government might have expected it to follow.<sup>26</sup> In Article I of the Japanese draft of the mutual convention, the Japanese government declared that it would not prohibit the use of trademarks that had been used in China for at least three years prior to its operation.<sup>27</sup> Moreover, in researching the Japanese trademark registration system, the British government concluded that it was bound to protect all Japanese trademarks in China even though they were unregistered in Britain, whereas the Japanese government need not protect British trademarks in China unless they were registered in Japan, due to the difference between the legal systems in both countries.<sup>28</sup> Consequently, under this scheme, even if a British firm like Sir Elkanah Armitage & Sons Ltd. protested against a Japanese merchant like Konishi Hanbei registering an imitation trademark in Japan, according to Article 2, Section 5 of the Japanese trademark law of 1899, the Japanese government would not hear the protest unless the original trademark had been registered at least three years before the law was put into operation.<sup>29</sup>

The British government proposed a counter draft, which clearly stipulated that the Japanese authorities in China and Korea were bound to protect Brit-

ish trademarks registered in Japan from infringement or misuse by Japanese firms.<sup>30</sup> Besides British trademarks registered in Japan, the British government officially enquired of the Japanese government whether the Japanese authorities in China and Korea would protect British trademarks unregistered in Japan and only used in China and Korea. If not, did British trademark owners have to register their trademarks in Japan?<sup>31</sup> Since there was no effective trademark registration system in China and Korea, the British government had no other choice but to make this enquiry. The Japanese government again sent back an unsatisfactory reply. It refused to accept the British draft of the mutual convention because it treated Korea (which by that point had become a Japanese protectorate) as equal to China where the extraterritorial rights of both countries were in force. However, considering the importance of a mutual convention for protecting trademarks in China, Komura Jutarō, the Japanese Minister of Foreign Affairs, guaranteed that the Japanese authorities in China would protect British trademarks even if they were not registered in Japan, on the condition that the British government abandoned its extraterritorial rights in Korea, just as the US, French, and German governments had done.<sup>32</sup> In return, as evidence of their sincerity, the Japanese government revised its trademark law to accept several requests by the British government: they reduced the registration fee, partially adopted the principle of first-to-use and stopped requiring plaintiffs to prove that their trademarks had been registered in Japan prior to being infringed upon.<sup>33</sup>

The Japanese government's efforts did not dispel the doubts of the British government. Although Komura officially replied that, "it goes without saying that Japan, having joined the International Commission for the Protection of Industrial Property [the Paris Convention for the Protection of Industrial Property], is bound by the obligation imposed under the provisions of Article 8 of that Convention", namely a provision for the protection of trade names without necessity of registration. He also stated that neither in Japan nor in Korea were there any special provisions of law relating to the protection of British trademarks unregistered in Japan, except in the case of trademarks in use prior to the operation of the old Commercial Law of 1893. This exception, however, did not appear to the eyes of the British diplomats to afford any protection to British unregistered trademarks in use before 1894. It merely stipulated that the owners of the unregistered British trademarks could not face legal proceedings from a user of a similar name, which had been registered.

British diplomats in Japan did not believe that the Japanese government would punish a Japanese citizen who had improperly used an unregistered trademark of a British firm in China, even if the British government did sign a mutual convention along these lines, or even restrain him from such improper use, in spite of Komura's reply.<sup>34</sup> Accordingly, the British government gave up on negotiations with the Japanese government for the mutual protection of the trademarks of both countries in China.

### *The Collapse of the Trademark Deposit System and its Aftermath, 1909–14*

At about the same time as the negotiations between the British and Japanese governments were ending in failure, Japanese industrial firms in China suffered from trademark infringement by Chinese firms. An important trademark infringement case from this period was *Kanegafuchi Bōseki* 鐘ヶ淵紡績 *v.* *Youxin gongsi* 又新公司 (1909). In dealing with an infringement on Kanegafuchi Bōseki's "Rangyo" 藍魚 brand (see Figure 3) by Youxin

30 FO228/2608 Claude MacDonald to John N. Jordan: Counter Draft of Convention for reciprocal protection of Trademarks in China and Korea [sic.], 4 September 1908.

31 FO228/2608 Claude M. MacDonald to Edward Grey No.233 with 2 Enclosures, 12 September 1908.

32 FO228/2609 Claude M. MacDonald to Edward Grey No.21, 3 February 1909.

33 FO228/2609 Claude M. MacDonald to Edward Grey No.78, 31 March 1909.

34 FO228/2609 D50 Horace Rumbold to Sir John Jordan, 25 September 1909.

35 For a full detailed outline of this case and its aftermath, see my “Shinmatsu Minsho ni okeru shōhyōken shingai funsō — Nicchū kankei wo chūshin ni” [“Conflict Over Sino-Foreign Trademark Violation in the Late Qing and Early Republican Periods: With Special Reference to Japanese and Chinese Companies”], *Shakai-Keizaisbigaku* [Socio-Economic History] 75.3 (September 2009): 5–13.

36 *NGK* 3.5.6.15. Official No.239 Ukita Gōji 浮田郷次 to Komura Jutarō, 17 August 1911. An English translation is available in FO228/2610 1, A Printed Circular No.1 of 1909, 26 January 1909.

37 *NGK* 3.5.6.15. Official No.221, Ariyoshi Akira 有吉明 to Uchida Kōsai 内田康哉, 19 July 1912; *ibid.*, Official No.28, Ariyoshi Akira to Katsura Tarō 桂太郎, 18 January 1913; *ibid.*, Official No.116 Ariyoshi Akira to Makino Nobuaki 牧野伸顯, 20 March 1913; *ibid.*, Official No.87 Makino Nobuaki to Ariyoshi Akira, 26 May 1913; *ibid.*, Official No.454 Ariyoshi Akira to Makino Nobuaki, 13 November 1913.

38 *IMH* 03-18-116-(01)-1-16 Nongshangbu guan yijian 農商部函一件, 24 April 1914; FO228/2610 D35 Wai-Chiao-Pu 外交部 to the Dean, 29 April 1914; *NGK* 3.5.6.15. Official Nos.148, 152, Yamaza Enjirō 山座圓次郎 to Katō Takaaki, 6 May 1914.

39 FO228/2610 D39 John N. Jordan to Sir E. Grey No.207, 22 May 1914.

40 FO228/2610 D84 Enclosure in J.V.A. MacMurray to Ker, 1 August 1914.

41 *IMH* 03-18-116-(01)-1-19, Fa kangshi zhaohui yijian 法康使照会一件, 24 May 1914; *NGK* 3.5.6.22. Confidential No.247 Hioki Eki 目置益 to Katō Takaaki, 4 August 1915.

42 *NGK* 3.5.6.15. Special Permission No.76, Ōura Kanetake to Katō Takaaki, 16 July 1914.

43 *NGK* 3.5.6.22. Confidential No.79, Hioki Eki to Katō Takaaki, Mar. 18, 1915.

44 See my “Shinmatsu Minsho ni okeru shōhyōken shingai funsō” pp.7–13.

gongsi, Mushanokōji Kintomo 武者小路公共, a Japanese diplomat, carelessly allowed Sheng Xuanhuai 盛宣懷, the owner of the Chinese firm (and important official and modernizer in the late Qing period—at the time, minister of Agriculture, Industry and Commerce) to use the revised imitation brand (see Figures 4 and 5). This was in spite of prohibiting him from using any trademark with a similar design to the original Rangyo, or “blue fish”. Chinese government officials and merchants regarded this action as the Japanese government granting permission to Chinese firms to openly use *similar* designs to the trademarks of Japanese firms. From then on, quite a few Japanese firms had to struggle with Chinese firms to protect their right to use their own trademarks.<sup>35</sup>

Even under such unfavorable conditions, the Japanese government could still rely on the trademark deposit (*Cun'an* 存案) system, at least in Shanghai, to redress their grievances. Under the *Cun'an* system, whenever a foreign firm noticed a Chinese firm or merchant infringing their trademark, they could inform the Shanghai Daotai 道台 via the consulate of their own country and ask that a notice be issued to prohibit the imitation trademark. Once such a notice was issued, foreign firms could sue Chinese firms or merchants at the Mixed Court or Shanghai Magistrate for compensation. Although this system was only valid within the Shanghai district, the economic center of China, it was effective for Japanese firms.<sup>36</sup> However, after the Xinhai revolution 辛亥革命 the new government decided to retire the *Cun'an* system, doing nothing to protect the trademarks of Japanese firms, no matter how many times the Japanese consul-general, Ariyoshi Akira 有吉明, requested it to do so. The government simply replied that he should wait until a new trademark law had been promulgated.<sup>37</sup>

When the Beijing 北京 government finally showed the Draft of Rules and Regulations of Trademark Registration (*Zhongguo shangbiao tiaoli caoan* 中国商標条例草案) to diplomats in April 1914, the entire corps was disappointed.<sup>38</sup> The most unsatisfactory point for the British government was that there were no provisions for protecting old trademarks of British firms that had been used in China since 1842. This was because the draft was largely adapted from the Japanese trademark law of 1909: it did not adopt the first-to-use principle in China, as requested by the British government in 1905, instead of the first-to-file principle.<sup>39</sup> These grievances were shared by the US government.<sup>40</sup> In addition, the French and Russian governments opposed the draft because the Chinese government did not allow their consuls to take part in judging foreign trademarks with pending applications for registration.<sup>41</sup> Even the Japanese government, whose trademark law of 1909 was substantively adopted, did not entirely approve of the draft because it did not explicitly mention trademarks such as those provisionally registered in Tianjin or Shanghai Maritime Customs, or deposited at Shanghai Daotai's office before the Xinhai revolution.<sup>42</sup> As it turned out, negotiations for revising the Draft of Rules and Regulations of Trademark Registration were postponed due to the outbreak of the First World War.<sup>43</sup> Consequently, many Japanese firms had to endure trademark infringement by Chinese merchants and firms until the end of the Great War.<sup>44</sup>

### *The Second Anglo-Japanese Negotiations on Trademark Regulation, 1913–23*

Like many prominent Japanese industrial firms, British firms in China in this period frequently suffered from trademark infringement by Chinese firms and merchants. They requested that the Chinese government issue a





**Figure 3**

“Rangyo 藍魚 (Blue Fish)” brand of Kanegafuchi Bōseki

Source: NGK 3.5.6.8. Official No. 86, Mushanokōji Kintomo 武者小路公共 to Komura Jutarō 小村寿太郎, 1 March 1908



**Figure 4**

Imitation trademark of “Blue Fish” brand by Youxin Gongsi.

Source: NGK 3.5.6.8. Official No. 86, Mushanokōji Kintomo to Komura Jutarō, 1 March 1908



**Figure 5**

Revised imitation trademark of Youxin Gongsi.

Source: NGK 3.5.6.8. Official No. 86, Mushanokōji Kintomo to Komura Jutarō, 1 March 1908

- 45 FO228/2751 D33 E. Fraser to John N. Jordan No.227 with 1 Enclosure, 9 August 1916; *ibid.*, D37 John N. Jordan to F.O. No.273, 30 September 1916.
- 46 FO228/2751 D37 Memorandum: Trademarks in John N. Jordan to F.O. No.273, 30 September 1916.
- 47 Kikuchi Takaharu, *Chūgoku minzoku undō no kibon kōzō-taigai boikotto undō no kenkyū* [The Historical Background of the Chinese National Movement: A Study of Anti-foreign Boycotts in Modern China] (Tokyo: Kyūko Shoin: 1974), pp.163–73; Karl Gerth, *China Made: Consumer Culture and the Creation of the Nation* (Cambridge: Harvard University Press, 2003), pp.133–57.
- 48 See my “Shinmatsu Minsho ni okeru shōhyōken shingai funsō,” pp.13–21.
- 49 FO228/2610 Enclosures Nos. 1 and 2 in Mr. O’Brien-Butler No.4 of 19 January 1914, 28 & 29 October 1913.
- 50 NGK 3.5.6.2. Special No.254 Sakigawa Saishirō 崎川才四郎 to Sakata Jūjirō 坂田重次郎, 27 December 1913.
- 51 NGK 3.5.6.2. Confidential No.260 Ochiai Kentarō 落合謙太郎 to Makino Nobuaki, Nov. 19, 1913; *ibid.* Confidential No.175 Makino Nobuaki to Ochiai Kentarō, 29 December 1913; FO228/2610 Enclosure No.4 in Mr. O’Brien-Butler’s No.4 of 19 January 1914, 15 January 1914; *ibid.*, D29 John N. Jordan to Japanese Minister, 29 January 1914.
- 52 NGK 3.5.6.2. Confidential No.92 Yamaza Enjirō 山座圓次郎 to Makino Nobuaki, 2 March 1914; *ibid.* Confidential No.44 Ochiai Kentarō to Makino Nobuaki, 11 March 1914; *ibid.* Confidential No.29, Makino Nobuaki to Consul Ochiai, 16 March 1914; *ibid.*, Confidential No.57 Consul Ochiai to Foreign Minister Makino, 24 March 1914.

notice to prohibit trademark infringement or improper use of the names of British firms or cities after the Xinhai revolution, and the Chinese government readily acceded to their request.<sup>45</sup> In contrast to the Japanese government, the British government never yielded to the Chinese claim to admit imitation trademarks. In each of the trademark infringement cases between British and Chinese firms listed in Table 2, the British consulates succeeded in protecting the trademarks of British firms. Therefore, the writer of the memorandum could afford to claim that, under present conditions, cases of infringement of foreign marks and labels were perhaps more satisfactorily dealt with on broad grounds of equity than they would be if tested by the strict technicalities of a modern code of registration law.<sup>46</sup>

With that being the case, why did the British government change its attitude and restart negotiations with the Japanese government on a trademark law in China at this time? It obviously considered that the activities of the Sino-Japanese groups who manufactured counterfeits and infringed upon the trademarks of British firms could no longer be neglected. In contrast to the time when Ozaki Nobumori had reported to the Japanese government in 1907, Japanese manufacturers were clearly no longer merely the thoughtless agents of “cunning Chinese merchants”, especially after 1915 when the first large anti-Japanese goods boycott took place in order to protest against the Twenty-One Demands of the Japanese government. The boycott caused Japan’s total exports to fall from 162,370,000 *taels* in 1914 to 141,120,000 *taels* in 1915.<sup>47</sup> Although this might seem a relatively small reduction, it must have felt like a serious threat to the Japanese manufacturers. In order to avoid being the target of the anti-Japanese goods boycott, they manufactured counterfeits of Western products and sold them through the commercial network of “cooperative” Chinese merchants in China.<sup>48</sup> However, as the following two cases, which took place in northern China during the First World War indicate, the relationship between Japanese manufacturers and “co-operative” Chinese merchants was not as simple as one might think.

#### 1. *British-American Tobacco Co. Ltd. (China) v. Sanlin Gongsi* 三林公司 (1913–15)

This case started in October 1913 when British-American Tobacco Co. Ltd. (China) (hereafter BAT) demanded from the Japanese consulate in Fengtian 奉天 that the Japanese tobacco firm Sanlin Gongsi cease production of the Peafowl cigarette brand, which was similar to their own Peacock brand (see Figure 6, Peafowl on the right, Peacock on the left).<sup>49</sup> Since the Peafowl brand was an unregistered trademark in Japan, whereas the Peacock brand had been registered in Japan (no. 15681), and BAT had purchased it from the original owners *Murai kyōdai shōkai* (Murai Brothers Co.) 村井兄弟商会 in 1904, BAT demanded the Japanese consulate prohibit Sanlin Gongsi from using the Peafowl brand.<sup>50</sup> The Japanese consul in Fengtian did not yield to this demand easily. He pointed out that BAT had been putting pressure on Chinese dealers only to sell their own tobacco or cigarettes by providing them with various rewards. He felt that the purchase of the Peacock brand was a result of pressure on the Japanese tobacco manufacturing company. Therefore, claiming that there was no mutual convention for protecting trademarks in China, he refused their request.<sup>51</sup> Even though his superiors in Beijing and Tokyo 東京 tried to persuade him to yield to the BAT’s request, he never succumbed to the pressure.<sup>52</sup>

This case seemed to be an attempt by BAT to protect their products from Japanese counterfeits, BAT not hesitating to purchase the right to use

**Table 2**

List of trademark infringement cases between British and Chinese firms, 1913 to 1915

<i>Name of case</i>	<i>Year</i>	<i>Place</i>
<i>Lever Brothers "Sunlight" Soap v. Hua Chang Co.</i>	1913–14	Beijing
<i>Lever Brothers "Sunlight" Soap v. Chemoo</i>	1914	Zhenjiang
<i>Lever Brothers "Sunlight" Soap, Gossage "Beehive" Soap v. He Mao 和茂</i>	1914–16	Nanjing
<i>Lever Brothers "Sunlight" Soap, Gossage "Beehive" Soap v. He Mao 和茂</i>	1914	Qinan
<i>Lever Brothers "Sunlight" Soap, Gossage "Beehive" Soap v. He Mao 和茂</i>	1915	Zhenjiang
<i>Lever Brothers "Sunlight" Soap, Gossage "Beehive" Soap v. Tonmoo Soap</i>	1915	Hankou
<i>Lever Brothers "Sunlight" Soap, Gossage "Beehive" Soap v. Han liyuan 威利元</i>	1915–16	Nanjing
Infringement against Gossage Soap by unknown Chinese	1914	Zhifu, Fuzhou
Infringement against Gossage Soap by unknown Chinese	1915	Xiamen
<i>Price's Candles v. Taiyuen Co.</i>	1915	Zhenjiang
Forgery of candle of Asiatic Petroleum Co.	1915	Ningbo
Forgery of "Pirate" cigarette of British American Tobacco Co.	1914–15	Xiamen, Hankou
Forgery against Hutley & Palmers' Biscuits	1914	Xiamen
Forgery against Anglo-Swiss Co.	1914	Xiamen
Infringement against Loxley & Co.'s trademark	1915	Xiamen
Forgery against Dr Williams's Pink Pills	1916	Ningbo
<i>Lever Brothers "Sunlight" Soap v. Ting Feng &amp; Co.</i>	1914	Shanghai
<i>Lever Brothers "Sunlight" Soap v. Chung Hua Printing Company</i>	1915	Shanghai
<i>Caldbeck, Macgregor &amp; Co. v. Li Yungchi</i>	1915	Shanghai
False packing of British American Tobacco Co. product	1915	Shanghai

Source: FO228/2751 D37 Memorandum and Appendix in John N. Jordan to F.O. No.273, Sept. 30, 1916.

**Figure 6**  
 "Peacock" brand and "Peafowl"  
 brand. Source: NGK 3.5.6.8.  
 Confidential No.260, Ochiai Kentarō  
 落合謙太郎 to Makino Nobuaki  
 牧野伸顕, 19 November 1913



53 Sherman Cochran, *Big Business in China: Sino-Foreign Rivalry in the Cigarette Industry, 1890-1930* (Cambridge: Harvard University Press, 1980), pp.40-1.

54 NGK 3.5.6.2. Official No.189, Ochiai Kentarō to Katō Takaaki, 4 August 1915.

55 FO228/3375 G.A. Fox to J.N. Jordan No.6, 4 February 1920.

56 FO228/3375 6937/18/24 Walter J. Clennell to John N. Jordan No.66, 21 October 1918.

trademarks from Japanese rival companies in order to eliminate counterfeits or similarly designed packages in China.<sup>53</sup> However, it was the anti-Japanese goods boycott movement in China that resolved the case in favor of BAT. Taking advantage of the change, BAT could eliminate the Japanese Peafowl brand from the Chinese market simply by issuing an advertisement that their Peacock brand had nothing to do with Japanese Peafowl cigarettes.<sup>54</sup> However, even after the case, Japanese counterfeits continued to infringe on BAT's cigarette brands, as they still had to issue a large advertisement to warn consumers not to buy counterfeit goods seven years later (see Figure 7).<sup>55</sup>

## 2. *J.P. Coats of Paisley v. Yongxiang hang* 永祥行

This case was a typical example of a Chinese firm, which employed a Japanese manager, Imamura Jisaku 今村治作 to disguise their factory as a Japanese firm so that they could conceal their trademark infringement. The Chinese firm "T'ung Fa Hsiang" (Chinese characters unknown), in Newchwang 牛庄 (now Yingkou 營口), manufactured cotton thread with an imitation trademark — the "Boy and Giraffe" brand — in its Yongxiang factory and sold it in Harbin and Newchwang. They produced 25 to 30 gross of the cotton thread per day, and could earn 7 *taels* of profit per gross.<sup>56</sup> Since the "Boy and Giraffe" brand was apparently similar to the famous "Bear" brand of the British company J.P. Coats of Paisley (although no samples of either exist in the sources), a complaint was made to the Chinese government, asking it to prohibit the Yongxiang factory from using the Boy and Giraffe brand. However, the Chinese government refused the request, claiming that the factory was a Japanese firm. However, the British consulate in Newchwang proved that the firm was genuinely Chinese. According to the consulate's investigation, it was not only founded with Chinese capital and



**Figure 7**

*Warning advertisement against Imitation Packaging by BAT.*  
 Source: FO228/3375 G.A. Fox to J.N. Jordan No. 6, Dec. 4, 1920

employed a Chinese general agent, but also emphasized to consumers that its goods were Chinese products. The employment of Imamura was merely camouflage.<sup>57</sup> As evidence, they quoted one of the firm's advertisements, which emphasized that its factory had been equipped at great expense with specially imported European machinery of all kinds, and had invited foreign experts to select and produce goods of the highest quality. This had been done with the object of producing first class thread, not with a view to profit, but because their ancestral land of China had long been flooded with daily increasing quantities of foreign goods whose influx could not be stayed without a determined effort to wrest back the advantage.<sup>58</sup>

The British government was concerned that the Yongxiang factory would register its "Boy and Giraffe" brand with the Japanese Patent Bureau through Imamura before J.P. Coats of Paisley had the chance to register its "Bear" brand.<sup>59</sup> However, after confirming that J.P. Coats had already registered its "Bear" brand in 1897 with the Japanese Patent Bureau (no.88145), the British government asked the Japanese government to protect the "Bear" brand from being infringed upon by T'ung Fa Hsiang. The request was refused, the Japanese government claiming that there was no mutual convention with the British government to protect the trademarks of both countries' subjects in China. Upon receiving this reply, the British felt it necessary to restart negotiations with the Japanese to protect British trademarks in China.<sup>60</sup>

Even at the heyday of the anti-Japanese goods boycott, there existed Chinese firms that used Japanese employees to conceal their trademark infringements under the cover of being Japanese firms, perhaps endorsing Ozaki Nobumori's report of 1907. Whether the Chinese or the Japanese took the initiative, when they cooperated with each other to manufacture and to sell counterfeits of Western products, their activities were a serious menace to British firms in China. Under these circumstances, and with cases like *J.P. Coats of Paisley v. Yongxiang bang* in mind, the British government might well have asked the Japanese government to cooperate with it to establish the trademark protection system in China.<sup>61</sup>

57 FO228/3375 4901/18/25 Peking to Newchwang No.28, 5 November 1918; *ibid.*, 8013/18/26 Walter J. Clennell to John N. Jordan No.76 and Enclosures 1 and 3 in Newchwang, General Series, No.76 of 13 December 1918.

58 FO228/3375 Enclosure 4 in Newchwang, General Series, No.76 of 13 December 1918.

59 FO228/3375 Enclosure 2 in Newchwang, General Series, No.76 of 13 December 1918.

60 FO228/3375 549/19/29 Walter Clennell to John N. Jordan, No.2, 10 January 1919; *ibid.*, Enclosures 2 and 3 in Newchwang, General Series No.2 of 10 January 1919; *ibid.*, H.B.M. Consulate-General, Shanghai to C.A.W. Rose, 22 January 1919; *ibid.*, Walter Clennell to John N. Jordan No.4, 23 January 1919.

61 FO228/3375 1547/19/35 Commercial, Cunyngham Greene to J.N. Jordan No.27, 27 January 1919.

### *The Third Anglo-Japanese Negotiations, 1919–23*

62 FO228/3375 In Tokio [*sic.*] desp. to F.O. No.27 Commercial 30/1/19: Memorandum, 27 January 1919; NGK 3.5.6.22. Confidential No.67 the Foreign minister, Uchida to the Japanese ministry in China, Obata, 26 February 1919; *ibid.*, Confidential No.214 Obata Yūkichi 小幡酉吉 to Uchida Kōsai, 23 August 1919.

63 NGK 3.5.6.22. Confidential No.127, the Foreign Minister, Uchida to the minister of Agriculture and Commerce, Yamamoto, 16 June 1919.

64 NGK 3.5.6.22. Special Permission No.319, Yamamoto Tatsuo to Uchida Kōsai, 30 October 1919; *ibid.*, Confidential No.50 the Foreign Minister Uchida to the Japanese ministry in China, Obata, 7 May 1920.

65 NGK 3.5.6.22. Confidential No.477, Obata Yūkichi to Uchida Kōsai, Dec. 4, 1920; *ibid.*, No.112 the Foreign Minister, Uchida, to the Japanese Ambassador in Britain, Hayashi, 17 March 1922; *ibid.*, Ambassador Hayashi to the Foreign Minister, Uchida, 31 March 1922; *ibid.*, Confidential No.161 Yoshida Isaburō 吉田伊三郎 to Uchida Kōsai, 24 April 1922; FO228/3375 11809/20/11 Enclosure No.2 in Sir E. Fraser's Despatch No.261 of 29 November to Peking, 23 July 1920.

66 NGK 3.5.6.22. Deputy Chief of Commerce, Matsuda 松田, to Hugh Home, 21 October 1919; *ibid.* Nakamatsu Shinkyō 中松真卿, to the first chief of the commerce department of the Ministry of Foreign Affairs, Saitō 齋藤, 24 March 1920; *ibid.*, Tel. No.299 the Japanese ambassador in Britain, Chinda 珍田, to the Foreign Minister, Uchida, 11 August 1920; *ibid.* Confidential No.112 the Foreign Minister, Uchida to the Minister of Agriculture and Commerce, Yamamoto, 17 August 1920; *ibid.*, Special Permission No.259, Yamamoto Tatsuo to Uchida Kōsai, 1 October 1920.

While proposing to the British that the Chinese government should solve the trademark problem by issuing their own regulations, the Japanese government also felt that it was time to deal with the trademark protection system in China in cooperation with the British government.<sup>62</sup> As evidence of its sincerity, they agreed to persuade the Chinese government to adopt the draft of the trademark regulations drawn up by the Japanese government, based on the first-to-use principle that the British government had proposed.<sup>63</sup> Nevertheless, this was far from being a satisfactory compromise for the British. The Japanese still intended to preserve the priority of the provisionally registered or deposited Japanese trademarks, many of which included similar marks or forgeries of Western firms' trademarks in China. If it succeeded in doing so, Japanese manufacturers could produce and export goods with forged or imitation trademarks or counterfeited products with the cooperation of their Chinese business partners. As evidence for this, the British could point out that the Japanese government still claimed that such Japanese trademarks should be treated as exceptions.<sup>64</sup> The British government was not to be deceived. It informed the Japanese that it would treat any Japanese trademarks as non-registered trademarks under the new Chinese trademark regulations, regardless of whether they were provisionally registered with the Chinese Imperial Maritime Customs in Tianjin or Shanghai or deposited at the Shanghai district.<sup>65</sup> After that declaration, it never again consulted with the Japanese government on the draft of the trademark regulations, no matter how many times the Japanese government made official enquiries.<sup>66</sup>

The focus of the dispute between them can be seen in Clause 7 and Clause 13 of the British draft of the trademark regulations. The full text of these clauses are quoted with the revisions or additions proposed by the Japanese government underlined and in square brackets:

Clause 7. No trademark shall be registered in respect of any goods or description of goods which is identical with one belonging to a different proprietor which is already on the Registrar, in respect of such goods or description of goods, or so nearly resembling such trademark as to be calculated to deceive, with the following exceptions, which shall apply only in respect of applications to register made within one year from the date on which this law comes into force:-

If the trademark proposed to be registered was used as a trademark in China before the 1st January, 1890 [1903 and has since been continuously so used up to the present], by the applicant or his predecessors in business; or

If the applicant for registration or his predecessors in business have honestly used the trademark in China during the period of not less than ten years [five years] before the date on which this law comes into force without protest or objection from anyone claiming a prior or paramount right to the said mark or to a mark so nearly resembling it as to give ground for objection, but the Registrar may subject to appeal impose such conditions, amendments, modifications or limitations, if any, as to mode or place of user or otherwise, as he may think right to impose.

[(c) If a trademark as to which an application in writing is made for registration is either one which has been deposited at the Ministry of Commerce or at the Daotai Yamen (i.e. *Cun'an*) or else one which has been registered at one of the Chinese Maritime Customs Stations for the last five years, except those trademarks regarding which the fact has been established that they have not continuously used after their deposit or provisional registration.]

Clause 13. Where each of several persons claims to be proprietor of the same trademark or of nearly identical trademarks in respect of the same goods or description of goods, and to be registered as such proprietor, otherwise than under Section 7, the Registrar shall determine the rights of the parties and in so doing shall have regard to the date of first-to-use the mark in China, and the state of knowledge in the particular trade as to the proprietorship of the trademark.

In the case of honest concurrent users, or of any special circumstances which, in the opinion of the Registrar, make it proper so to do, the Registrar may permit the registration by another applicant of such a trademark or of a nearly identical trademark for the same goods or description of goods subject to such conditions, and limitations, if any, as to mode or place of user or otherwise as the Registrar may think it right to impose.

[With regard to the application of this clause to those trademarks which have been deposited or provisionally registered in China before the coming into force of the present draft Law, it shall be presumed that these trademarks have continuously been used *bona fide* since the performance of the required formalities.]<sup>67</sup>

The object of the British government in this draft was to ensure the priority of the trademarks of British or other Western firms in China, or at least those which had been used since the latter half of the nineteenth century, and to exclude those of Japanese firms from China, many of which included similar designs to those of Western firms and resembled them by using the English language. However, had they admitted the amendments of the Japanese government, such problematic Japanese trademarks, would doubtlessly have survived in China. Thus, there was no chance that the British government would agree with the Japanese proposals. Officially informing the Japanese government that it would not agree in early January 1923, its third attempt to establish the trademark protection system in China with the cooperation of the Japanese government ended in failure.<sup>68</sup>

### *The Birth of the Chinese Trademark Law, 1923–26*

While the British government was drawing up the draft of the trademark regulations and negotiating with the Japanese government, it underestimated the abilities of the Chinese government which had been preparing its own trademark registration system and trademark law. Since it regarded the Japanese government as its more important partner, it clandestinely leaked the draft of the trademark law to the Japanese government, even when it was still being examined by the Chinese congress in March 1923. The Chinese government unofficially informed its ally that it would establish a bureau of trademark registration in the Ministry of Agriculture and Commerce, branches of which would be set up in Tianjin and Shanghai. Moreover, the bureau would take on board the complete records of foreign firms' patents and trademarks that had been provisionally registered with the Maritime Customs.<sup>69</sup>

The most important articles of the Chinese trademark law and its detailed regulations were numbers 3 and 26. Taking the controversy between the British and the Japanese governments into consideration, the Chinese government steered a middle course. In Article 3 of the trademark law it was stipulated that when more than two persons applied for the same or a nearly identical trademark in respect of the same category good, the Registrar of the bureau would register the applicant according to the first-to-use principle.

67 NGK 3.5.6.22. Enclosure in Confidential No.161 Yoshida Isaburō to Uchida Kōsai, 24 April 1922; *ibid.*, Confidential No.24, the Foreign Minister, Uchida, to the Japanese Minister in China, Obata, 3 March 1923; FO228/3376 3133/23/43 British Draft of Chinese Trademark Law. Amendment proposed by the Imperial Japanese government.

68 NGK 3.5.6.22. Confidential No.211, Obata Yūkichi to Uchida Kōsai, 5 March 1923.

69 NGK 3.5.6.22. Confidential No.229, Obata Yūkichi to Uchida Kōsai, 9 March 1923.

- 70 NGK 3.5.6.22. Confidential No.244, Obata Yūkichi to Uchida Kōsai, 15 March 1923.
- 71 *IMH* 03-18-118-(01)-1-6 Zhaohui gaoshi you Zhujing geshi daiban 照会稿事由駐京各使代辦, 30 June 1923; FO228/3376 From Wai-chiao Pu 外交部 to H.M. Minister, 27 September 1923; *ibid.* Trademark Registration, 29 October 1923.
- 72 NGK 3.5.6.22. Confidential No.20 Yokotake Heitarō 横竹平太郎 to Yoshizawa Kenkichi 芳澤謙吉, 9 October 1923; *IMH* 03-18-118-(02)-1-23 Nongshangbu zi yijian 農商部咨一件, 13 November 1923.
- 73 FO228/3377 6039/24/65 H.P. Wilkinson to H. J. Brett No.3, 21 July 1924.
- 74 NGK 3.5.6.22. Official Correspondence No.216 Yada Shichitarō 矢田七太郎 to Matsui Keishirō 松井慶四郎, 15 March 1924.
- 75 NGK 3.5.6.22. Nakane Hitoshi 中根齊 “*Shina sbōhyōbō ni kansuru eibei no banntai wo nanzu* 支那商標法に関する英米の反対を難ず” (Criticism Against the Anglo-American opposition to the Chinese Trademark Law) March 1924; *IMH* 03-18-120-(01)-7 Shou zhuying Chen daiban yijian 收駐英陳代辦一件, 3 March 1926.
- 76 NGK 3.5.6.22. Confidential No.127 the Foreign Minister Uchida, to the Ministry in China, Yoshizawa, 28 August 1923; FO228/3376 W. J. Oudendijk to Ronald Macleay, 29 November 1923.
- 77 NGK 3.5.6.22. Official No.364 Yada Shichitarō to Yoshizawa Kenkichi, 18 October 1923; *IMH* 03-18-118-(02)-1-24, Nongshangbu zi yijian 農商部咨一件, 14 November 1923.
- 78 NGK 3.5.6.22. Official Correspondence No.601 Yoshida Shigeru 吉田茂 to Ijūyin Hikokichi 伊集院彦吉, 26 December 1923; *ibid.* Commerce No.38, Yokotake Heitarō to Shidehara Kijūrō 幣原喜重郎, 2 July 1924; *ibid.*, No.143 Consul-General in Shanghai, Yada, to the Foreign Minister, Shidehara, 16 June 1924; FO228/3376 H. J. Barrett to Ronald Macleay No.9, Dec. 17, 1923; *ibid.*, E. Teichman to Ronald Macleay, 4 January 1924; *ibid.*, 194/24/103 Ronald Macleay to Foreign Office No.8, 9 January 1924; Trademarks Bureau: “Satisfactory Progress for September” *Peking and Tientsin Times*, 3 October 1924 re-quoted from FO228/3377; “Trademark Bureau at Work,” *NCH* 5 July 1924, p.2.

However, if neither of the trademarks had been used before or if neither applicant could prove the origin of the usage of their trademarks, the Registrar of the bureau would register according to the first-to-file principle. In Article 26, it was stipulated that the Registrar of the trademark bureau would ask to examine the trademarks applied for and publish the successful trademarks in the *Monthly Trademark Gazette* (Shangbiao gongbao 商標公報) within a certain time period. If no one protested or raised an objection claiming a prior or paramount right to the said mark within six months, the mark would be registered.<sup>70</sup>

Only after the Chinese congress passed the law and the Ministry of Agriculture and Commerce put it into force on May 9 did each member of the diplomatic corps receive two copies of the Chinese trademark law and its regulations.<sup>71</sup> The corps as a whole, including Japan, refused to recognize it, claiming that it breached Article 7 of the Mackay treaty, Article 5 of the Supplementary Treaty of Commerce and Navigation between Japan and China and Article 9 of the treaty for the extension of the commercial relations between the US and China.<sup>72</sup>

The real reason the British government opposed the Chinese trademark law and regulations was that the British were skeptical about whether or not they would be effective in preventing the activities of Chinese merchants and Japanese manufacturers from infringing on the trademarks of British firms in China.<sup>73</sup> Suspicious of the abilities of the Chinese Registrar in the trademark bureau and the Chinese language level of the British merchants in China, the British ministry requested that the Chinese government employ experienced Western specialists in the trademark bureau as their examiners, issue an English version of the *Monthly Trademark Gazette* and open a special court to deal with trademark infringement cases according to the Mixed Court System.<sup>74</sup> The Chinese government agreed to accept the first and second requests as a compromise, but they rejected the last request as a breach of their sovereignty.<sup>75</sup>

While the British ministry was concentrating on negotiations with the Chinese government for revisions of the trademark registration system, they were left behind by the actions of other parties. First of all, the Japanese could no longer wait for the completion of negotiations between the diplomatic corps and the Chinese government for revising the trademark registration system and decided to recognize the Chinese trademark law even though other governments had not done so.<sup>76</sup> Furthermore, as an even bigger blow to the British, foreign firms stopped respecting instructions from their ministries not to register their trademarks with the Chinese trademark bureau, fearing that Chinese firms and merchants would register the foreign trademarks (or imitations) before them. Consequently, foreign firms in China preferred to register their trademarks with the Chinese trademark bureau rather than carry out provisional registration at the Maritime Customs in Tianjin and Shanghai.<sup>77</sup> Two key actors accelerated the process: BAT, which had most popular trademarks in China and major German firms, which had lost their extraterritorial privileges through defeat in the First World War. All of these companies decided to register their trademarks with the Chinese trademark bureau, after Japanese firms had registered theirs between October 1923 and June 1924.<sup>78</sup> Table 3 indicates the numbers of foreign trademarks registered with the Chinese trademark bureau from May 1925 to January 1926.

While the British ministry wished to ensure the protection of British firms' trademarks in China, whether they were registered with the Chinese trademark bureau or not, its measures had little effect. Recognizing the irrevers-



**Table 3**

The numbers of foreign trademarks registered in the Chinese Trademark Bureau from May 1923 to January 1926

	<i>Dec. 1925</i>	<i>Jan. 1926</i>	<i>May 1923–Jan. 1926</i>
Great Britain	227	59	4365
Japan	16	14	2674
China	31	40	2180
Germany	153	14	2058
USA	24	19	1670
France	77	2	207
Switzerland	3	0	203
Holland	10	1	102
Sweden	0	1	98
Russia	20	0	20
Canada	1	0	15
Italy	1	0	10
Norway	0	0	10
Miscellaneous	0	0	35
<b>TOTAL</b>	<b>563</b>	<b>150</b>	<b>13647</b>

Source: NGK 3.5.6.22. *Commerce No. 64 Katō Nichikichi to Tanabe Teruo*, 26 April 1926.

ible current, it became clear that the British would have to perform a U-turn and permit their firms to register trademarks with the Chinese trademark bureau at their own risk.<sup>79</sup> Other members of the diplomatic corps and the British Chambers of Commerce in Shanghai and Manchester regarded this silent change of attitude as a sign that the British government would recognize the Chinese trademark law and its trademark registration system in the near future. Consequently, they decided to recognize the Chinese trademark law and its trademark registration system.<sup>80</sup>

The Japanese government had officially recognized the law in October 1925, turning a deaf ear to the British government's appeal not to do so,<sup>81</sup> and it was followed by other Western governments, from May to September 1926.<sup>82</sup> Realizing that there was no point in continuing to stand alone, the British government finally decided to recognize the Chinese trademark law and its trademark registration system at about the same time.<sup>83</sup> This was the end of its struggle to protect British trademarks against Japan and China.

### *Conclusion*

The Chinese trademark law of 1923 did not come about because of the development of Chinese capitalism, as is assumed by Chinese historians. In fact, it was a response by the Chinese government to the struggle between the British and the Japanese governments for mastery of the Chinese import trade in the early twentieth century. The essence of the struggle between

79 FO228/3378 2079/25/31 Enclosures in Mr Pratt's dispatch No.47 of 7 March 1925 to Peking.

80 NGK 3.5.6.22. *Commerce No.189 Yokotake Heitarō to Shidehara Kijūrō*, 21 May 1925; FO228/3377 4369/24/14 S. Barton to Ronald Macleay No.58, 29 May 1924; *IMH* 03-18-119-(02)-1-25 Zhu Ying Zhu Daiban Miguan yijian 駐英朱代辦密函一件, 17 June 1925.

81 NGK 3.5.6.22. Telegram No.964 the Japanese minister in China, Yoshizawa, to the Foreign minister, Shidehara, 8 October 1925; *ibid.* Confidential Nos. 621 & 622, Yoshizawa Kenkichi to Shidehara Kijūrō, 28 October 1925.

82 *IMH* 03-18-120-(02)-39 Zhi Meiguan jielüe gao 致美館節略稿, 9 November 1926.

83 FO228/3379 4046/26/77 Circular to Consuls No.48, 5 June 1926; *ibid.*, 4362/26/80 Ronald Macleay to Foreign Office, 16 June 1926.

the two countries was how to manipulate the “co-operative” Chinese mercantile network or how to prevent its activities. In this struggle, it was the Japanese side that took the initiative. Seriously considering the infancy of Japanese industry, and the character of the Chinese who had infringed on foreign trademarks or commissioned Japanese manufacturers to produce imitations of Western firms’ products since the 1890s, the Japanese had gradually become aware of how to manipulate this network. Although it is difficult to reconstruct the process from the extant documents, the Japanese government and Japanese firms also gradually became aware of the effect of the first-to-file principle, at the latest from the end of the 1890s onwards. Since the Japanese trademark law of 1899, which had adopted the principle of first-to-file, ensured the legitimacy of trademarks if no one protested or raised an objection against their registration within three years, some Japanese and Chinese merchants regarded it as a device to protect their dubious trademarks, which were imitations of the trademarks of Western firms or were counterfeit versions.

Once the Japanese succeeded in having the Chinese government put a trademark law based on the Japanese model into force, and once Japanese firms were able to register their trademarks with the Chinese government before Western firms did, the Japanese forgeries or counterfeits were able to obtain legitimacy instead of the Western originals. This enabled some Chinese merchants and Japanese manufacturers to build a stable bridgehead to undermine the superiority of Western firms in China. Thus, the Japanese government attached great importance to the first-to-file principle.

By contrast, the British firms and government sought to protect the priority of their own trademarks, which had prevailed in China since the latter half of the nineteenth century. Contrary to the Japanese government, since they never permitted Chinese firms to use even a slightly revised trademark or a similar design to the original, they did not need the Chinese trademark law. Only by demanding Chinese authorities issue a prohibition against such dubious trademarks could they protect the originals. What the British were most worried about were Japanese imitation manufacturers who sold counterfeits through Chinese merchants. Concerned that the popularity of British brands would be irrevocably undermined, the British government had to consult with the Japanese government in order to establish a mutual convention, or to request the Chinese government to adopt a trademark law with the first-to-use principle, the draft of which the British and the Japanese were to draw up. However, because the final goals of both countries were opposed to each other, it was quite natural that these attempts ended in failure.

The Chinese trademark law of 1923 was a response from the Chinese government to this struggle; their attempt to satisfy both the British and the Japanese is reflected in Articles 3 and 26. Did this attempt succeed in putting an end to the Anglo-Japanese struggle? As the Chinese government in Beijing was defeated and ceased operation in 1927, the law was only in effect for a short period, so what happened to the foreign trademarks registered with the Chinese trademark bureau after the establishment of the Nationalist government? This is the topic of my next research project, based on unpublished documents in Tokyo, Taipei and London that provide evidence for developments in this area until the early 1930s.