



JUDICIAL REVIEW OF DECISIONS OF THE TRADEMARKS BOARD

BY

KUNLAVEE PUNUMPAI

**AN INDEPENDENT STUDY SUBMITTED IN PARTIAL FULFILLMENT OF
THE REQUIREMENTS FOR THE DEGREE OF
MASTER OF LAWS IN BUSINESS LAWS (ENGLISH PROGRAM)
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ENTITLED

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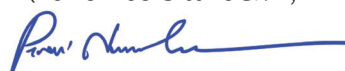
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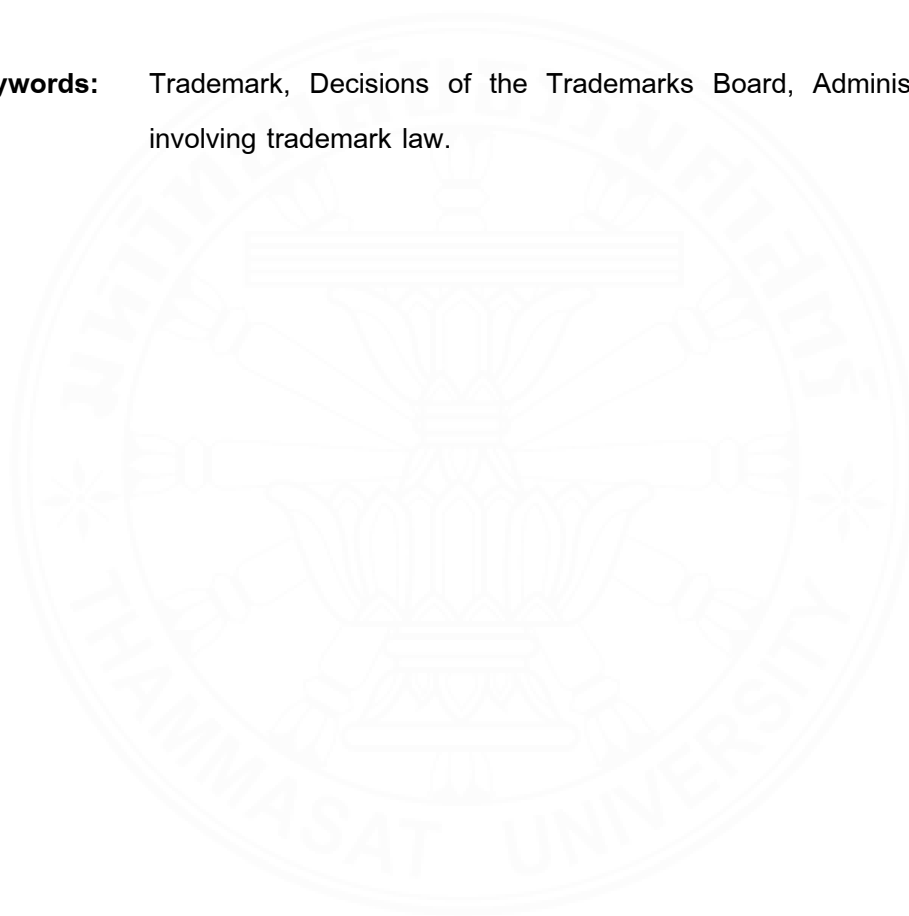
ABSTRACT

The Trademark Act B.E. 2534 (1991) empowers administrative agencies or government officials with the authority to issue administrative orders in accordance with the Act. If administrative actions or orders that empowered the administrative agencies or government officials to act were found to be unlawful or unpleasant for an individual who is adversely affected by this action, thus, the concerned or interested parties may file an appeal against the decision of the administrative officials to request a judicial review over such administrative order. However, the Supreme Court and the Committee on the Determination of the Powers and Duties among Courts consistently rendered the decision that the administrative disputes involving trademark law shall be under the jurisdiction of the Intellectual Property and International Trade Court, not the Administrative Court. Consequently, trials in civil cases and administrative cases by the Intellectual Property and International Trade Court are conducted in the same manner, for example, the Court applies the Accusatorial System for all types of cases. Moreover, judicial review is performed by reviewing the merit of a decision rather than the legality of the decision. As a result, it would seem that this practice is contrary to the principle of administrative law, and it may result in potential problems subsequently.

The purpose of the study is to illustrate the existing legal problems regarding the judicial review of decisions of the Trademarks Board, which are in practice regarded as

administrative orders, under the jurisdiction of the Intellectual Property and International Trade Court, to provide fundamental principles of trademark protection and judicial review both in domestic laws and foreign domestic laws, and to analyze and provide the most appropriate in addressing the current legal problem. Additionally, this study provides a summary of recommendations aimed at improving and changing the administrative system within the Intellectual Property and International Trade Court and the relevant law in order to maximize proper justice.

Keywords: Trademark, Decisions of the Trademarks Board, Administrative disputes involving trademark law.



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CHAPTER 1

INTRODUCTION

1.1. Background and Problems

The primary function of the protection afforded by a trademark is to provide consumers with an identifying the origin of the goods or services. In Thailand, to ensure that the trademark is fully protected under the law, trademark owners must register their trademark with the Department of Intellectual Property (DIP). After the initial application was filed, the Registrar will examine the substantive requirements in order to conform with the current law and practice. Moreover, the fundamental registrability criteria are clearly stated in Section 6 of the Trademark Act B.E. 2534.¹ In detail, the mark must be distinctive, not prohibited by law, as well as not similar to the prior registered trademarks. In considering the trademark application, if the Trademark Registrar objects to the trademark on the ground of the entire trademark or any essential part thereof is not registrable under Section 6, the Registrar shall reject the application and notify the applicant with the order giving the grounds therefor.²

As a member of the World Intellectual Property Organization (WIPO), Thailand generally follows the international intellectual property norms and standards that have been set out by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).³ The World Intellectual Property Organization established the minimum standard for refusal of

¹ The Trademark Act B.E. 2534 (1991)

Section 6 To be registrable, a trademark must

- (1) be distinctive;
- (2) not be prohibited under this Act;
- (3) not be the same as or similar to a trademark registered by another person.

² The Trademark Act B.E. 2534 (1991)

Section 16 If, in the opinion of the Registrar, the entire trademark or any essential part thereof is not registrable under Section 6, the Registrar shall refuse registration and shall, without delay, in writing notify the applicant of the order giving the grounds therefor.

³ U.S. Embassy Bangkok, 'Thailand - Country Commercial Guide' (*Official Website of the International Trade Administration*, 19 February 2019) accessed 9 June 2023

the registration procedure. The provision of the Agreement enables the member states to enact the laws mandating that the official officer should allow the applicant to make their observations after receiving the refusal order. Additionally, it was clearly stated that the applicant should be given the opportunity to appeal the whole or partial refusal order.⁴ The refusal order can be appealed to the Registrar, an administrative appeals board, or the court depending on laws and regulations of each Member state. In Thailand, the Trademark Act of B.E. 2534 (1991) provides administrative authorities and government officials with the authority to issue administrative orders in accordance with the Acts. Moreover, according to the Trademark Act of B.E. 2534 (1991), the Trademark Registrar shall have the authority to examine trademark registrations and refuse the registration in case the mark is not registrable. The applicant, therefore, has the right to appeal the order issued by the Registrar to the Trademarks Board within sixty days of the date of receiving the Registrar's order, according to Section 18 of the Trademark Act of B.E. 2534 (1991). Once the decision has been rendered by the Trademarks Board, if the applicant sees the decision of the Trademarks Board as unpleasant, the applicant is entitled to file an appeal against the decision of the Trademarks Board with the court.

Since orders or decisions issued by the Trademarks Board, affect the rights of individuals or the owner of the trademark. Thus, it can be concluded that the decision of the Trademarks Board shall be considered as the administrative order according to the structure of the administrative law. Therefore, interested persons or concerned parties can appeal the aforementioned decision or present their disputes to seek a judicial review of such administrative actions by courts. However, the Intellectual Property and International Trade Court considers administrative disputes involving trademark law, which in theory should be resolved by administrative procedure rules, to be civil cases under the Intellectual Property law⁵, not administrative cases. As a result, the administrative court lacks the authority to adjudicate administrative disputes involving trademarks within its administrative context.

⁴ WIPO Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use* (WIPO 2008)

⁵ The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996)

Currently, administrative disputes against the decision of the Trademarks Board involving trademark registration are brought before the Intellectual Property and International Trade Court, and the applicant seeks a judicial review to determine whether an administrative decision was properly issued on the basis of law and whether properly exercised the discretionary power in the spirit of the legislation. However, the study found that the Intellectual Property and International Trade Court decides both general trademark cases and administrative disputes involving trademark law by applying the Accusatorial system. The fact that administrative procedure should be based on the Inquisitorial system in order to balance the power between parties. Theoretically, the judicial review of administrative actions relating to trademark issues that fall under the jurisdiction of the Intellectual Property and International Trade Court shall also be governed by administrative law principles.

Additionally, from several studies on the Intellectual Property and International Trade Court judgments, it was found that the Intellectual Property and International Trade Court exercised its discretion on behalf of the administrative agencies by reviewing the merits of decisions of the Trademarks Board. For instance, the judgment of the Central Intellectual Property and International Trade Court on Black Case No. Tor Por 128/2548 and the Red Case No. Tor Por 9/2550, the registration was refused by the Trademarks Board on the grounds that the mark “ELEMENTSIX” lack of inherent distinctiveness, thus the mark is not registrable. In which the decision of the Trademarks Board is an exercise of administrative discretion. However, the Central Intellectual Property and International Trade Court's determination of facts and interpretations led to the consideration under the trademark law, the Court held that the plaintiff's trademark “ELEMENTSIX” has a distinctive character which is registrable under the Trademark Act B.E. 2534 (1991). Evidently, the Central Intellectual Property and International Trade Court acted as a superior to the Trademarks Board, despite the fact that the Court is not the executive branch that is responsible for enforcing the laws. Moreover, judicial review by the court seeks to determine whether an administrative decision

Section 7 The intellectual property and international trade courts shall have jurisdiction over the following matters:

(3) civil cases regarding trademarks, copyrights, patents, and cases arising from agreements on technology transfers or licensing agreements.

was properly made by focusing on the law, not on the merits of the decision. Consequently, decisions of the Intellectual Property and International Trade Courts are manifestly inconsistent with the judicial review principles under administrative law. Such adjudication does not limit the scope of consideration to whether the decision of the Trademarks Board is lawful. Due to the fact that the Court is required to recognize the roles and positions of administrative agencies are governmental organizations tasked with carrying out the implementation of legislation, thus, the Court cannot prejudge issues of content or facts already examined by administrative agencies. Since the Intellectual Property and International Trade Court will rectify all administrative errors, it is possible that the process, procedure, and standard for issuing administrative orders in trademark disputes involving misconduct or unlawful action by Registrars or the Trademarks Board will not be significantly improved. Consequently, it has an impact on the development of the adjudication process in adjudicating administrative disputes related to trademark law, which has a direct impact on protection of people's rights and liberties in the judicial process. For all reasons, regarding the judicial review of decisions of the Trademarks Board under the jurisdiction of the Intellectual Property and International Trade Court, without the amendment of pertinent laws and rules, the study uncovered four significant legal problems, as outlined below.

Firstly, there is an issue regarding the suitability of allowing the Intellectual Property and International Trade Court to adjudicate and decide administrative disputes involving trademark issues. Since Section 3 of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) defines "Intellectual Property and International Trade Cases" as civil and criminal cases under the jurisdiction of the intellectual property and international trade courts, only such cases are considered "Intellectual Property and International Trade Cases". In addition, Section 7 of the Act grants the Central Intellectual Property and International Trade Court jurisdiction over civil and criminal intellectual property cases. It can be seen that administrative cases are not included in the current provisions. However, the Supreme Court and the Committee on Jurisdiction of Courts have consistently held that the Intellectual Property and International Trade Court has the authority to adjudge over such cases due to the expertise of the Court. The Intellectual Property and International Trade Court considered that administrative cases regarding the

appeal against the decision of the Trademarks Board are characterized as civil cases of its jurisdiction. As a result, trials in civil cases and cases involving administrative disputes are conducted in the same manner, and the Court applies the Accusatorial system of adjudication to all categories of cases. In general, the administrative court shall apply the Inquisitorial system of trial, instead of the Accusatorial System, in order to ensure fairness for balancing the power of parties between concerned individuals and administrative agencies or officials. Based on the principle of public law, the administrative procedure should be rigorously applied in all instances, including the application of the Inquisitorial system of administrative trial or the fundamental principle of judicial review. Consequently, the interpretation of the administrative case involving the appeal of the Trademarks Board's decision as a case under the jurisdiction of the Central Intellectual Property and International Trade Court without amendments to the current law could result in unfair trials.

Secondly, the issue relates to the court proceedings of the Intellectual Property and International Trade Court, which decides administrative trademark disputes. According to the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) and the Rules for Intellectual Property and International Trade Case B.E. 2540 (1997), the Acts and Rules failed to differentiate between administrative cases and civil cases involving trademark issues. As a result, the proceedings in the Intellectual Property and International Trade Court are based on civil proceedings in both types of cases. As previously stated, the Court will then apply the Accusatorial system to administrative cases. Thus, the Intellectual Property and International Trade Court solely acts as an intermediary to conduct the proceedings and examine the admissibility of the evidence duly presented by the parties. Moreover, the civil procedure mainly emphasizes the role and rights of the parties to trial, and the case will be conducted by the legal burden of proof principle which the party who alleges the fact in each issue shall bear a legal burden of proof of the fact under Section 84/1 of the Thai Civil Procedure Code. On the other hand, the administrative court system generally applies the Inquisitorial system in which the Courts have a significant role in proceedings with a trial and actively find the facts and evidence, not limited to facts or

evidence adduced by the parties to the case.⁶ The Inquisitorial system is used to guarantee that matters brought before the administrative court will be decided in a fair and impartial manner due to the unbalancing power between parties. Consequently, the Intellectual Property and International Trade Court decides administrative disputes involving trademark law through civil proceedings, thus the Court play a diminished role in fact-finding and evidence.

Thirdly, the issue of classifying cases under the jurisdiction of the Intellectual Property and International Trade Court. Since cases of appeal against the administrative decision of the Trademarks Board are classified as civil cases under the jurisdiction of the Intellectual Property and International Trade Court. Consequently, both civil and administrative trademark disputes are resolved through the same proceedings. In addition, administrative disputes may also arise from the Trademarks Board or Registrars' neglect of duty, unjustified delay in the performance of functions, or abuse of power in the issuance of administrative orders. Consequently, administrative disputes in each instance will have varied administrative action characteristics, which should be considered differently depending on the nature of the administrative activities. Therefore, the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) provides that only specified civil and criminal cases shall be governed by the Court, which do not include administrative cases. This results in all types of cases involving trademark issues being treated similarly by the Court, which is contrary to the administrative procedure. Therefore, the concerned persons are unable to receive an appropriate and effective remedy to apply to the problem at hand.

Lastly, the issue of Intellectual Property and International Trade Court judges lacking adequate knowledge and experience with administrative law. Since the establishment of the Central Intellectual Property and International Trade Court as a specialized court separated from the Court of Justice, thus, judges should have knowledge and expertise in particular

⁶ Visrutch V, 'Thailand - Association Internationale Des Hautes Jurisdictions Administratives' (Association Internationale des Hautes Jurisdictions Administratives International Association of Supreme Administrative Jurisdictions, 23 November 2022) <<https://www.aihja.org/en/membre/thailand-supreme-administrative-court/>> accessed 11 July 2023

areas of intellectual property, as intellectual property cases are distinct from general cases. Presently, it has been determined that a judge's approach to judgment regarding administrative disputes is inconsistent with the principles of administrative law. In theory, judicial review can only determine whether an administrative decision was legally made by focusing on the law, not on the merits of the decision. However, the Court's current practice is reviewing the merits of decisions of the Trademarks Board, instead of focusing on the legality of the decisions. Furthermore, judges of the Intellectual Property and International Trade Court, however, are appointed by judges who are trained and have gained expertise in judicial proceedings under private law and using the Accusatorial System in trials. Consequently, when judges have to adjudicate cases relating to administrative disputes, in theory, they must also possess the requisite knowledge, expertise, and experience in adjudicating cases in accordance with the principles of public law. Hence, the lacking of experience and expertise in public law resulted in the ineffective judicial review of administrative actions.

Therefore, due to the reason that decisions of the Trademarks Board were characterized as administrative orders, the applicant shall have the right to appeal the decision of the Trademarks Board to the Court in accordance with the Legal State principle as well as administrative law. For all reasons, there is an uncertainty of the Intellectual Property and International Trade Court for judicial review of the decision of the Trademarks Board.

1.2. Hypothesis

Judicial review of decisions of the Trade Marks Board by the Intellectual Property and International Trade Courts under Thai law remains deficient and inappropriate in that the Court is empowered to decide the merit of cases rather than reviewing only the legality of the Board's decisions. It is, therefore, appropriate to amend the law by, in particular, amending the Rules of the Intellectual Property and International Trade Courts to the effect of limiting the jurisdiction of the Court, in relation to judicial review, to reviewing the legality of administrative decisions of the Trademarks Board. Furthermore, current trials in civil cases

and administrative cases regarding trademark disputes are similarly conducted by applying the Adversarial System. As a consequence, the trial and adjudication of the case cannot truly establish equity for private parties. Thus, the Intellectual Property and International Trade Court should apply the Inquisitorial system to administrative cases by requiring the Court to play a significant role in gathering facts and evidence. Moreover, the law should be amended to differentiate between administrative and civil cases, as is appropriate and consistent with Thai legal law.

1.3. Objectives of Study

1. To study the background and overview of fundamentals of trademark rights and protection in relation to the practical administrative proceeding of trademark registration;
2. To study principles, theories, and concepts regarding judicial review of administrative actions under both jurisdictions of Thai and foreign courts;
3. To study the rules of law relating to the rights of the trademark owner and the judicial review over the decision of the Trademarks Board as specified in the Trademark Act B.E. 2534 (1991), the Rules for Intellectual Property and International Trade Case B.E. 2540 (1997), the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996), the Administrative Procedure Act B.E. 2539 (1996), and the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999);
4. To study and demonstrate the existing legal problems of the legality of judicial review over the Trademarks Board's decision;
5. To propose solutions for the amendment regulations in order to resolve the problems or difficulties of the legality of the Court judgment over the disputes against the Trademarks Board's decision.

1.4. Scope of Study

This independent study shall focus on the existing principle of laws and other relevant regulations that comply with the overview of the trademark conceptual and practical administrative proceedings of trademark registration in Thailand. In addition, the study will focus on appropriate solutions to resolve the issues regarding the judicial review of the Trademarks Board's decision. To see whether the appropriateness would be the amendment to provide additional provisions regarding the judicial review of the Trademarks Board, or the determination the case involving administrative disputes shall be under the jurisdiction of administrative courts. Also, the study will focus on the problem of the judicial review over the decision of the Trademarks Board as specified in the Trademark Act B.E. 2534 (1991), the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996), the Rules for Intellectual Property and International Trade Case B.E. 2540 (1997), the Administrative Procedure Act B.E. 2539 (1996), and the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 (1999), and the principles of intellectual property court proceedings in accordance with Thai trademark law and foreign national trademark laws in order to provide the clear legal power of the Central Intellectual Property and International Trade Court in delivering a judgment.

1.5. Methodology

The methodology for this independent study focuses on documentary research by examining and analyzing legal documents including textbooks, articles, online publications, theses, the Registrar's order, the Trademarks Board's decision, the Court's decision, Thai and foreign legislations, and other related sources regarding conceptual of trademark and administrative law and procedure for the purpose to have a greater understanding of the problems.

1.6. Expected Results

1. To present the overview of the trademark conceptual and practical administrative proceeding of trademark registration;
2. To understand the principles, theories, and concepts regarding judicial review of administrative actions under both jurisdictions of Thai and foreign courts;
3. To understand the principles relating to the rights of the trademark applicant and the judicial review over the decision of the Trademarks Board;
4. To thoroughly understand the problems of the legality of judicial review over the Trademarks Board's decision;
5. To provide the appropriate and effective legal solution to resolve the problems of the legality of judicial review over the Trademarks Board's decision in Thailand, in order to provide a clear, specific, and exact discretionary power of the Central Intellectual Property and International Trade Court.

CHAPTER 2

FUNDAMENTAL PRINCIPLES OF TRADE MARKS PROTECTION AND JUDICIAL REVIEW

2.1. Overview of the Protection of Applicant's Trademark Rights in Thailand

Modern states are governed by centralized authority and power. The state is turned to be regarded as a juristic person separate from the individual, however, the state maintained its claim to absolute sovereignty.⁷ Thus, the state is juridically equal and equally capable of the same rights or duties as individual citizens. Moreover, the state has its own intentions, which are separate from those of any individual person. This, in brief, the state is a juridical person which is an abstract subject formed by law, and endowed with free will, rights, and duties that give it a separate identity within legal relations.⁸ However, the state cannot exercise its sovereignty without the intermediate involvement of natural persons, any person or group of persons exercising sovereignty on behalf of the State can be known as 'an official government agency'.⁹

The 'Legal State' is, therefore, a key instrument in the formulation or enforcement of laws, along with providing a mechanism to check and balance the exercise of state power. Also, the main purpose of the Legal State is to monitor the abuse of powers by administrative authorities.¹⁰ The State guarantees and recognizes the fundamental rights to liberty and freedom in the Constitution in order for people to exercise their rights appropriately. As a result, this form of state has restricted powers strictly subject to its own laws. The purpose of the Legal State principle is to ensure the rights and liberties of people over the abuse of

⁷ Charvet J, 'The Idea of State Sovereignty and the Right of Humanitarian Intervention' (*JSTOR*, 1997) <<https://www.jstor.org/stable/1601447>> accessed 29 April 2023

⁸ Adriano EA, 'Natural Persons, Juridical Persons, and Legal Personhood' (2015) 8 *Mexican Law Review* 101

⁹ Chanchai Sawangsak, Kham Athibai Kodmhai Pok-Khron (31st edn, Winyuchon 2022) (ชาญชัย แสวงศักดิ์, คำอธิบายกฎหมายปกครอง (พิมพ์ครั้งที่ 31, วิญญูชน 2565)).

¹⁰ Gupta R, 'Judicial Control over Administrative Actions' (*Law column*, 24 June 2021) <<https://www.lawcolumn.in/judicial-control-over-administrative-actions/>> accessed 29 April 2023

powers by administrative authorities. Consequently, in order to ensure the protection of existing rights, public law principles are divided as follows.¹¹

1) The Principle of Legality of the Administrative Action.

In accordance with this principle, the administrative agency's actions must be in accordance with the statutes and regulations enacted by the legislative body. This indicates that, in the relationship between individuals and administrative agencies, administrative agencies will have the authority to order individuals to perform or refrain from certain actions, which must be expressly authorized by law. In addition, the administrative powers exercised by the administrative agency must be consistent with applicable laws.¹²

2) The Principle of the Constitutional Control of Laws.

The law should be consistent with constitutional principles, particularly the law which empowers administrative executives that affect people's rights and liberties. The law must specify 'which executive has the authority to do an act that affects people's rights and liberties,' in what circumstances, and within certain limits. Moreover, the law must take into account the necessity and proportionality of the power in order to maintain the best public interest.

3) The Principle of Judicial Control Over Administrative Action

The Constitution clearly specifies that the government is divided into legislative, executive, and judiciary. Therefore, to be consistent with the current law and the constitution, judicial control over administrative action must be upheld by judicial independence.¹³

¹¹ Somyot Chueathai, Kham Athibai Lak Rattathammanoon Tuapai (2nd edn, Thammasat University 1992) (ชาญชัย แสวงศักดิ์, คำอธิบายหลักรัฐธรรมนูญทั่วไป (พิมพ์ครั้งที่ 2, โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2535)).

¹² Dyzenhaus D, Hunt M and Taggart M, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation' (2001) 1 Oxford University Commonwealth Law Journal 5

¹³ Elliott DW, *Judicial Control of Administrative Action: Sourcebook* (Captus Press 2011)

2.2. The Principle of Legality of the Administrative Action

2.2.1. The Meaning of 'Legality of The Administrative Action'

The principle of legality of the administrative action or the administrative action must be lawful is a fundamental principle in administrative law. The main purpose of the principle is to ensure that the administrative action adheres to the law that is reasonable and procedurally fair. It signifies that the law is a source and limitation of the lawful power for administrative acts. Consequently, administrative action is simply the carrying out of the law.¹⁴

As previously described, the lawful administrative action will approach effectiveness and efficiency by providing adequate control over the administrative act and consistent with the Legal State, which consists of two sub-principles as follows.

1) The principle of administrative actions must be lawful.

Administrative agencies' actions are legally bound by the applicable law. The legal binding of the actions performed by the administrative agencies can be described in two different ways as follows. Firstly, in case administrative acts must be performed since it is stipulated by laws and legal principles. Thus, the administrative agency's acts are obligated to comply with laws and practices. Secondly, in case the law does not prescribe duties of the administrative agency, the administrative agency shall conduct the activities for the public interest or in response to fulfilling the needs of the public. The administration shall refrain from actions that are against the law because the unity of state power and unity in the legal system should be established. If administrative agencies are allowed to conduct any activities against the law without any penalties, therefore, there will be a lack of effectiveness and efficiency of laws. Consequently, the administrative agency cannot impose any measure against the law.¹⁵

¹⁴ Vorapot Virutpich, Lak Karn Phuen Than Khong Kodmhai Pok-Khrong [Fundamental principles of administrative law] (2nd edn, Winyuchon 1997) (วรพจน์ วิศรุตพิชญ์, หลักการพื้นฐานของกฎหมายปกครอง (พิมพ์ครั้งที่ 2, วิญญูชน 2540)).

¹⁵ Worachet Pakeerut, Kwam Ru Bueng Ton Kiew Kub Kodmhai Pok-Khrong : Lak Karn Phuen Than Khong Kodmhai Pok-Khrong Lae Karn Kratum Tang Pok-Khrong (2nd edn, Winyuchon 2003) (วรเจตน์ ภาคีรัตน์, ความรู้เบื้องต้นเกี่ยวกับกฎหมายปกครอง: หลักการพื้นฐานของกฎหมายปกครองและการกระทำทางปกครอง (พิมพ์ครั้งที่ 2, วิญญูชน 2546)).

In summary, the administrative agency shall not impose administrative sanctions in general and in an abstract way (known as 'by-law' which is stated by subordinate legislation and the Administrative Procedure Act) against the Constitution and any acts. However, even the legislative measures are directly issued to specified individuals, for example, an administrative order. The administrative agency still cannot impose administrative orders against the Constitution and any acts as well.

2) The principle of no law, no power.

Since the law is the source of power, the administrative agencies will also be empowered by the law. While the principle of administrative actions must be lawful only requires the administrative agency to exercise within the legal framework. On the other hand, the principle of no law, no power means that the administrative agency must exercise the powers and authority that have been empowered by laws to conform with the rules established by law. Moreover, the authority and power for administrative actions must be provided by written laws. The administrative agency cannot exercise its power on a customary law basis. In case of the aforesaid customary law exists, it is the duty of the legislative body to enact a law in writing to certify or abolish the customary law for the sake of certainty in the legal system.

2.2.2. Classification of Administrative Action

The administrative actions could be classified into two categories. These are Juristic acts and Real acts. The Juristic Act is an expression of the intent of administrative officials to establish relations between persons, for example, the administrative act. In other words, the acts of administrative officials are voluntary acts to create rights between the administrative agency or administrative officials and individuals. For the Real acts, the act is an action that uses physical force to perform in order to comply with the rights and duties.

2.2.2.1. The Juristic Acts

Juristic acts have four important characteristics as follows:

- 1) Juristic act is an act aimed at expressing the intention to establish relations with a person or a group of persons by the administrative agency.

- 2) The expression of intention indicates the intention to enter into a legally binding effect.
- 3) The legally binding effect performed by the administrative agency is their intention to establish legal relations between two parties. One party is the agency or a person acting on behalf of the State who has the power to give administrative orders to another party to act or refrain from any actions. Moreover, the legal relations between persons are the relation to create, modify, transfer, preserve, extinguish, or affect rights.
- 4) The aforesaid legal relation must be a relation formed by the Administrative Organization to express the unilateral intention without the consent of another party.¹⁶

From the above characteristics, it indicates that the Juristic act or administrative act is a unilateral act issued by the government agency without the consent of another party. Moreover, the administrative act could be classified into two categories as follows;

- (1) The 'by-law' is in accordance with Section 5 of the Administrative Procedure Act B.E. 2539 (1996). The Section clearly stated that the meaning of the 'by-law' referred to a Royal Decree, Ministerial Regulation, Notification of a Ministry, ordinance of a local government, rule, regulation or any other provisions of general applicability without addressing to a specific case or person.¹⁷ Also, Section 3 of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 stated that "by-law" means a Royal Decree, Ministerial Regulation, Notification of a Ministry, ordinance of local administration, rule, regulation or other provision which is of general application and not intended to be addressed to any specific case or person.¹⁸
- (2) The 'administrative order' is a unilateral Juristic act under the administrative law. The characteristic of an administrative order is a concrete act that shall be applicable to specific individuals outside the government. Section 5 of the Administrative Procedure Act B.E. 2539 (1996) stated that 'administrative order' means

¹⁶ Administrative Procedure Act B.E. 2539 (1996) s 5

¹⁷ Administrative Procedure Act B.E. 2539 (1996) s 5

¹⁸ Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 s 3

1) the exercise of power under the law by an official to establish juristic relations between persons (i.e., the State agency and the individual to create, modify, transfer, preserve, extinguish or affect the individual's status of rights or duties, permanently or temporarily, such as giving an order or permission or approval, deciding an appeal, certifying and registering, but shall not include the issuance of a by-law;

2) other acts as prescribed in the Ministerial Regulation.¹⁹

From the meaning of the 'administrative order', the principal characteristics can be separated into five respects.

Firstly, an administrative order was issued by an official. According to Section 5 of the Administrative Procedure Act B.E. 2539 (1996), the 'official' means a person who, or a group of persons or a juristic person which exercises or is empowered to exercise the administrative power of the State.²⁰

Secondly, an administrative order is the exercise of powers of the state. It also clearly illustrates that an administrative official exercises power under the law to issue an order. The issuance of administrative orders exercises coercive powers over individuals without their consent. If the administrative order is not caused by the exercise of legal power, then it is not the issuance of an administrative order. In considering the legal authority, it must be considered whether administrative officials have the authority to issue enforceable orders that affect individuals. In addition, the issuance of an administrative order cannot be a case of exercise of legislative power (enacted legislation) or exercise of judicial power (trial) since the acts of the parliament and the courts are not subject to the scope of the administrative order.

Thirdly, administrative orders must be aimed at prescribing the legal consequences of any legal relation between persons. For example, the Trademark Registrar has instructed the applicant that the exclusive right over some parts of the mark must be disclaimed, which is in accordance with Section 17 of the Trademark Act B.E. 2534. Therefore, if the order

¹⁹ *Ibid.*

²⁰ Administrative Procedure Act B.E. 2539 (1996) s 5

affects people's rights and obligations, it then is within the scope of the administrative order principle.

Fourthly, an administrative order shall identify with individual specificity in the case. Administrative orders must be issued in order to determine the legal position in a particular case or circumstance. For example, the Registrar issues a notification order regarding trademark registration. The legal nature of administrative order is directed towards a specific person but the person may not be named in such order. For example, the officer found the buildings are placed in the restriction area, but the owner is not physically present at the building. The official also may order demolition by means of an announcement requiring the offender to be demolished without specifying the person's name. In which administrative order applicable in this particular case may be a general order applicable to a group of persons, such as the order regarding prohibiting people from entering buildings that are prone to collapse. These orders are compulsory on many persons similar to a "by-law"; however, they actually are not "by-law" as they are intended to have an immediate effect on a definite group of persons.

Lastly, the administrative order has a direct external administrative agency legal effect. As long as it remains internally effective, it is only preparation or consideration for the issuance of an administrative order. Moreover, the administrative order may undergo some changes from that originally prepared. For instance, the assistant registrar has initially examined the application and has a preliminary opinion. In this case, no administrative orders have been issued. Even if the registrar has instructed an order to the assistant registrar to recheck an opinion, this order is not considered an administrative order since the order has no direct external effect on the trademark applicant. Consequently, when the order has been issued to the applicant and the applicant shall comply with it, it would therefore be an administrative order.

Therefore, the Juristic acts either as 'by-law' or 'administrative order' are both the exercise of power to establish juristic relations between persons to create, modify, transfer, preserve, extinguish, or affect the individual's status of rights or duties. The difference is that 'by-law' are general applicability that was not intended to apply to any specific case or person. For the administrative order, the order must be issued applicable to each specific individual

or case. Thus, in consideration of the Juristic acts, whether such acts are an administrative order or not, the two characteristics of the 'by-law' should be taken into account. If lacking any one of them, the acts are therefore considered as an administrative order. In detail, the lack of application to the general recipient and intended to be addressed to any specific case or person, it shall be characterized as an administrative order.

2.2.2.2. The Real Acts

The Real act means the act of governmental bodies, other relevant authorities, or the private sector acting on behalf of the state and such action is not a Juristic act. Moreover, the Real act lacks the characteristics of Juristic acts. The Real acts may be at any stage of proceedings on consideration regarding the issuance of the Juristic acts. The Real acts may establish juristic relations between persons, for example, the unlawful Real acts that cause damage to any person is a tort, therefore, the administrative agency is obligated responsible for violations for the loss or injury caused. It can be seen that the liability of the administrative agency does not arise from the intention of the administration but is the enforcement of the law.²¹ Thus, such liability of the administrative agency has resulted from the Real Acts.

2.2.3. Effectiveness and Validity of Administrative Orders

Since the administrative order is the exercise to establish juristic relations between persons to create, modify, transfer, preserve, extinguish, or affect the individual's status of rights or duties, permanently or temporarily. Section 42 of the Administrative Procedure Act B.E. 2539 (1996) states that *'An administrative act shall become effective against the person concerned when he or she is notified thereof. An administrative act shall remain effective as long as it has not yet been revoked or has not expired by lapse of time or any other reason...'* When the administrative orders have been notified and the requirements have completely

²¹ Bishop W, 'A Theory of Administrative Law' [2018] Administrative Law 335

complied with Section 68²² and Section 75²³ of the Administrative Procedure Act B.E. 2539 (1996), the receiving party, therefore, affected their legal position as a consequence of receiving the order. Therefore, the effectiveness and validity of administrative orders are important, if the recipient party disagrees with the proposed administrative order, the recipient party may appeal the order within the period specified by law hereof.

The elements for the effectiveness and validity of an administrative order are as follows;²⁴

(1) The competent official.

The Juristic acts are the exercise of power by the executive bodies of government. Section 12 of the Administrative Procedure Act B.E. 2539 (1996) states that 'An administrative act shall be made only by the competent official'. Therefore, the administrative order shall be issued by the administrative authority that has administrative power.

(2) The process of preparation and form of the administrative order.

Section 34 of the Administrative Procedure Act B.E. 2539 (1996) has provided the form of an administrative order as 'An administrative act may be made in written, verbal or other forms of meaning, but it must be sufficiently clearly defined in content or meaning'. Thus, the administrative order must be able to communicate properly with the receiving party.

(3) The purpose of the administrative order.

The administrative authority performs public duties and exercises state power, therefore, the interests of the major public should be duly. The interest in the common good

²² Administrative Procedure Act B.E. 2539 (1996)

Section 68 The provisions of this Chapter shall not apply to the notification which cannot be made in verbal or written form or is made by other means as prescribed by law.

In case an administrative act is expressed in other forms as prescribed in the Ministerial Regulation, it shall take effect upon notifying.

²³ Administrative Procedure Act B.E. 2539 (1996)

Section 75 The appointment of a qualified member of a committee shall be made by specifying the name of the qualified member.

²⁴ Ruetai Hongsir, Sam Pok-Khrong Lae Karn Domnern Kadee Nai Sam Pok-Khrong (12nd edn, Winyuchon 2023) (ศาลปกครองและการดำเนินคดีในศาลปกครอง ฤทัย หงส์ศิริ (พิมพ์ครั้งที่ 12, วิญญูชน 2566)).

of public society must be taken into consideration for the issuance of the administrative order or juristic acts unless the law has specifically specified the other purpose of exercising the power to issue the administrative order in certain matters.

(4) Other relevant reasons.

Apart from the authority of the administration, the administrative official must act within the scope of the laws or regulations. In case of any specific requirement or condition prescribed by law or regulation, the administrative official shall exercise only the powers granted to them under such law and regulation. Moreover, the order must be reasonable and procedurally fair. Section 30 of the Constitution of the Kingdom of Thailand clearly states that 'All persons are equal before the law and shall enjoy equal protection under the law...'. This concept also is in accordance with the principle that 'the act shall not cause unnecessary process or excessive burden to the public' in Section 9 of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542.

Moreover, if there is a lack of one of the above conditions for the effectiveness and validity of administrative orders or juristic acts, such orders or acts may still be administrative orders or administrative juristic acts. However, the orders or juristic acts may be revoked or have no legal effect in the future.²⁵

2.3. The Principle of Due Process in the Administrative Procedure.

A democratic state under the Legal State demands that the issuance of administrative juristic acts must conform to the precepts of the legality of the actions, which is an important principle of administrative law. Therefore, the principle of legality of administrative action is a principle of administrative law that ensures an individual's rights and liberty are provided by the exercise of administrative power. This principle is fundamental in many countries and is the basis for the administration and decision-making of administrative officials for civil society.

²⁵ Purichaya Wattanarung, Lak Kodmhai Maha Chon [PRINCIPLES OF PUBLIC LAW] (14th edn, Ramkhamhaeng University Press 2019) (ปริญญา วัฒนรุ่ง, หลักกฎหมายมหาชน (พิมพ์ครั้งที่ 14, สำนักพิมพ์มหาวิทยาลัยรามคำแหง 2562)).

Thus, the official's acts must be in accordance with the legal framework governing their power and responsibility.

According to the general principle of due process in the administrative procedure, in a liberal democratic state with democratic rule, the state ensures the stability of the people's rights to receive equal treatment from the state, as well as aims to provide individuals with justice in all instances. As a liberal democratic state develops rapidly in terms of economy, society, and culture, the state, therefore, there is responsible and controls economic, social, and cultural activities in order to achieve social justice and meet the needs and demands of the public interest. The administrative acts are the responsibilities of the state that need to be the most efficient and effective result, while also having the least impact on the people's rights and liberties. The state has established various laws regulating the exercise of private rights and prescribing the obligations of officials or government agencies. For instance, providing private rights of any action, the execution control of administrative acts, providing public service, and the settlement of disputes between private parties or between private parties and public officials. These acts are administrative acts that must be in accordance with the principle of legality of the administrative action.²⁶

The principle of legality of the administrative action is a fundamental principle of the Legal State to verify the validity of administrative acts, which preserves that government officials must be held responsible to the law and cannot exercise authority arbitrarily or without a legal framework. This concept ensures that administration acts must be acted within the legal boundaries established by the law and ensures that persons and entities affected by administrative acts are treated appropriately and fairly. Moreover, administrative actions must be consistent with court procedures, which means that when administrative officials exercise their power, the officials shall follow the same particular procedures as those that are used in the court proceeding. These particular procedures include the principles of impartiality, without prejudice, and have no personal interest in the matters. Also, administrative officials must gather accurate facts prior to rendering an order in order to be procedurally fair and the orders must be supported by reasonable and valid rationale. Therefore, the reasons for the

²⁶ Wisarutphith W, *Judicial Control of the Exercise of Administrative Discretion*. Bot Bundit 47, no. 1 (1991): 45-46.

administrative orders must be disclosed clearly, which is regarded as a general legal principle that the administration has to comply with. These principles control the exercise of administrative authority before the issuance of administrative juristic acts and are a criterion for verifying the legitimacy of administrative juristic acts that have been issued to the recipient. Adopting the principles of court proceedings to apply to the acts of administrative authorities resulted in 'the principle of due process in the administrative procedure'. Administrative procedures have been recognized as a process similar to court proceedings, i.e., the procedure to file a claim, take evidence, determine the issues in dispute, use administrative discretion, and the principles of due process of the court used in the administrative procedure. The principle of due process includes the principles of Natural justice and Due process of law.

2.3.1. The Principle of Natural Justice

The principles of Natural justice have been created and used by the judiciary in protecting the public's rights against the arbitrariness of administrative bodies.²⁷ Natural justice originated with Magna Carta²⁸ in 1215 and is highly significant in the area of administrative law. The principle provides the minimum requirement that an administrative body has to fulfill for actions of administrative officials whose procedures are similar to the court proceedings (*Quasi-judicial*). These administrative procedures are the control and inspection authorities to protect people's rights from official abuse of power and to comply with the principle of Natural justice. The government's actions must follow the correct

²⁷ Mirandah, 'New Regulations of the Thai Trademark Appeal Board Bring Changes to Procedures' (Mirandah Asia, 18 July 2019) accessed 1 April 2023

²⁸ Magna Carta was the first document to put into writing the principle that the king and his government were not above the law. It attempted to prevent the king from exploiting his power and imposed boundaries on royal authority by establishing law as a power in and of itself.

procedures and be consistent with the procedure used in a trial that affects the fundamental rights of people.²⁹ The principle of Natural justice consists of two important principles.

1) **Nemo judex in causa sua**

The principle of 'Nemo judex in causa sua' can be translated to 'no one shall be an arbitrator on his own or a cause in which he is interested'.³⁰ It implies that the authority to which the matter has been assigned should be neutral and impartial in its actions.

2) **Audi alteram partem**

The principle of 'Audi alteram partem' can be translated to "to listen to the other side".³¹ The principle provides the basis for an impartial hearing, and a principle against prejudice will certainly be part of the procedure.

The two above principles of Natural justice make it clear that when applies to government bodies, including ministers, government officials, local government bodies, and government officials acting as judicial officers in the adjudication of private claims. If there is a failure of Natural justice applied to the case, the courts have the power to do the judicial review of administrative action by prohibiting administrative agencies from doing beyond the powers or revoking the administrative order. As a result of the administration not strictly applying the principles of natural justice in adjudicating disputes between the administration and individuals, it possibly causes the High Court Judge to order that there is no such administrative order existing. Moreover, if a non-compliance act causes substantial harm to another party, the judicial review of the administrative acts by the court can be summarized as follows.

First, the rule against bias, the concept of 'no-one is judge in his own cause' or the principle of having no conflict of interest, which is the rule strictly applied by judges in the common law system. It means that the making decisions of the judge must be constituted of impartial individuals acting fairly without bias or prejudice, as a minimum criterion of natural

²⁹ 'Natural Justice and Procedural Fairness at Obsi' (Ombudsman for Banking Services and Investments (OBSI)) <<https://www.obsi.ca/en/how-we-work/resources/Documents/Principles-of-Natural-Justice-in-Ombudsmanship.pdf>> accessed 9 May 2023

³⁰ *Ibid.*

³¹ 'Principles of Natural Justice' (Unacademy, 9 June 2022) accessed 9 May 2023

justice. Therefore, the concept of 'no-one is judge in his own cause' shall apply to the procedure of administrative authority in the disputes between administrative agencies and individuals. Hence, this principle reinforces an official's impartiality and guarantees that the decision issued is purely based on the evidence presented in a case. The types of bias may be classified under the following types such as personal bias, pecuniary bias, subject matter bias, policy notion bias, etc..³²

Second, the rule of fair hearing, this rule stipulates that each party must have the opportunity to present their evidence and viewpoints and that officials must conduct an impartial trial as a consequence. The affected person should be disclosed the relevant evidence that will be used against him and be given the chance to refute the evidence presented by the opposing side. This is an important natural justice rule since it prohibits authorities from punishing an individual without adequate and sufficient reason. A person should be given advance notice to ensure he is aware of the charges raised against him and can prepare to respond properly. The concept of natural justice has been adopted and recognized in order to protect public rights from arbitrary administrative actions..³³

2.3.2. The Principle of Due Process of Law

The origin of the concept of due process can be traced back to English Common Law..³⁴ The principle that any individual shall not be deprived of his life, freedom, or assets without prior notification and a chance to defend himself, and this concept was widely recognized in England..³⁵ The MAGNA CARTA, which defined the rights of English subjects against the monarch and was signed in 1215, is the earliest instance of a guarantee from the Constitution of due process..³⁶ This document contains the clause stating that "No free

³² 'Natural Justice' (Wikipedia, 15 July 2023) <https://en.wikipedia.org/wiki/Natural_justice> accessed 9 May 2023

³³ *Ibid.*

³⁴ 'Due Process' (Wikipedia, 28 June 2023) <https://en.wikipedia.org/wiki/Due_process> accessed 10 July 2023

³⁵ Harrison, John. "Substantive Due Process and the Constitutional Text." *Virginia Law Review*, vol. 83, no. 3, 1997, pp. 493–558. JSTOR, <https://doi.org/10.2307/1073649>. accessed 9 July 2023.

³⁶ *Ibid.*

man shall be seized or imprisoned... except by the lawful judgment of his peers or by the law of the land". In subsequent years, this notion of the law of the land developed into the term "due process of law".

The principle guarantees for any legal proceedings will be equitable and that the defendant will be given a notification of the procedures and a chance to be heard before the government acts to take away the person's life, freedom, or assets. Moreover, provisions under the Constitution must not be irrational, arbitrary, or capricious in their application. The concept of due process refers to the concept that the government is obligated to respect every one of the legal rights that are due to an individual in accordance with the law. Due process has also mostly been defined as restricting laws and legal proceedings for judges, rather than legislators, to determine and ensure fundamental equality, fairness, and liberty. This interpretation has frequently raised controversy and is comparable to the notions of natural justice.³⁷

2.4. The General Scope of the Administrative Judicial Control

The purpose of public administration is to serve society in order to improve the common good. Therefore, to achieve particular goals of public administration, it is necessary to enable the government to exercise public power. All public power is held on behalf of the public sector, which holds significant power with effects on individuals' rights. Thus, it should be necessary to provide control over the action of government agencies.

The abuses of administrative power can be described in the following actions, such as administrative action without authority, the action of non-compliance with the stipulated formality, the action of non-compliance with the significant proceedings, the authority is used for purposes other than those stipulated by law (Distortion of powers), the action that violates the other law, the action by creating unnecessary procedures an unreasonable burden to the applicant, the abuse of discretion, and etc. In order to prevent all abuses of administrative power to issue administrative action or administrative orders, judicial control plays a

³⁷ Corwin, Edward S. "The Doctrine of Due Process of Law before the Civil War." Harvard Law Review, vol. 24, no. 5, 1911, pp. 366–85. JSTOR, <https://doi.org/10.2307/1324692>. Accessed 9 July 2023.

significant role in protecting society and citizens from the abuse of power by exercising arbitrary power without boundaries.

2.4.1. The General Scope of the Control Over Administrative Actions.

The meaning of control over administrative actions refers to the examination of administrative actions and legal remedies.

“The examination of administrative actions” means the prevention of abuse of the administrative authority. The examination is meant the determination regarding the legality and the appropriate administrative actions in the progress of issuance of the administrative act. Therefore, this examination is the control before the administrative agencies issue the administrative acts or administrative orders. There are many forms of examination, for instance, objection against the decision of administrative agencies, consultation processes, inquisition, access to documents awareness, the duty to give reasons for administrative actions, the right to attend a hearing, etc.

“The legal remedies” refer to a judicial relief, in case of the administrative act was unlawful since it breached the principle of the law. The issuance of the administrative act shall be able to correct the mistake of the actions or orders in order to recover damages. Thus, the remedies were in progress after the administrative act was issued.

Therefore, control over administrative actions referred to the examination of unlawful administrative actions and remedies for damages to people who have suffered as a result of such actions, whether external or internal controls on administrative agencies. For instance, the control by courts, parliament, and specialized agencies. It may therefore be public protection for unlawful administrative action.

2.4.2. Judicial Control Over Administrative Action

The primary objective of all countries with democracy is to have an efficient and effective system of administration. Judicial control refers to the control that the Courts have over the administrative agencies, which is the court's power to keep administrative actions within the framework of the law. It also means that an offended individual has the legal right

to argue against the unlawful actions of the administration. The basic goal of judiciary control over administration is to protect individuals' rights and liberties which ensures the legality of administrative activities.

In Thailand, the judiciary is very significant. To protect people's rights, the constitution envisions an independent judiciary. The judicial control over administrative action by the court is the role of the judiciary body to provide the injured person a right to file a lawsuit against the administrative agencies. Since unlawful administrative acts have an effect on the people's rights, liberties, and legitimate interests, then, the injured person may request for the Court to revoke such order or request the administrative agencies to pay monetary damages depending on the case. However, the judicial review and control by the Courts over administrative action only review the lawfulness of a decision or action made by administrative agencies, the Courts may not review the reasonableness of such administrative action.³⁸

The judicial review and control by the Courts over administrative action can be classified under the following systems.

2.4.2.1. Judicial Control by the Court of Justice

Most of the countries with a common law system applied a single court system, in which the judicial power is not divided but is regarded as a single power for settling legal disputes³⁹. It implies that there is no distinction between the individual and administration and provides that the individual and administration have equal positions, thus, the private sector and administration are either subject to the jurisdiction of the Court of Justice. Therefore, all cases involving public law shall be under the jurisdiction of the Court of Justice. Consequently, the Court of Justice is able to conduct trials of an administrative case, a case involving a dispute in relation to an administrative agency, a case involving a dispute in relation to an unlawful administrative act, or a case involving an unlawful administrative act which involves a tort that can be claimed a compensation. The Court of Justice will conduct

³⁸ Vorapot Virutpich, Kho Kwam Kid Lae Lak Tarn Bang Pra Karn Khong Kodmahi Pok-kroong (6th edn, Winyuchon 2023) (วรพจน์ วิศรุตพิชญ์, ข้อความคดีและหลักการพื้นฐานบางประการของกฎหมายปกครอง (พิมพ์ครั้งที่ 6, วิญญูชน 2566)).

³⁹ Parness JA, *The Concept of a Unified Court System* (DePaul University 1974)

judicial proceedings by adopting civil and commercial codes, civil procedure codes, penal criminal law, or criminal procedure codes. This system mostly applies to Anglo-Saxons such as in England, etc.

2.4.2.2. Judicial Control by the Administrative Court

The dual court system divides cases for hearing in the Court of Justice and the Administrative Court. Thus, the judicial control by the administrative court is divided into two court structures, namely; the Court of Justice which has the authority to decide private-law cases, and the Administrative Court which has the authority to decide the public-law cases.

In Thailand, the formation of the Administrative Courts marked the commencement of a dual court system. The Administrative Court's jurisdiction has judicial power in administrative cases which is distinct from the Courts of Justice's jurisdiction, which is able to adjudicate criminal and civil cases. The Courts have powers to decide and resolve administrative cases regarding the exercise of administrative power or the actions of an administrative agency as prescribed by law.⁴⁰

2.4.3. Scope and Nature of the Administrative Judicial Review

In a sense, judicial review of administration is the core of administrative law. The decision of the administrative agency may be judicially reviewed by the competent court to determine whether administrative actions are illegal. Certainly, it is the most appropriate approach to examine a public authority of competence. The purpose of judicial review is to ensure that a decision made by a public authority is reasonable, lawful, and impartial.⁴¹

There are significant conditions before filing an administrative case to the respective court. In cases when the law prescribes a specific process for the remedy of a particular injury or damage. Before bringing administrative disputes to the competent court, the plaintiff must follow the pre-condition before filing a complaint. If the plaintiff fails to fulfill the pre-

⁴⁰ Chanchai Sawangsak, 'INTERNATIONAL ASSOCIATION OF SUPREME ADMINISTRATIVE JURISDICTIONS' (*General Information of Thai Administrative Court*) accessed 16 May 2023

⁴¹ *Ibid.*

condition, plaintiffs shall not be entitled to file a case to the Court. The pre-conditions are clearly prescribed by law such as, the injured person must follow the administrative appeal proceedings provided by specific law. If there is no specific law, the injured person shall appeal against the administrative act by filing the appeal with the issuing official within the stipulated time which set out by the Administrative Procedure Act B. E. 2539. Therefore, the plaintiff must perform certain administrative appeal proceedings before filing a court case.

The Administrative Court is able to conduct trials and settle issues involving administrative bodies or administrative officials. Section 9 of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 clearly stated that the Administrative Courts have the competence to try and adjudicate or give orders over the following matters:

- 1) the case involving a dispute in relation to an unlawful act by an administrative agency or State official, whether in connection with the issuance of a by-law or order or in connection with other act, by reason of acting without or beyond the scope of the powers and duties or inconsistently with the law or the form, process or procedure which is the material requirement for such act or in bad faith or in a manner indicating unfair discrimination or causing unnecessary process or excessive burden to the public or amounting to undue exercise of discretion
- 2) the case involving a dispute in relation to an administrative agency or State official neglecting official duties required by the law to be performed or performing such duties with unreasonable delay
- 3) the case involving a dispute in relation to a wrongful act or other liability of an administrative agency or State official arising from the exercise of power under the law or from a by-law, administrative order or other order, or from the neglect of official duties required by the law to be performed or the performance of such duties with unreasonable delay
- 4) the case involving a dispute in relation to an administrative contract
- 5) the case prescribed by law to be submitted to the Court by an administrative agency or State official for mandating a person to do a particular act or refraining therefrom

6) the case involving a dispute in relation to the matters prescribed by the law to be under the jurisdiction of Administrative Courts.

Consequently, this Act prescribes the disputes which shall be under the jurisdiction of the Administrative Courts. Moreover, the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 also outlines the exceptions, which means that the following particular matters shall not be under the jurisdiction of the Administrative Courts.

1) action concerning military disciplines, whether the punishment over the military disciplines or other relevant disciplines.

2) action of the Judicial Commission under the law on judicial service which means that these actions are not regarding the case trial but involve the court management of the judicial officers. For example, the appointment and transfer of judges, selection and promotion of judges, disciplinary action, etc. Despite these actions are all involved administrative power, but the matters are not within the jurisdiction of the Administrative Courts.

3) the case within the jurisdiction of the following specialized courts:

- a) the case within the Juvenile and Family Courts
- b) the case within the Labour Courts, for example, the case regarding the rights and responsibilities of employers and employees, disciplinary action of state enterprise employees, etc.
- c) the case within the Tax Courts, for example, the case regarding the appeal in dispute of tax assessment, tax refund, etc.
- d) the case within the Bankruptcy Courts.
- e) the case within the Intellectual Property and International Trade Courts

In addition, the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 Section 72 stated that in delivering a judgment, an Administrative Court has the power to issue a decree for any of the following:

1) ordering revocation of a by-law or order or restraining an act in whole or in part, in the case where it is alleged in the case filed that an administrative agency or State official has committed an unlawful act under section 9 paragraph one (1). In

this issuing the decree, the Administrative Court may direct that it should have a retrospective or non-retrospective effect or prospective effect to any particular time or may prescribe any condition therefor, as justice in a particular case shall require.

2) ordering the head of the administrative agency or State official concerned to perform the duty within the time prescribed by the Administrative Court, in the case where it is alleged in the case filed that the Administrative agency or State official has neglected the duty or performed the duty with unreasonable delay

3) ordering the payment of money or the delivery of property or the performance or omission of an act with or without prescribing the time and other conditions, in the case where the case filed is in connection with a wrongful act or liability of an administrative agency or State official or in connection with an administrative contract

4) ordering a treatment towards the right or duty of the person concerned, in the case where it is requested in the case filed that the Court give a judgment declaring the existence of such right or duty

5) ordering a person to act or refrain from any act in compliance with the law.

In the case where the Administrative Courts ordering of the payment of money or the delivery of property specified in the judgment, if the person fails to make a payment or delivery of the property, the Courts may proceed with an execution order against the property of the such person in due course.

In passing a judgment of the case, the Administrative Court shall order the return of the whole or part of the Court fees in proportion to the winning of the case.

It signifies that the Administrative Courts have the authority to decide administrative matters including disputes among the officials of the administrative agencies, between the administrative agencies and individuals, which in relation to any act or refraining from any act by an administrative agency or State official. Also, the Administrative Courts were empowered by law to protect the people's right to liberty from an unlawful act by an administrative agency or State official, and to protect the public interest in the meantime. The Courts play a significant role in the establishment and development the administrative law and administrative formalities.

As the Administrative Courts have served as an instrument for protecting people's rights from unlawful acts issued by the administrative agencies, thus, the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 has laid down the rules for the Administrative Court proceedings. One of the main objectives of the Act is to ensure efficient, practical, economical, and impartial proceedings. However, the Administrative Courts are courts with the authority to try and decide administrative cases, therefore, the plaintiff or injured party must follow the following procedural principles before administrative courts. For instance, the plaintiff must be the person who was injured by the administrative act, the plaintiff must file a notice of appeal against the administrative act before the filing of a lawsuit⁴², the plaintiff must file a lawsuit within the required time, etc. As a result, these administrative court proceedings have different characteristics than the civil procedures.

Although the Administrative Courts play an important role in judicial review or control over administrative actions, such judicial review or control over administrative actions by the Administrative Courts is one mechanism of the administrative control system. Thus, the control over administrative actions will be fully effective when there are other relevant controls for applying it simultaneously, especially the application of preventative control. For instance, the development of the administrative procedure and controlling administrative agencies to be more efficient and more serious enforcement.

Moreover, according to the principle of administrative law, judicial review shall seek to determine whether an administrative decision was properly made by focusing on the law, not on the merits of the decision. The Court will only need to consider whether the decision-making process was consistent with natural justice, whether factors considered by the decision-maker were correct under the legislation, and whether the decision-maker acted within their powers.⁴³

⁴² Administrative Procedure Act B. E. 2539 (1996) s 48

⁴³ 'What Is Judicial Review?' (*Armstrong Legal*, 23 November 2020)

<<https://www.armstronglegal.com.au/administrative-law/national/judicial-review/what-is-judicial-review/>>
accessed 17 May 2023

2.5. General Principles and Proceedings of Trademark Protection

When it comes to intellectual property law, the trademark is the only intangible asset that can be renewed to permanently retain for protection. The world has changed dramatically; besides the physical wonder, this evolution is attributed to several innovations and improvements in trade and commerce. Innovations, literature, and advertising materials are the creations of human creativity generated by intellectual labor. The law protects the creations of incredible minds across the world. Trademarks are essential for distinguishing one business's goods or services from those provided by another.

Apart from trademark infringements, another general concern for trademark owners regarding trademark is the registrability of the mark. Before trademark registration is granted, the mark can be objected to by the Trademark Registrar based on absolute ground or relative ground basis. The applicant may oppose the Trademark Registrar's refusal by filing an appeal.

For the nature and historical of trademark protection, a trademark developed from an ordinary symbol and was afterward used for goods or services in commerce. To truly understand the concept and function of a trademark, it is necessary that it should begin with the study of the trademark's history in the past. the study will go deeper into the conceptual of trademarks by exploring the theoretical perspective of trademark functions, protection basis, registrability criteria.

2.5.1. The Historical of Trademark

In the ancient era, the discovery of trademarks occurs during the ancient time when humans began to develop their ability to communicate in the lack of an alphabet system⁴⁴. The concerned symbols were comprised of the factory's and manufacturer's names and were

⁴⁴ Chanchai Sawangsak, *INTERNATIONAL ASSOCIATION OF SUPREME ADMINISTRATIVE JURISDICTIONS' (General Information of Thai Administrative Court)* (Winyuchon Publication House 2022)

stamped on the proper positions of the products. For example, people in China were producing earthenware with the name of the reigning Chinese emperor, Egyptians also left their markings on almost everything they created, including clothing, bricks, tiles, dishes, and gravestones. However, these historical trademarks were not recognized by law. They typically used them to assert ownership of any invention⁴⁵. In the Roman era, it has written documents of an economy that applied for trademarks on a daily basis. Later, as commerce progressed, the introduction of marking became widespread in the Middle age. During this era, the main purpose of markings was to distinguish one product or service from another, and marks can be classified into three types:

Firstly, these marks are frequently found on home stamps or house marks which are called personal marks. It is used to identify the person in such a household. Furthermore, if the home operates a business, whether as a merchant, or an owner of a hotel, such marks are frequently recognized in order to persuade consumers to use their services. However, such marks can be applied for more than just economic recognition, they are also used to distinguish one particular person from another. For example, using the mark for recognition of the prisoners.

Secondly, the proprietary marks referred to the mark that the merchants usually use to represent their products, therefore, the function of the mark is for employees who are incapable to read and may identify who is the owner of the product or if the product belongs to their employer. Such marks can additionally be used to identify the true owner of cargo in case of a risk to the vehicle for transportation and transition. For example, the shipwrecked cargo ship and pirate heist. This is to ensure that if such items transported by transportation are lost, the real owner of the products will be able to prove their ownership and return them.

Thirdly, the regulatory production marks that are mandated by law or regulation to be displayed on goods for the purpose to identify the source of goods or services. This would subject the real owner of such imported goods to legal punishments.⁴⁶

⁴⁵ Ramirez S, 'The History of Trademarks All around the World' (*iGERENT*, 30 June 2021)
<<https://igerent.com/history-trademarks-all-around-world>> accessed 21 May 2023

⁴⁶ Harvard Law Review, Apr., 1927, Vol. 40, No. 6 (Apr., 1927), pp. 813-833

In the early years of trademark enforcement, many countries recognized trademark infringement and punishment. For example, in England, penalties might also be imposed on people who used an illegal trademark on gold or silver cloth. And when it comes to the Modern time, during the era of the industrial revolution, the manufacturing industry changes from using hand labor that is insufficient for producing goods in large quantities to using an industrial approach. This industrial approach is better capable to produce a large number of goods with the same or better quality compared to that of hand labor. After this, a significant revolution in economics happened, and there is a widespread application of trademarks to indicate the source of goods resulting in the widespread availability of goods in the marketplace. Anglo-American countries, especially in the United States of America and England, provide a clear example of modern trademark formation.

In the nineteenth century, trademark infringement was generally seen as fraudulent activity and deception case law that the trademark owner would allege that their companies suffered the loss of consumers caused by their competitor's fraud and deceit in applying the trademark of the real owner without permission⁴⁷. However, the main argument of the trademark owner would highlight simply protecting their exclusive right over their trademark, instead of emphasizing trademark replicating or imitation in the eyes of the public. Even if there are both public deceit and property damage in the court trial, it can be concluded that public damaged was not a significant factor in the court's judgment. Particularly, the court considers the defendant's fraudulent intention over the confusion created through trademark imitating.

In Thailand, the marks can be seen on dishware and mediums of exchange in ancient time, for example, the use of bullet money, known in Thai as 'Photduang'.⁴⁸ In the early 1900s, the concept of trademark protection originated as an offense in trade, which was provided by the Penal Code of the Kingdom of Siam R.S. 127 (1908).⁴⁹ The Penal Code

⁴⁷ McKenna MP, 'The Normative Foundations of Trademark Law' (*SSRN*, 16 March 2006)

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=889162> accessed 23 May 2023

⁴⁸ 'Bullet Money' (*Wikipedia*, 17 April 2023) <https://en.wikipedia.org/wiki/Bullet_money> accessed 23 May 2023

⁴⁹ Section 236-238 of the Penal Code for the Kingdom of Siam R.S. 127 (1908).

indicated the penalties for counterfeiting and imitation of the marks, as well as the importation and distribution of goods bearing a counterfeit or imitated trademark. Later, the Department of Agriculture established Thailand's first trademark registration office in 1910.⁵⁰ When Thailand became a member of the Berne Convention for the protection of literary and artistic works in B.E. 2474 (1931), the Law on Trade Marks and Trade Name B.E. 2457 (1914) was enacted.⁵¹ This law is intended to apply exclusively to the registration of trademarks and trade names. After the enactment of the Law on Trade Marks and Trade Name B.E. 2457 (1914) and the formation of the Trademarks Register Office, the evolution of trademark law developed together with the changeover of the Trademark Office. Around ten years after the Trademark Register Office was established, the Thai government started recognizing the important role of the Trademark Office in both local and international commerce. The Department of Business Registration was formed in 1923 to replace the previous Trademark Office.⁵² As a consequence of its establishment, all registration matters that used to be handled by the Trademark Register Office are now handled by the Department of Business Registration. Later, as a result of the development of the competent trademark office and the tremendous expansion of commerce in Thailand, the new Thai Trademark law was adopted in accordance with the requirements of the current Trademark law in order to be more suitable to the social circumstances of that time, which also known as the Trademark Act B.E. 2474 (1934).⁵³ The Trademark Act B.E. 2474 (1934) was enacted by relying on the detailed legislative of the English Trade Marks Act 1905. This Act came into force on 3 February 1992. However, the 1934 Act has several problematic pinpoints, then, the Trademark Act B.E. 2534 (1991) was enacted to resolve the existing problems.

⁵⁰ 'What Is the Department of Intellectual Property?: Price Sanond: Lawyers in Bangkok, Thailand' (*Price Sanond*, 5 November 2020) accessed 23 May 2023

⁵¹ Ip W, 'Thailand's Struggles to Protect Translation Rights for Foreign Literary Works' (*WE IP*, 20 July 2022) accessed 23 May 2023

⁵² Paeruang S, 'Problems of Non-Traditional Trademarks Protection Under Thai Law: A Case Study of Motion and Multimedia Marks' (thesis, Thammasat University 2020) 21

⁵³ *Ibid.*

The rationale behind the enactment of the Trademark Act B.E. 2534 is simply that the Trademark Act B.E. 2474 has been in force for a long time, therefore, several of its provisions are outdated and cannot adequately protect the rights of trademark owners. In addition, service marks, certification marks, and trademark licensing agreements are currently widespread and protected by the national laws of many foreign countries but are still not protected by Thai Trademark law. Furthermore, the Act has certain inadequate matters, especially the failure to properly define the powers and duties of the Trademark Registrar and the Trademarks Board, as well as the rights of applicants. Consequently, this is the root cause of practical problems and it is expedient to revise the said Act to be more appropriate by enacting the 1991 Act. The 1991 Act remains the current law in force in Thailand regarding trademark protection with its amendment three times.

In addition to revisions to trademark laws, the Department of Intellectual Property (also known as DIP), a new departmental-level organization under the Ministry of Commerce, was established in 1992 to be responsible for all intellectual property matters.⁵⁴ The Department took over the registrations of trademarks from the previous department up to the present moment.

For court proceedings concerning intellectual property, the Central Intellectual Property, and International Trade Court was established on December 1, 1997, under the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996). The Court was established due to the notion that the characteristics of intellectual property and international trade cases are different from other ordinary cases.⁵⁵ Also, judges with expertise in intellectual property and international trade should handle the cases in order to provide equitable, efficient, prompt, and internationally recognized justice in intellectual property and international trade.

⁵⁴ Ibid.

⁵⁵ Central Intellectual Property and International Trade Court, 'History - Central Intellectual Property and International Trade Court' (*Central Intellectual Property and International Trade Court*, 30 April 2020)

2.5.2. Protection of Trademark in Thailand

A trademark is a recognizable mark or symbol that identifies the particular origin of goods or services. Trademark law is designed in order for customers to place trust in trademarks as reliable sources of information about the origin and quality of goods. Due to the increase of counterfeiting or infringement of trademarks as a result of trade competition, state legislatures should set out the acts that will protect trademark owners. At first, to ensure equal justice for both owners and customers, the law should identify the specific provisions regarding the definition of a trademark, registrability of a trademark, as well as the acquisition and loss of trademark rights. And thus, this section would like to focus on the study of the importance of trademark law especially international law and the Thai trademark acts.

2.5.3. Definition of Trademark

Generally, trademarks and other intellectual property are bound by the territoriality principle, which enables trademark acquisition and protection to be based on a country-by-country basis where such trademark rights have been registered. The jurisdiction of the state within its territory may impose different restrictions and requirements for trademark registration, which are based on the country's policies and financial circumstances. For a better understanding of this topic at both the national and local levels, the definition of a trademark should be studied first in light of definitions provided by domestic law as well as the definition at the international level. The study aims to harmonize and define the essential elements of trademark acquisition and protection and then study the developments of the definition compliance applies to the international rules in order to summarize the main principles and basic criteria of a trademark from an international and theoretical perspective.

Firstly, the definition of a trademark is provided by the TRIPs agreement. The TRIPs agreement does not specifically state what a trademark is, the TRIPs define what types of signs must be eligible for protection as trademarks.⁵⁶ In particular, Article 15.1 of the TRIPs agreement states that:

⁵⁶ 'Understanding the WTO - World Trade Organization' (WTO)

<https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_text_e.pdf> accessed 27 May 2023

[a]ny sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colors as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.⁵⁷

Because of the reason that several trademark provisions under the TRIPS Agreement are intimately connected to an agreement handled by the WIPO, the WIPO also defines the definition of a trademark in the sense in which the words are described in the WIPO Intellectual Property Handbook that “A trademark is any sign that individualizes the goods of a given enterprise and distinguishes them from the goods of its competitors.”⁵⁸ Therefore, it can be seen that the TRIPs agreement established minimum standards of fundamental criteria for trademark protection that each WTO member government has to enact its domestic law. According to the definition of a trademark provided by the TRIPs agreement and the WIPO Handbook, a trademark consists of two fundamental components that are distinguished by their functions. Firstly, trademarks enable to individualize of the products of legal entities or private individuals. Second, the trademark must be capable of assisting consumers or the general public in distinguishing the product covered by the trademark from the products of others. Moreover, since Thailand has been a WTO member since 1 January 1995⁵⁹, thus provisions of the TRIPs agreement have been adopted to harmonize trademark laws in Thailand.

⁵⁷ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) accessed 27 May 2023

⁵⁸ WIPO Intellectual Property Organization, WIPO Intellectual Property Handbook: Policy, Law and Use (WIPO 2008)

⁵⁹ World Trade Organization, ‘Thailand and the WTO’ (*World Trade Organization*) accessed 27 May 2023

In Section 4 of the Trademark Act B.E. 2534, the definition of the 'trademark' was defined by stating that "trademark means a mark used or proposed to be used on or in connection with goods to distinguish the goods with which the trademark of the owner of such trademark is used from goods under another person's trademark". However, since the TRIPs agreement and the Trademark Act B.E. 2534 provided their particular definition of a trademark, the distinguishability functions, essentials, and attributes of a trademark will be provided in the section on trademark functions.

2.5.4. The Essential Functions of a Trademark

According to the definition of a trademark prescribed by the TRIPs agreement, WIPO Handbook, as well as the Trademark Act B.E. 2534, it can be concluded that a trademark must be a sign capable of distinguishing the goods or services. However, not all signs are acceptable to be registered as a trademark. If a sign fails to distinguish a particular good or service from another, it is not acceptable to register it as a trademark. Signs that can be concluded as a trademark must be able to demonstrate their ability to perform the trademark functions in the market. In principle, each sign desiring to be trademarked should be able to accomplish four distinct functions.

1) Identification of Source and Origin Function

One of the most significant roles of a trademark is to provide customers with information about the source or origin of a product. The trademark ensures the customer or end-user the identification of the actual source of the goods or services.⁶⁰ These then assist customers in choosing those products that have the greatest connection to their degree of satisfaction.⁶¹ Consumers must be able to identify the source or origin of goods applied to such trademark in order to distinguish them from other products in the market. Therefore, consumers' awareness of where their goods originated is not just there to assist them make informed decisions between a selection of different products which might be difficult to identify

⁶⁰ Acharya & M, 'Functions of Trademarks in India' (cleartax, 25 May 2022)

<<https://cleartax.in/s/functions-trademarks-in-india>> accessed 28 May 2023

⁶¹ WIPO, *Introduction to Trademark Law & Practice: The Basic Concept* (2nd edn, WIPO 1993) 10.

at the time of purchasing but also to guarantee customers who have placed belief in the manufacturer that any goods sold by the selected brand will match their expectations.

2) Quality Function

A trademark assures customers that goods or services bearing the trademark are of expected quality. In this respect, a trademark should be regarded as a guarantee of consistency in the quality of items bearing the identical trademark. It should be emphasized that, although there is no legal requirement for the trademark owner to control the quality of their goods, or it has no duty for a manufacturer to ensure that product quality is maintained under their trademark. And the trademark owner has the right to improve or lower the quality of their goods, the effort on such control is totally the intention of the trademark owner.⁶² Hence, when customers have a positive experience with a product bearing a particular trademark, they are more likely to use the same product bearing the same trademark in the future. The customers will repurchase a product since they trust such products will be of the same high quality as when it was first purchased.⁶³

3) Advertising Function

Another important role of trademarks is to promote goods and services, effectively publicizing them. Due to the development of trademarks, current trademarks are now used as marketing tools to attract customer interest in a product. Trademarks were no longer simply used to indicate the origins of goods and services, but they additionally served to attract people emotionally. One of the primary reasons for the evolution of trademark function is the development of trademark presentation, in particular, marks that first emerged in the form of signals with simple meanings were transformed into symbols with a broader variety of components and more stylish meanings.⁶⁴ In essence, the advertising function is the situation where a trademark serves as an instrument for communication with the consumer through the usage of goods bearing a trademark that serve to represent the qualities of the goods.

⁶² *Wagamama Ltd v City Centre Restaurants Plc* [1997] Eu. L.R. 313 (01 August 1995)

⁶³ *Ibid.*

⁶⁴ Drescher TD, *The Transformation and Evolution of Trademarks: From Signals to Symbols to Myth*, vol 82(3) (Trademark Reporter)

4) Economic Function

The primary goals of trademarks are to increase economic efficiency by assisting customers in connecting information associated with the trademark to goods and services and enabling people to convey their preferences. Such confidence stemmed from the belief that manufacturers would maintain their market reputation by preserving and improving the quality of their products and services, this will benefit them in a long-term way in terms of investment.⁶⁵ As a result, the commercial value of the brand's reputation known as "goodwill" will be advantageous to the owner of the brand in the long run, and trademarked goods and services will be easily accessible and perceived by consumers.⁶⁶ Furthermore, manufacturers believe that trademarks play a role in increasing their incentives to preserve their branding value by investing in assuring consistency of quality throughout their various goods.⁶⁷ Therefore, it can be concluded that trademarks are conventional signals that may deliver informational material that the trademark owner emphasizes to their customers.⁶⁸

2.6. The Rational Basis of Trademark Protection and Criteria for the Protectability of a Trademark

Each jurisdiction could individually provide its own trademark law and eligibility conditions for trademark protection. Although the fact that the notion of "international trademark rights" refers to a range of trademark rights held in many different countries, the recognition and enforcement of these rights belong to each jurisdiction and are generally not

⁶⁵ Bhatia T and Khurana P, 'Economic Aspect of Trademark' [2020] SSRN Electronic Journal

⁶⁶ 'Reputation and Its Risks' (Harvard Business Review, 1 August 2014)
<<https://hbr.org/2007/02/reputation-and-its-risks>> accessed 28 May 2023

⁶⁷ Feng J and Xie J, 'Performance-Based Advertising: Price and Advertising as Signals of Product Quality' [2007] SSRN Electronic Journal

⁶⁸ Wertheimer HW, 'The Principle of Territoriality in the Trademark Law of the Common Market Countries' (1967) 16 International and Comparative Law Quarterly 630

interdependent.⁶⁹ This part will present the available rational basis of trademark protection and criteria for the protectability of a trademark as a fundamental framework.

2.6.1. The Rational Basis of Trademark Protection

Trademarks are a type of intellectual property that is governed by the territoriality principle, in recognition of the right of each state to exercise its own territorial sovereignty and identify its own policy for the protection of trademarks.⁷⁰ Currently, even while trademark protections are likely to include either registration and usage as a condition for obtaining trademark rights, there are typically two individual bases that can be pursued in order to acquire trademark protection.

First, the 'legitimate use' of a mark may serve as the basis for establishing rights in a trademark. For instance, according to US trademark laws, the Lanham Act's definition of "trademark" illustrates that apart from the fulfillment of the distinguishing function of a trademark, the mark must also be intended to use in commerce.⁷¹ In this regard, the trademark rights protection under US law will be based on the use of such mark. The trademark protection based on use is provided not just under US national law, but also under Article 16. 1 of the TRIPS Agreement.⁷² Therefore, for the use in commerce basis, this basis is an additional basis to the trademark registration, which requires the use of a mark as a requirement for trademark protection and the acquisition of trademark rights.

⁶⁹ 'International Trademark Rights' (*International Trademark Association*, 1 February 2021)

<<https://www.inta.org/fact-sheets/international-trademark-rights/>> accessed 28 May 2023

⁷⁰ Austin GW, 'The Territoriality of United States Trademark Law' (*SSRN*, 13 April 2006)

<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=896620> accessed 28 May 2023

⁷¹ 15 U.S. Code § 1127 - Construction and definitions; intent of chapter

⁷² Agreement on Trade-Related Aspects of Intellectual Property Rights

Article 16.1 "...In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use"

Second, trademark protection can additionally be acquired through registration, in almost all countries, this is the standard approach for obtaining trademark rights.⁷³ In later years, the Paris Convention provided the basis of registration, which forced upon Contracting States the duty to provide for trademark registration.⁷⁴ This insured that trademarks should be registered. As a result of the territorial basis of trademark protection, each jurisdiction shall have the independent discretion to define the criteria for trademark registration in accordance with reasonable and appropriate requirements. Generally, the applicant shall file the trademark application to the competent authority of each jurisdiction. In Thailand, the Department of Intellectual Property (the “DIP”) is a competent authority responsible for intellectual property matters.⁷⁵

2.6.2. Criteria for the Protectability of a Trademark

Although a trademark's protectability may be expressed differently in each country, the criteria for the trademark to be protected have been shared with the same criteria for all of them. As mentioned earlier, a trademark must be able to assist customers or people in general in identifying and distinguishing goods and services under such trademark, whether in considering the same type of goods or services or not. Thus, the distinguishing function should become the first requirement that must be fulfilled for trademark registration, and it needs to be ensured that this particular function can be possibly seen in all marks. The second protectability criteria is trademarks must not be subject to absolute grounds for refusal of registration. According to Article 6quinquies B of the Paris Convention for the Protection of Industrial Property, the possible list of grounds for denial was stated and separated into three potential grounds for each country's enactment as follows;

⁷³ 'What Is a Trademark Filing Basis?' (Trademark Lawyer Law Firm, PLLC) accessed 29 May 2023

⁷⁴ Paris Convention for the Protection of Industrial Property

Article 6 (1) Marks: Conditions of Registration; Independence of Protection of Same Mark in Different Countries

(1) The conditions for the filing and registration of trademarks shall be determined in each country of the Union by its domestic legislation.

⁷⁵ *Ibid.*

- (1) when they are of such a nature as to infringe rights acquired by third parties in the country where protection is claimed;
- (2) when they are devoid of any distinctive character, or consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, place of origin, of the goods, or the time of production, or have become customary in the current language or in the bona fide and established practices of the trade of the country where protection is claimed;
- (3) when they are contrary to morality or public order and, in particular, of such a nature as to deceive the public. It is understood that a mark may not be considered contrary to public order for the sole reason that it does not conform to a provision of the legislation on marks, except if such provision itself relates to public order.⁷⁶

To summarize, these three conditions of protectability of a trademark have been adopted by all country and regional trademark law frameworks. Moreover, each jurisdiction may establish any further criteria necessary to expand or restrict the scope of trademark protection in accordance with its own national policy.

2.6.3. Criteria for the Protectability of a Trademark in Thailand

The protectability of a trademark in Thailand is based on the basis of registration. Consequently, the trademark will be protected if it has been registered with the Trademark office. According to Section 6 of the Trademark Act B.E.2534 (1991), There are three crucial elements of trademark registration that an admissible registration must fulfill.

1) Distinctiveness Requirement

Distinctiveness is an important characteristic of a trademark since it adequately serves its function of identifying the origin or source of goods and services. Despite the fact that there was no specific definition of 'distinctiveness' defined by the Trademark Act B. E. 2534 (1991), Section 7 of the Trademark Act B.E. 2534 (1991) defined 'distinctiveness' as

⁷⁶ Paris Convention, s 6quinquies B

a trademark that enables the public or users to distinguish the goods with which the trademark is used from other goods.⁷⁷ In addition to the first paragraph of Section 7, the Act specifies additional criteria for distinctiveness, Section 7 Paragraph 2 defining that a trademark is assumed to be protected under the law if it contains one or more of the example characteristics described below;

(1) a personal name, a surname of a natural person not being such by its ordinary signification, a full name of a juristic person in accordance with the law on such matter or a tradename represented in a special manner and having no direct reference to the character or quality of the goods;

(2) a word or phrase having no direct reference to the character or quality of the goods and not being a geographical name prescribed by the Minister;

(3) an invented word;

(4) a stylized letter or numeral;

(5) a combination of colors represented in a special manner;

(6) the signature of the applicant or the predecessor in his or her business or the signature of another person with his or her permission;

(7) the representation of the applicant or of another person with his or her permission or of a deceased person with the permission of his or her ascendants, descendants and spouse, if any;

(8) an invented device;

(9) a picture having no direct reference to the character or quality of the goods and not being a picture of a map or a geographical site prescribed by the Minister;⁷⁸

Apart from the inherent distinctiveness specified in Section 7 Paragraphs 1 and 2, the last paragraph also includes further conditions for a mark to be regarded as a distinctive mark. If the applicant can provide evidence of use of the trademark to prove that his or her trademark has been widely sold or advertised in accordance with the relevant Ministerial Regulations, such mark shall be deemed distinctive.⁷⁹

⁷⁷ Trademark Act B.E. 2534 (1991) s 7 paragraph 1

⁷⁸ Trademark Act B.E. 2534 (1991) s 7 paragraph 2 (1)-(9)

⁷⁹ Trademark Act B.E. 2534 (1991) s 7 paragraph 3

2) Not Be Prohibited by Law

The mark must not be prohibited by law, which is the second criteria for trademark registration. Thai trademark law establishes thirteen reasons for the denial of prohibited marks, which consist of both absolute and relative grounds for denial. The examples of the prohibition based on the types of mark clearly stated in Section 8 of the Trademark Act B.E. 2534 (1991), namely, state arms or crests, royal seals, official seals, national flags of Thailand, royal standard flags or official flags, royal names, etc..⁸⁰

3) Not Identical with or Similar to a Registered Trademark

For the registrable trademark according to Section 6 (3) of the Trademark Act B.E. 2534 (1991), trademarks that may be eligible for registration shall not be the same as or similar to a trademark registered by another person. As a consequence of this, the law specifies an additional requirement for the aforementioned registrability, which may be separated into two distinct categories of occurrences. First, the trademark shall not identical with a trademark registered by another person for use with goods in the same class or in different classes found to be of the same character..⁸¹ Second, the trademark shall not so similar to a trademark registered by another person that the public might be confused or misled as to the ownership or origin of the goods for use with goods in the same class or in different classes found to be of the same character..⁸²

2.7. Overview of the Trademark Registration Procedure in Thailand.

To be granted trademark protection in Thailand, a trademark must be registered..⁸³ The trademark application must be filed with the Department of Intellectual Property (DIP). Moreover, the trademark must not be similar to any prior registered trademarks, which in accordance with Section 13 of the Trademark Act. Thailand currently uses the 11th version

⁸⁰ Trademark Act B.E. 2534 (1991) s 8

⁸¹ Trademark Act B.E. 2534 (1991) s 13 paragraph 2 (1)

⁸² Trademark Act B.E. 2534 (1991) s 13 paragraph 2 (2)

⁸³ AMS L, 'Trademark Registration and the Madrid Protocol' (*MPG*, 24 September 2021) accessed 30 May 2023

of the Nice Classification,⁸⁴ which includes 34 classes of products (Classes 1–34) and 11 classes of services (Classes 35–45). The application will subsequently be reviewed by a trademark registrar, which could take 7-10 months. If the application or required document is inaccurate or not sufficient, the applicant will be allowed to correct it. Once all requirements have been fulfilled, the application will be published in the Trademark Gazette for opposing within 60 days. The details of the registration procedure are as follows.

2.7.1. Filing Process

It is recommended that a trademark application together with necessary documents should be submitted to the Department of Intellectual Property in order to assure that the mark will be protected. After the DIP has received the filed application together with all of the necessary supporting documents, the Registrar will give a particular application number to the applicant, and the request will then be examined.

2.7.2. Examination Process

When an application has been filled, the Registrar will conduct an examination to determine whether or not the application satisfies the prerequisites outlined in the Trademark Act. In the case that the Registrar does not raise any objections or ask for any revisions, the application will continue to the publication process.

2.7.3. Publication Process

The publication of a trademark application in the Trademark Gazette with a deadline of a 60-day period during which third parties may file relevant documentation to the Registrar in order to oppose the trademark application. If there is no opposition to the application within the stipulated time limit of 60 days, the Registrar shall proceed with the registration process. If an opposition is filed, the applicant must file a counterstatement to the Registrar within 60 days after receiving a copy of the opposition, otherwise the trademark application will be abandoned. After the counterstatement has been submitted, the Registrar will decide whether or not the objection may be accepted and then notify the parties of his or her decision. Both

⁸⁴ *Ibid.*

parties have the right to file an appeal against the decision rendered by the Registrar to the Trademarks Board and the Intellectual Property Court subsequently.

2.7.4. Registration Process

After the publication period of ninety days has passed, the Registrar will provide the applicant request to pay official fees for registration. These costs may vary depending on the particular details of trademark registration. The registration is valid for ten years of the filing date and may be renewed for successive periods of ten years.⁸⁵

2.8. Procedures Before the Registrar

According to Section 16 of the Trademark Act B.E. 2534 (1991), states that the Registrar shall refuse registration if, in the opinion of the Registrar, the entire trademark or any essential part thereof is not registrable under Section 6.⁸⁶ Under certain conditions, as will be outlined further below, applications for trademark registration may be rejected by the Registrar, opposed by third parties, or revoked altogether.

Office actions may be issued by the Registrar for one or more than one action. The Registrar has the right to issue the refusal for the application on the grounds that the mark is not inherently distinctive, identical or similar to a well-known or prior registered mark, a violation of public morality, or a violation in any other aspect of the law. In detail, the grounds for refusal can be separated into two individual subjects as follows.

2.8.1. Absolute Grounds for Refusal of Registration

The absolute ground for refusal prevents registration of marks that are solely descriptive, functional, or undesirable in general.⁸⁷ The registration of a trademark should be refused if the characteristics of the mark do not satisfy the legal requirements of "mark" or

⁸⁵ *Ibid.*

⁸⁶ Trademark Act B.E. 2534 (1991) s 16

⁸⁷ Colston C [1999] Principles of Intellectual Property Law

"trademark" under the current law and practice. When a mark fails to fulfill the registrability criteria of trademark registration or when it is apparent that the subject mark is not a sign capable of developing into a trademark, thus, the application for registration as a mark should be denied. In this particular scenario, it would not be needed to examine the sign to see whether there are any additional absolute or relative grounds for refusal. Compared to Thai Trademark law, a trademark that does not satisfy registrability in Section 7 may be refused on the absolute ground.⁸⁸

2.8.2. Relative Grounds for Refusal of Registration

The relative ground for refusal concerns the mark in relation to the trademark of others. A relative ground will also be used to reject a mark that disputes with a prior registration for another trademark. Because the marks do not pertain to absolute grounds for refusal that are associated with the trademark itself, thus, refusal grounds that are based on the pre-existing rights of others shall be applied which are referred to as "relative grounds". Relative grounds for refusal may be established by the Registrar's own decisions, or as a consequence of a third-party opposition or objection lodged against a mark's registration. The relative ground may also be asserted in petitions for opposition, revocation, cancellation, or invalidity of registration after it has been granted. Compared to Thai Trademark law, a trademark which identical or similar to a prior registered trademark under Section 13 will be refused on the relative ground.⁸⁹

On such grounds, the applicant can file an appeal to the Trademarks Board in case the applicant disagrees with the Registrar's decision. The applicant may also file an appeal with the Intellectual Property Court against the Trademarks Board's decision.

⁸⁸ Emruli S, Nuhui A and Kadriu B, 'Trademark Protection, Absolute and Relative Grounds for Refusal of Trademark' (2016) 1 European Journal of Multidisciplinary Studies 291

⁸⁹ *Ibid.*

2.9. Protection of the Rights of Trademark Applicants

Administrative orders once issued have an immediate effect, and administrative officials have the authority of enforcing mandatory measures to comply with such decisions without first seeking the court's permission, unless otherwise provided by law. As a result, it affects the status of rights or duties of persons who are subject to administrative orders. In these cases, a mechanism for protecting the rights of persons affected by administrative orders needs to be established.

The rights of appeal under the Trademark Act B.E. 2534, an appeal is a procedure in which a trademark applicant disagrees with the Registrar's decision whereby the applicant has the right to appeal to the Trademark Board for the Board to reconsider the Registrar's order. Also, the applicant must follow this pre-condition before filing a complaint.

As the Trademarks Board is a group of persons who are empowered to exercise administrative power under the Trademark law. In detail, the committee of the Trademarks Board is composed of the Director-General of the Department of Intellectual Property as chairman, the Secretary General of the Juridical Council or his representative, the Attorney-General or his representative, and no fewer than eight nor more than twelve other qualified persons in the fields of law or commerce with the experience in intellectual property or trademarks appointed by the Council of Ministers as members.⁹⁰ Therefore, the Trademarks Board has the authority to the following matters.

- (1) to decide appeals against orders or decisions of the Registrar under this Act;
- (2) to consider and order on the petition for cancellation of trademarks, service marks, certification marks, collective marks or trademark license agreements under this Act;
- (3) to advice and counsel the Minister on the issue of Ministerial Regulations and notifications under this Act;
- (4) to consider other matters assigned by the Minister.⁹¹

⁹⁰ Trademark Act B.E. 2534 (1991) s 95

⁹¹ Trademark Act B.E. 2534 (1991) s 96

According to the Trademark Act B.E. 2534 (1991), the Trademarks Board shall have the authority to reexamine against the Registrar's decision on any issue in the particular provision stating that "The applicant shall be entitled to appeal the order of the Registrar...". It was found that the particular provisions which grant the right to appeal are in the following matters:

- (1) According to Section 18, the applicant shall be entitled to appeal the order of the Registrar under Section 15, Section 16 and Section 17 to the Trademark Board within sixty days from the date of receipt of the Registrar's notification. Decisions of the Board shall be final.⁹²
- (2) According to Section 21, an applicant seeing his or her trademark applied for is not identical with nor confusingly similar to other prior pending trademarks, may appeal the Registrar's order under Section 20 paragraph one to the Trademark Board within sixty days from the date of receipt of the order. In such case, Section 18 shall apply *mutatis mutandis*.⁹³
- (3) According to Section 27, where there are applications under Section 13 or Section 20 paragraph one, as the case may be, if the Registrar finds there have been honest concurrent users or special circumstances making it proper to do so, he or she may grant registration of such identical or similar trademarks of several owners subject to such conditions and limitations as to the mode or place of use or such other conditions and limitations as he or she may think fit to impose. The Registrar shall, without delay, notify the applicant and the registered owner of the order in writing with reasons.⁹⁴

The applicant or the registered owner may appeal the order of the Registrar under paragraph one to the Trademark Board within sixty days from the date of receipt of the notification.

⁹² Trademark Act B.E. 2534 (1991) s 18

⁹³ Trademark Act B.E. 2534 (1991) s 21

⁹⁴ Trademark Act B.E. 2534 (1991) s 27

- (4) According to Section 31, the applicant shall be entitled to appeal the Registrar's revocation order under Section 30 paragraph one to the Trademark Board within sixty days from the date of receipt of the notification.⁹⁵
- (5) According to Section 37, the applicant or the oppose shall be entitled to appeal the decision of the Registrar to the Trademark Board within sixty days from the date of receipt of the notification of the decision of the Registrar. The Board shall decide the appeal without delay.⁹⁶
- (6) According to Section 60, an order to cancel a trademark registration under Section 55 paragraph two, Section 58 or 59 paragraph one, stating the grounds therefor, shall be notified in writing to the proprietor without delay.

The trademark owner shall be entitled to appeal the order of the Registrar under paragraph one to the Trademark Board within sixty days from the date of receipt of the notification of the order. If no appeal is filed within the specified period, the order of the Registrar shall be deemed final.⁹⁷

- (7) According to Section 69, in the case where the Registrar finds that Section 68 would not cause the public to be confused or misled and is not contrary to public order or morality or to public policy, the Registrar shall order registration of the agreement and for such purposes may impose conditions or restrictions. But if the Registrar finds that the license agreement will confuse or mislead the public or is contrary to public order or morality or to public policy, the Registrar shall refuse to register the license.

Orders of the Registrar under the first paragraph shall be promptly notified in writing to the owner of the trademark and persons who have applied to be registered as licensees. In the case where the Registrar has imposed conditions or restrictions or has refused registration, the said persons shall also be informed of the reasons such refuse.

⁹⁵ Trademark Act B.E. 2534 (1991) s 31

⁹⁶ Trademark Act B.E. 2534 (1991) s 37

⁹⁷ Trademark Act B.E. 2534 (1991) s 60

The trademark owner or the registered licensee shall be entitled to appeal the order of the Registrar under paragraph one to the Trademark Board within sixty days from the date of receipt of the notification of the order. If no appeal is filed within the specified period, the order of the Registrar shall be deemed final.⁹⁸

- (8) According to Section 74, when an order is made under Section 72 paragraph two by the Registrar, the order together with the grounds thereof shall be promptly notified in writing to the trademark owner and licensees. The order shall take effect from the date of receipt of the notification.⁹⁹
- (9) According to Section 83, the Registrar may require the applicant for registration of a certification mark to amend the regulations on use of the certification mark as he may think fit within sixty days of the date of receipt of the order and shall in writing promptly notify the applicant of the order with the grounds therefor. Sections 18 and 19 shall apply to appeals against orders of the Registrar *mutatis mutandis*.¹⁰⁰
- (10) According to Section 84, if the Registrar is of the opinion that the applicant for registration of a certification mark does not have sufficient ability to certify the characteristics of the goods or services as provided in the regulations on use of the certification mark or that registration of the certification mark would not be in the public interest, the Registrar shall refuse registration and shall in writing promptly notify the applicant of the order with the grounds of the refuse. Sections 18 and 19 shall apply to appeals against orders of the Registrar *mutatis mutandis*.¹⁰¹
- (11) According to Section 89, the owner of a certification mark or any other person prejudiced or to be prejudiced by the order of the Registrar under Section 87 or Section 88 shall be entitled to appeal the order to the Trademark Board within sixty days from the date of the publication under Section 87 or from the date of

⁹⁸ Trademark Act B.E. 2534 (1991) s 69

⁹⁹ Trademark Act B.E. 2534 (1991) s 74

¹⁰⁰ Trademark Act B.E. 2534 (1991) s 83

¹⁰¹ Trademark Act B.E. 2534 (1991) s 84

receipt of the notification of the Registrar's order under Section 88, as the case may be¹⁰²

Therefore, if the applicant disagrees with an order issued by the Registrar refusing or requiring based action on any issue, the applicant is enabled to appeal to the Trademarks Board only within that particular issue and the Trademarks Board's decision will be restricted to the issue of appeal. According to Section 96, the Board shall have the powers and duties to decide appeals against orders or decisions of the Registrar under this Act. In case the Registrar does not issue such particular orders, the Trademarks Board will be unable to make a decision concerning the matter in question. After the Trademarks Board has issued its decision, the applicant who disagrees with the decision of the Trademarks Board can appeal to the Court to seek the revocation of such decision, this can be seen in the ruling of Supreme Court Judgment No. 1793/2549. Therefore, the Trademark Act B.E. 2534 has a specific procedure and timeframe for appealing an administrative order, which is sufficient in comparison to the Administrative Procedure Act B.E. 2539 (1996).

2.10. The grounds for admissibility of a case regarding the appeal against the decision of the Trademarks Board

The previously mentioned principle of legality of the administrative action is a general principle of administrative law that can be effectively enforced in case the Court, as judicial independence¹⁰³, has a reasonable approach. In addition, the courts must be empowered to issue final and enforceable orders to monitor and control the balancing exercise of administrative power in accordance with the laws enacted by the legislative and administrative

¹⁰² Trademark Act B.E. 2534 (1991) s 89

¹⁰³ 'Judicial Independence' (*Wikipedia*, 6 July 2023) <https://en.wikipedia.org/wiki/Judicial_independence> accessed 10 July 2023

sectors.¹⁰⁴ This is consistent with the concept of the right to remedy by capable judges¹⁰⁵, a principle endorsed in Article 8 of the Universal Declaration of Human Rights (UDHR).¹⁰⁶ It is another element of the rule of law that results in people of the state truly being right holders, able to apply legal instruments to challenge state power fairly to the court.¹⁰⁷ Therefore, in principle, if the applicant considers that the decision of the Trademarks Board is unlawful, the applicant who has directly suffered damage due to the decision of the Trademarks Board shall have the right to bring a court case in a court of competent jurisdiction. It is also for judicial review proceedings of the decision by the court.

On the basis of the above principle, it can be said that the provision which states that the orders or decisions of the Trademark Board shall be final is inconsistent with the principle of the right to remedy by capable judges and the principle of the Legal State. For example, if Mr. A is a business operator dealing with the production and distribution of a fashion clothing brand that is well-known in overseas markets. Mr. A. wishes to sell his products in Thailand, Mr. A., therefore, apply for trademark registration with the Trademark Registrar, Department of Intellectual Property. Also, Mr. A considered that his trademark is registrable under the trademark law, which has sufficient distinctiveness, not prohibited by law, and is not similar to the prior registered trademarks. In addition, Mr. A. has already registered his trademark in many countries around the world. However, it appears that the Thai Registrar and Trademarks Board issued an order and decided that such a trademark was not registerable based on their discretion prescribed by the provisions of the Trademark Act B.E. 2534. If Mr. A. disagrees with the aforesaid order or decision since it was an exercise of discretion in

¹⁰⁴ Worachet Pakeerut, Khodmahi Pok-kroong Pak Tue Pai (Nitirat 2011) (วรเจตน์ ภาคีรัตน์, กฎหมายปกครอง ภาคทั่วไป (นิติราษฎร์ 2554)) p. 73-75.

¹⁰⁵ Budapest EYC, 'Universal Declaration of Human Rights' (*Compasito - Manual on Human Rights Education for Children*) <http://eycb.coe.int/compasito/> accessed 10 July 2023

¹⁰⁶ Article 8 of the Universal Declaration of Human Rights (UDHR)

'Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.'

¹⁰⁷ Worachet Pakeerut, Kham Sorn Wa Duay Rat Lae Lak Khodmhai Maha Chon (2nd edn, Thammasat University 2014) (วรเจตน์ ภาคีรัตน์, คำสอนว่าด้วยรัฐและหลักกฎหมายมหาชน (พิมพ์ครั้งที่ 2, โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2557)) p. 165-178.

misinterpreting the law, but Mr. A could not bring such a matter to the court. It will result in Mr. A not deserving justice by having to continue using his trademark in Thailand as an unregistered trademark. This can create rights that are considerably inferior to registered trademarks. Even such a trademark has sufficient requirements for registrability criteria as provided by the substantive law. For this reason, the interpretation of a provision that defines that an order or decision shall be "final" should also be interpreted in accordance with the principle of the Legal State. In conclusion, the provision that indicates that the decision of the Trademarks Board shall be final should be interpreted to be "final" only in the administrative process and does not deprive the Court to accept such cases for trial and adjudication.

However, it appears that prior to B.E.2534 (A.D.1991), the trademark law of Thailand was in force at that time namely the Trademark Act B.E. 2474 (and its amendments). This Act establishes principles identical to those in the current Trademark Act B.E. 2474. For instance, when the Registrar has refused the trademark application, the applicant has the right to appeal the Registrar's order to the Trademark Board within ninety days from the date of receiving the Registrar's refusal. And when the Trademarks Board has a final decision, the decision shall be final and binding. It turns out that Supreme Court Judgment No. 470/2509¹⁰⁸ and Supreme Court Judgment No. 875/2509¹⁰⁹ have ruled that when the law specifically specifies the procedure of appeal against the decision or order of the Trademark Registrar, the plaintiff is not permitted to pursue an objection by other means, such as by filing a lawsuit to the court¹¹⁰. Despite the fact that the Supreme Court in the preceding case did not state so explicitly. It implied that even if the plaintiff had appealed against the Trademark Registrar to the Trademarks Board, if the plaintiff is still unsatisfied with the Trademarks Board's decision, the plaintiff has no right to file the case to the court. Because the trademark law does not provide for the plaintiff's rights as such which is inconsistent with the principle of

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Wat Tingsamit, Kham Athi Buy Krueng Mhai Karn Ka [*Commentary of Trademark Law*] (Nititham 2002) (วัศ ดิงสมิตร, คำอธิบายกฎหมายเครื่องหมายการค้า (สำนักพิมพ์นิติธรรม 2545)).

legality of the administrative act¹¹¹ and the principle of the right to remedy by capable judges. This results in the applicant's rights under substantive law, namely the Trademark Act, being affected.

However, after the promulgation of the Trademark Act B.E. 2534, especially after the promulgation of the Administrative Procedure Act, B.E. 2539, which is the introduction of principles and concepts of administrative law into force in Thailand for the first time. Supreme Court Judgment No. 3549/2541 reversed the original judgment which was based on the provisions of the Trademark Act B.E. 2474 (and its amendments). The appeal decision of the Trademarks Board that shall be final under the provisions of Section 18 Paragraph 1 of the Trademark Act B.E. 2534 only in case that such a decision was a lawful decision. If the decision of the Trademarks Board is unlawful, the applicant shall have the right to bring the case to the court to request that the decision be revoked. It appears that the Supreme Court in subsequent cases has taken the above judgment as the basis by accepting appeal cases against the Trademark Board's decision. As can be seen in a number of Supreme Court judgments such as Supreme Court judgments 3543/2545, Supreme Court judgments 1793/2549, Supreme Court judgments 4205/2549, Supreme Court judgments 7715/2549, Supreme Court judgments 7024/2549, Supreme Court judgments 773-776/2550 and Supreme Court judgments 4676/2558, etc.

In addition to the legality of the aforementioned decision of the Trademarks Board, the Supreme Court in Supreme Court Judgment No. 1793/2549, Supreme Court Judgment No. 4205/2549, and Supreme Court Judgment No. 7715/2549 also explained further that the decision shall be final only in the administrative process. The applicant has no right to appeal to other officials of the administration but does not deprive that person of the right to bring the case to court. This is an interpretive guideline that is consistent with several sub-principles of the rule of law and with the principle of appealing administrative orders before filing a judicial case. Likewise, the other specific act also prescribes that such administrative orders

¹¹¹ Boonchu Na Pomphet, Akkasarn Prakob Karn Sorn Wi cha Khodmhai Pok-kroong (Faculty of Law, Chiang Mai University) (เอกสารประกอบการสอนวิชากฎหมายปกครอง (Administrative Law)' (คณะนิติศาสตร์ มหาวิทยาลัยเชียงใหม่) <<https://www.law.cmu.ac.th/law2011/journal/e1531818728.pdf>> accessed 9 July 2023.

are "final" as well, but the participant can still file an appeal to the Administrative Court. For example, in the case of the Sheriff's order under the Subdistrict Council and Subdistrict Administrative Organization Act, 1994 that ordered the President of the Subdistrict Administrative Organization to retire (Section 64, paragraph 2), or the decision to remove members of the Tambon Administrative Organization Council (Section 47 ter paragraph 2)¹¹².

2.11. The Jurisdiction of a Competent Court

2.11.1. Administrative Court Jurisdiction

As mentioned earlier, cases falling under the jurisdiction of the Administrative Courts are clearly stated in Section 9 of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542. The Administrative Courts have over the following brief matters:

- 1) the case involving a dispute in relation to an unlawful act by an administrative agency or State official
- 2) the case involving a dispute in relation to an administrative agency or State official neglecting official duties required by the law to be performed or performing such duties with unreasonable delay
- 3) the case involving a dispute in relation to a wrongful act or other liability of an administrative agency or State official arising from the exercise of power under the law
- 4) the case involving a dispute in relation to an administrative contract
- 5) the case prescribed by law to be submitted to the Court by an administrative agency or State official for mandating a person to do a particular act or refraining therefrom
- 6) the case involving a dispute in relation to the matters prescribed by the law to be under the jurisdiction of Administrative Courts.

¹¹² Supawat Singsuwong, Karn Aut Torn Kham Sang Tang Pok-kroong (Krisdika Bureau of administrative law 2017) (ศุภวัฒน์ สิงห์สุวรรณ, การอุทธรณ์คำสั่งทางปกครอง (สำนักงานคณะกรรมการกฤษฎีกา 2560) p. 6-7.

Consequently, this Act prescribes the disputes which shall be under the jurisdiction of the Administrative Courts. Moreover, the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 also outlines the exceptions, which means that the following particular matters shall not be under the jurisdiction of the Administrative Courts.

1) action concerning military disciplines, whether the punishment over the military disciplines or other relevant disciplines.

2) action of the Judicial Commission under the law on judicial service which means that these actions are not regarding the case trial but involve the court management of the judicial officers. For example, the appointment and transfer of judges, selection and promotion of judges, disciplinary action, etc. Despite these actions are all involved administrative power, but the matters are not within the jurisdiction of the Administrative Courts.

3) the case within the jurisdiction of the following specialized courts:

- a) the case within the Juvenile and Family Courts
- b) the case within the Labour Courts, for example, the case regarding the rights and responsibilities of employers and employees, disciplinary action of state enterprise employees, etc.
- c) the case within the Tax Courts, for example, the case regarding the appeal in dispute of tax assessment, tax refund, etc.
- d) the case within the Bankruptcy Courts.
- e) the case within the Intellectual Property and International Trade Courts

2.11.2. Central Intellectual Property and International Trade Court

Section 7 of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) stated that the intellectual property and international trade courts have the power to adjudicate civil and criminal cases over the following matters:

- 1) criminal cases regarding trademarks, copyrights and patents;

- 2) criminal cases regarding offences under Sections 271 –275 of the Criminal Code;
- 3) civil cases regarding trademarks, copyrights, patents and cases arising from agreements on technology transfers or licensing agreements;
- 4) civil cases in connection with offences under Sections 271 –275 of the Criminal Code;
- 5) civil cases regarding international sale, exchange of goods or financial instruments, international services, international carriage, insurance and other related juristic acts;
- 6) civil cases regarding letters of credit issued in connection with transactions under (5), inward or outward remittance of funds, trust receipts, and guarantees in connection therewith;
- 7) civil cases regarding arrest of ships;
- 8) civil cases regarding dumping and subsidization of goods or services from abroad;
- 9) civil or criminal cases regarding disputes over layout–designs of integrated–circuits, scientific discoveries, trade names, geographical indications, trade secrets and plant varieties protection;
- 10) civil or criminal cases that are prescribed to be under the jurisdiction of the intellectual property and international trade courts;
- 11) civil cases regarding arbitration to settle disputes under (3)-(10).

2.11.3. Determination of the Powers and Duties among Courts

The decision of the Committee on the Determination of the Powers and Duties among Court no.9/2546¹¹³, the adjudicative jurisdiction of the court over trademark disputes was determined by the Committee on Jurisdiction of Courts in accordance with Section 10 Paragraph 1 (3) of the Act on the Determination of the Powers and Duties among Courts

¹¹³ The decision of the Committee on the Determination of the Powers and Duties among Court no. 9/2003.

B.E. 2542.¹¹⁴ The facts of the case are that the Department of Intellectual Property (DIP) who grants trademark protection is a government agency, on the other hand, the application who files the trademark application is a private sector. Indeed, trademark disputes should fall into the administrative structure by the nature of the administrative law. The defendant argues on the issue of jurisdiction by arguing that the court does not have jurisdiction over the defendant's person or the subject matter. The Administrative Court has an opinion that civil cases regarding trademarks, copyrights, patents, and cases arising from agreements on technology transfers or licensing agreements are able to be both civil and administrative cases. However, the cases which will fall under the jurisdiction of the intellectual property and international trade courts shall be private-to-private disputes regarding trademarks, copyrights, patents, and cases arising from agreements on technology transfers or licensing agreements, as can be seen in the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996), Section 7 Paragraph 1 (3).¹¹⁵ In

¹¹⁴ Act on the Determination of the Powers and Duties among Courts B.E. 2542

Section 10 In the case where there is a plaint filed with any court, if the sued party considers that such case is under the jurisdiction of another court, such party may file a petition with the plaint-receiving court. The petition shall be submitted, in case of the Court of Justice and the Military Court, before the date of taking evidence; or in case of the Administrative Court or any other Court, before the date of the first hearing. In this regard, the plaint-receiving court shall temporarily stay the proceedings and deliver without delay its opinion to the court whose jurisdiction is considered competent by the party. The courts concerned shall proceed as follows:

(3) if the opinion-delivering court and the opinion-receiving court have conflicting opinions with regard to the competent jurisdiction over such case, the former shall submit the matter to the Committee; the Committee shall make a determination within thirty days from the date receiving the matter; if there is a necessity, the Committee may extend the period to not longer than thirty days with a record of the reason for such necessity.

¹¹⁵ The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996)

Section 7 (3) The intellectual property and international trade courts shall have jurisdiction over the following matters:

(3) civil cases regarding trademarks, copyrights, patents and cases arising from agreements on technology transfers or licensing agreements

this case, the dispute between the plaintiff, a private sector, and the defendant, an administrative agency, regarding the exercise of discretionary power of Registrar under the Trademark Act B.E. 2534 (1991) falls within the scope of the Administrative Court's jurisdiction pursuant to Section 9 Paragraph 1 of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542.

On the other hand, the Central Intellectual Property and International Trade Court have an opinion that intellectual property cases are special cases involving scientific knowledge and liberal arts fields where true expertise is required to reach a decision because it can be very effective for technical issues. Moreover, in respect of intellectual property cases shall be decided based on the international framework, as shown by the Trade-Related Aspects of Intellectual Property Rights (TRIPs) to which WTO participating countries are obligated to comply with uniform legal requirements.¹¹⁶ The Central Intellectual Property and International Trade Court was established in order to provide justice in relation to intellectual property and international trade equitably¹¹⁷ and to comply with the notion of the TRIPs Agreement. Also, the rationales behind the establishment of the Central Intellectual Property and International Trade Court concern the notion to encourage, develop, and disseminate innovation and technological advancement for the mutual benefit of creators and the public, with an eye toward creating benefits for society and the economy based on the balance of rights and of the legally binding intellectual property rights. In order to achieve such goals, the Intellectual Property and International Trade Courts shall have jurisdiction in adjudicating intellectual property cases in all aspects, including the right acquisition and enforcement of intellectual property rights.

From the above-mentioned principles, to ensure that such trademarks are fully protected under the law, trademark owners must register their trademarks to the Department of Intellectual Property (DIP) for their intellectual property rights. In case there is a dispute involving trademark registration, which is considered as an administration order, consider

¹¹⁶ 'Overview: The TRIPS Agreement' (*World Trade Organization*, 2022) accessed 2 June 2023

¹¹⁷ Central Intellectual Property and International Trade Court, 'History - Central Intellectual Property and International Trade Court' (*Central Intellectual Property and International Trade Court*, 30 April 2020) <<https://ipitc.coj.go.th/th/content/page/index/id/191441>> accessed 2 June 2023

whether the Registrar's order and decision-making are undertaken in accordance with the law. In order to determine the issue of such an order concerning intellectual property rights, it should be required expertise with certain skills help to decide on relevant knowledge and use it to render the decision. This will result in administrative control based on the legality of administrative action according to characteristics of the administrative case in relation to an unlawful act by an administrative agency. The Central Intellectual Property and International Trade Court, as a specialized court, is therefore an appropriate court to examine the discretion of government agencies and administrative orders relating to such intellectual property rights. However, the opinion of the Administrative Court that when the intellectual property matter in question involves a dispute between private parties, it shall fall within the jurisdiction of the Intellectual Property and International Trade Court is improper consideration. The Administrative Court applied the general principles of jurisdiction between civil and administrative cases rather than the principles of the specialized court system established to try and adjudicate specific cases. Therefore, the decision based on general principles is inappropriate, as the Court renders the principles of specialized court systems incapable of fully benefiting the process. As a result, the rationale for intellectual property protection is not aligned with the spirit of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court.

In addition to the aforementioned principles, in considering the powers and duties of the intellectual property and international trade courts pursuant to Sections 7 (3)¹¹⁸ and 7 (8)¹¹⁹, the interpretation of the term "civil case" in section 7 (3) as only referring to disputes

¹¹⁸ The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996)

Section 7 (3) The intellectual property and international trade courts shall have jurisdiction over the following matters:

(3) civil cases regarding trademarks, copyrights, patents and cases arising from agreements on technology transfers or licensing agreements.

¹¹⁹ The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996)

Section 7 (8) The intellectual property and international trade courts shall have jurisdiction over the following matters:

between private parties may not be accurate since the term "civil case" in Section 7 (8) also refers to the exercise of administrative powers for examination of the dumping and subsidization of goods or services from abroad. It can be seen that the civil cases under Section 7(8) is not only a dispute between private parties, however, such cases fall under the jurisdiction of intellectual property and international trade court.

Trademark law is a subset of intellectual property law in which the adjudication of these cases requires judges with specialized knowledge and it is important to ensure right and proper conduct in trial. Consequently, the Intellectual Property and International Trade Court was established in the Court of Justice to determine the quorum and special procedure in accordance with the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996). Therefore, civil cases regarding trademarks, copyrights, patents and cases arising from agreements on technology transfers or licensing agreements shall be under the jurisdiction of the Intellectual Property and International Trade Court.¹²⁰

In the event that the Registrar issues an order involving the trademark application under the Trademark Act of B.E. 2534, it shall be primarily based on the principles stated in the trademark law. Thus, disputes regarding the Registrar's order must also fall under the jurisdiction of the Intellectual Property and International Trade Court. Despite the fact that the Registrar's order regarding the trademark registration is an administrative order, however, any objection to the Registrar's order concerning trademark rights constitutes a civil case involving trademarks, which is an administrative case exception and shall not be under the jurisdiction of the Administrative Courts. Moreover, in order for the consideration of a person's trademark rights to be examined by a specialized court, Section 9 paragraph 2(3) of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 defines that the case within the Intellectual Property and International Trade Courts shall not be under the jurisdiction of the Administrative Courts.¹²¹ The Committee on the Determination of the Powers and Duties among Court decided that the Central Intellectual Property and

(8) civil cases regarding dumping and subsidization of goods or services from abroad.

¹²⁰ *Ibid.*

¹²¹ *Ibid.*

International Trade Court has jurisdiction over the trial and adjudication of cases involving the Registrar's orders under Trademark law.

In such cases, the Civil Procedure Code is applied to the consideration of a complaint seeking the revocation of administrative acts. The nature of tort cases is to seek remedies and damages, whereas the purpose of cases for revocation of administrative acts is to determine the legality of administrative acts. Therefore, it is the case that the Administrative Court cannot fully perform its duties in examining the legality of administrative juristic acts.

2.11.4. Court of competent jurisdiction of the case regarding the appeal against the decision of the Trademarks Board

Prior to December 1, 1997, and March 9, 2001, when the Central Intellectual Property and International Trade Court¹²² and the Central Administrative Court¹²³ were inaugurated respectively. The General Court of Justice, as a court of general jurisdiction, has jurisdiction to hear appeals against the trademark board's decision mentioned above. According to the principles that have been endorsed in the Constitution of the Kingdom of Thailand 'The Courts of Justice have the power to try and adjudicate all cases except those specified by this Constitution or the law to be within the jurisdiction of other Courts.'¹²⁴ Thus, in considering whether the court will accept the case for adjudication or not, it is only the preliminary consideration that the plaintiff or the appellant must only prove his *locus standi*¹²⁵ to file the

¹²² Ariyanuntaka V (*Intellectual Property and International Trade Court: A New Dimension for IP Rights*) accessed 6 May 2023

¹²³ Administrative Court, Pra Kard Pratarn Sarn Pok-kroong Soong Sud Rueng Satarn Tee Tang Lae Wan Perd Tum Karn Khong Sarn Pok-kroong Klang (Thai government gazette Feb 28, 2001) (ศาลปกครอง, “ประกาศประธานศาลปกครองสูงสุด เรื่อง สถานที่ตั้งและวันเปิดทำการของศาลปกครองกลาง” (ราชกิจจานุเบกษา 28 กุมภาพันธ์ 2544)).

¹²⁴ Office of the Council of State, Sarn Lae Ong Korn Eun Nai Kra Buen Karn Yutitum (Office of the Council of State 2018) (สำนักงานคณะกรรมการกฤษฎีกา, ศาลและองค์กรอื่นในกระบวนการศาลยุติธรรม' (สำนักงานคณะกรรมการกฤษฎีกา 2561)).

¹²⁵ Admin, 'Locus Standi: Meaning and Essential Ingredients of Locus Standi' (Legal Study Material, 6 December 2021) accessed 6 May 2023

lawsuit without having to consider the jurisdiction of the court in respect of the fact of the case. As Supreme Court No. 3549/2541 ruled that when the plaintiff argued that the order of the Trademark Registrar and the decision of the Trademarks Board were unlawful, thus, the Registrar's order and Trademarks Board's decision to refuse the registration of the plaintiff's trademark would affect the plaintiff's rights. The plaintiff shall have the right to sue under Section 55 of the Civil and procedure code¹²⁶.

In addition, it is noted that although the Statute of the Court of Justice prescribes that courts of first instance in the judiciary system have jurisdiction over "civil cases" and "criminal cases" as provided in Section 17, Section 18, Section 19, and Section 25, this does not preclude the court from hearing an administrative case. In fact, it appears that the Court of Justice has positioned itself as a court with the power to control the administration until the date that the Administrative Court was established as mentioned above. Since prior to the concept of administrative cases spreading into Thailand, particularly through the enactment of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542, an administrative case may also be regarded as a type of civil case within the jurisdiction of the Civil Court.

However, once the Intellectual Property Court and the Administrative Court have been established, the issue of which court will have the jurisdiction of the case, which is an overlapping case, must be taken into account from the provisions of their specific jurisdiction first. If the case does not fall under the jurisdiction of the Specialized Courts, the General Court of Justice shall have jurisdiction over the case.¹²⁷ The aforementioned consideration principle was stated in Supreme Court judgment No. 7696/2548, in which the Court ruled that when the executions of the Judicial Service Commission of the Court of Justice are not within the jurisdiction of the Administrative Court in accordance with the exceptions specified in the Act on the Establishment of Administrative Courts, such cases would fall under the jurisdiction of the Court of Justice.

¹²⁶ Civil Procedure Code s 55

¹²⁷ Pairot Wayuphap, Kgam Ati Buy Rabub Sarn Lae Pra Thammanoon Sarn Yu Ti Tham (8th edn, Winyuchon 2019) (ไพโรจน์ วายุภาพ, คำอธิบายระบบศาลและพระธรรมนูญศาลยุติธรรม (พิมพ์ครั้งที่ 8 วิญญูชน 2554)).

In the case of the Intellectual Property Court, although it is a court established in the Court of Justice system, it has the status of a specialized court. The Act for the Establishment of and Procedure for Intellectual Property and International Trade Court, B.E. 2539 (1996) has given the said court to have limited jurisdiction only for cases as provided in Section 7, with jurisdiction over "criminal cases" and "civil cases" regarding trademarks¹²⁸. As stated in Section 7 (1)-(4), which is the regulation of provision in the same manner as appearing in the law for the organization of courts of justice. Therefore, in the interpretation of such provisions prior to the promulgation of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542, civil cases must be interpreted to include the cases regarding the lawsuit filed for revocation of an order or decisions of the Trademark Registrar or the Trademark Board. Moreover, even aforesaid civil cases also have the characteristics of an administrative case, the cases should be reconsidered by the judicial system.

However, after the promulgation of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542, the concept of administrative case proceedings in the Thai legal system was separated from civil case proceedings for the first time. Therefore, the previous interpretation of the laws governing the jurisdiction of the Intellectual Property Court no longer seems to be accurate and consistent with the entire legal system. In terms of content aspect, the lawsuit filed for revocation of the trademark refusal decision by the Trademarks Board is also a dispute in relation to unlawful acts by administrative agencies or state officials. For instance, issuance of an unlawful order, issuance of an order incorrectly in accordance with the formality, procedure or material method prescribed for that action, issuance of an order in bad faith, issuance of an order by unfair discrimination, issuance of an order by creating unnecessary procedures an unreasonable burden to the applicant, or abuse of discretion. Consequently, the cases must fall under the jurisdiction of the Administrative Court, which is no longer under the jurisdiction

¹²⁸ Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996), s 7

of the Intellectual Property Court as provided in Section 9 paragraph 1 (1) of the Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542.¹²⁹

Referring the opinion of Professor Doctor Banjerd Singkaneti, he considered that the Trademark Registrar's order and the Trademarks Board's decision are administrative orders relating to specific laws, thus, judges should have knowledge and expertise in particular areas of specific laws. Also, other intellectual property disputes may occur, therefore, this case should not be placed within the jurisdiction of the Administrative Court. However, the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court has provided that the Intellectual Property Court has jurisdiction only over civil and criminal cases, not including administrative cases. Therefore, the provisions in the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court should be amended for further clarity.¹³⁰

In addition, when compared with the Act on Establishment of other specialized courts, especially the Act on Establishment of the Juvenile and Family Court and Procedures B.E. 2553, which was enacted after the Act on Establishment of Administrative Courts, it can be seen that there is no restriction of the case that needs to be a civil case under their jurisdiction. Thus, the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court should also provide specific provisions regarding the jurisdiction over administrative cases.

¹²⁹ The Act on Establishment of Administrative Courts and Administrative Court Procedure, B.E. 2542 Section 9. Administrative Courts have the competence to try and adjudicate or give orders over the following matters:

- (1) the case involving a dispute in relation to an unlawful act by an administrative agency or State official, whether in connection with the issuance of a by-law or order or in connection with other act, by reason of acting without or beyond the scope of the powers and duties or inconsistently with the law or the form, process or procedure which is the material requirement for such act or in bad faith or in a manner indicating unfair discrimination or causing unnecessary process or excessive burden to the public or amounting to undue exercise of discretion;

¹³⁰ Banjerd Singkaneti, Lak Khodmhai Kiew Kub Karn Kwub Kum Fhai Pok-kroong (7th edn, Winyuchon 2020) (บรรเจิด สิงคะเนติ, หลักกฎหมายเกี่ยวกับการควบคุมฝ่ายปกครอง (พิมพ์ครั้งที่ 7, วิญญูชน 2563)).

2.12. Conclusion

2.12.1. The legal status of the decision of the Trademarks Board as an administrative order

Refer to the definition of "administrative order" in Section 5 of the Administrative Procedure Act B.E. 2539 (1996). By considering the issuance of the Trademarks Board's decision, such an order was thus considered an administrative order for the following reasons:

Firstly, the Trademarks Board¹³¹ is the authority that has the legitimate power to decide appeals against the Registrar's order or decision, and to decide the petition for cancellation of trademarks or trademark license agreements¹³² as specified in the Trademark Act. Consequently, the Trademarks Board is an 'official' as defined in Section 5 of the Administrative Procedures Act, B.E. 2539. As the Trademarks Board is a group of persons who are empowered to exercise administrative power under the Trademark law. In detail, the committee of the Trademarks Board is composed of the Director-General of the Department of Intellectual Property as chairman, the Secretary General of the Juridical Council or his representative, the Attorney-General or his representative, and no fewer than eight nor more than twelve other qualified persons in the fields of law or commerce with the experience in intellectual property or trademarks appointed by the Council of Ministers as members.¹³³

Secondly, the decision of the Trademarks Board is the unilateral exercise of power to decide the appeal without the consent of the applicant before registration. Such an order was notified by the authority which is the legitimate committee under the trademark law. The decision of the Trademarks Board was merely an administrative order giving effect to the requirements of the regulation.

¹³¹ Ministry of Commerce, Kham Sang Tang Tung Ka Na Kam Ma Karn Krueng Mhai Karn Ka (Department of Intellectual Property, Legal Division 2020) (กระทรวงพาณิชย์, 'คำสั่งแต่งตั้งคณะกรรมการผู้ทรงคุณวุฒิในคณะกรรมการเครื่องหมายการค้า' (กรมทรัพย์สินทางปัญญา กองกฎหมาย 2563)).

¹³² Trademark Act B.E. 2534 (1991) s 96

¹³³ Trademark Act B.E. 2534 (1991) s 95

Thirdly, it has been seen that the decision of the Trademarks Board is an administrative order which directly affects the right status or obligation of the applicant. Moreover, such a decision of the appeal is characterized as an 'administrative act' defined by Section 5 of the Administrative Procedures Act, B.E. 2539.

Fourthly, the decision of appeal establishes a substantial legal relation between the applicant and officials, affecting the registration application of a particular applicant. This legal relation of the administrative act was clearly prescribed by the meaning of administrative act in Section 5 of the Administrative Procedures Act, B.E. 2539. Also, the applicant is a person who challenges an application, a person who will be subject to an administrative act.¹³⁴

Lastly, the decision of the Trademarks Board is a ruling on the basis that directly affects the external body of administration. It implies that the decision affects the applicant for trademark registration who is a person apart from the body of the Trademarks Board and the Department of Intellectual Property.

When it finally turns out that the decision of the Trademarks Board is characterized as an 'administrative act' for the reasons described above. Therefore, such a particular decision would fall under the general principles of administrative law. Accordingly, judicial review of administrative acts should be taken into account before enforcing the decision.

2.12.2. The competent court over the appeal against the decision of the Trademarks Board

In the event that the Trademarks Board issues a decision involving the trademark application under the Trademark Act of B.E. 2534, it shall be primarily based on the principles stated in the trademark law. Thus, disputes regarding the Trademarks Board's decision must also fall under the jurisdiction of the Intellectual Property and International Trade Court. Despite the fact that the Trademarks Board's decision regarding the trademark registration is

¹³⁴ Administrative Procedures Act, B.E. 2539

Section 5 "participant" means an applicant or a person who challenges an application, a person who is or will be subject to an administrative act, or a person who participates in an administrative process because his or her right may be affected by an administrative act.

an administrative order, however, any objection against the Trademarks Board's decision concerning trademark rights constitutes a civil case involving trademarks, which is an administrative case exception and shall be under the jurisdiction of the Central Intellectual Property and International Trade Court.

Therefore, the decision of the Trademarks Board is characterized as administrative order that should be governed by administrative law. However, due to the decision primarily based on the principles stated in the trademark law, thus, it should be required expertise with certain skills help to decide on relevant knowledge and use it to render the decision. Currently, there is a decision that the Central Intellectual Property and International Trade Court, as a specialized court, is therefore an appropriate court to examine the discretion of government agencies and administrative orders relating to such intellectual property rights. For that reason, it is not only causing the argument between the Administrative court and the Central Intellectual Property and International Trade Court, but it also results in several subsequent legal issues and problems such as the issue regarding the suitability of allowing the Intellectual Property and International Trade Court to adjudicate and decide administrative disputes, the issue concerning the court proceedings of the Intellectual Property and International Trade Court, the categorize the case under the jurisdiction of the Intellectual Property and International Trade Court, etc. As a consequence of the uncertainty of Thai laws, there are numerous other legal issues, such as the absence of particular provisions providing the Intellectual Property and International Trade Court with the authority to decide administrative cases, which arise accordingly.

CHAPTER 3

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN THE FOREIGN LAWS

3.1. Introduction

At an international level, the legality control over administrative acts, whether exercised by an internal administrative body, a political body, or a constitutionally autonomous body and each one of these approaches has advantages and disadvantages. It was considered that judicial review of administrative actions by the court is the most effective means of protecting the rights of the people. In which judicial control refers to the power of the court to control administrative acts within the limitations of the law. It further implies that an aggrieved citizen has the right to challenge an unlawful administrative action in a court of law. The main objective of judicial review over administrative agencies is to protect the rights and liberties of citizens by assuring the legality of administrative acts. Lord Bryce has aptly remarked, '*There is no better test of the excellence of a government than the efficiency of its judicial system.*'¹³⁵

In general, the scope of administrative control exercised by the judiciary system is distinct from that of the control by the internal executive branch. In other words, while internal administrative control may govern both the legality of administrative action as well as the legality of its purpose, it may also govern the question of the appropriateness of action. Although the judiciary system is responsible for administrative supervision, the courts are only able to regulate whether or not an activity is lawful; they cannot control whether or not acts are suitable.

In addition to the limitation of the judicial system above, judicial review may be subdivided into two structures, namely, judicial review within the specific powers given to the court by legislation, and judicial review allowed by general power. Firstly, judicial review within the specific powers given to the court by legislation means the judiciary can review the actions of the administrative agencies in cases where there is a law for the courts to perform. This is

¹³⁵ Bryce James; Modern Democracies, 1929, P-384

the initial step in the development of courts that exercise the control over administrative agencies. Secondly, judicial review allowed by general power means the judiciary has the power to examine the actions of the administrative agencies without having to consider the specific law in such matters, in which benefits to the individual party who affected by the administrative acts.¹³⁶

3.2. Judicial Review of Administrative Action Relating to Intellectual Property Law in Foreign Courts.

In liberal democracy, the legality of administrative acts is reviewed by the courts through the establishment of the Administrative Court as an organization separate from the Court of Justice. For instance, the administrative court in Germany. In some countries, however, the Court of Justice is also responsible for reviewing the legality of administrative actions along with the adjudication of civil and criminal cases, for example, England, the United States of America, etc.

3.2.1. Germany

In Germany, the courts are characterized by their specialized, regional, and hierarchically integrated nature. In addition to the Federal Constitutional Court and the Länder's constitutional courts, there are six main types of courts:

- 1) The Ordinary courts (*ordentliche Gerichte*) adjudicate in formal proceedings for civil cases and criminal offenses. In contrast to the United States, Germany's court system does not consist of parallel federal and state courts. The ordinary courts in Germany are composed of four levels.

¹³⁶ Banjerd Singkaneti, Lak Khodmhai Kiew Kub Karn Kwub Kum Fhai Pok-kroong (7th edn, Winyuchon 2020) (บรรเจ็ด สิงคะเนติ, หลักกฎหมายเกี่ยวกับการควบคุมฝ่ายปกครอง (พิมพ์ครั้งที่ 7, วิญญูชน 2563)).

However, the entry trial court are either the Amtsgericht (Local or Circuit Court) and the Landgericht (High Court).¹³⁷

- 2) The Administrative courts (*Verwaltungsgerichte*) are courts that have jurisdiction over public and administrative law issues including the judicial review over the administrative actions. The Administrative courts are composed of three different levels: local administrative courts, higher administrative courts, and the Federal Administrative Court.¹³⁸
- 3) Fiscal Courts (*Finanzgerichte*), also known as tax law courts or finance courts, adjudicate cases pertaining to taxes and have a two-tiered structure. The Federal Fiscal Court (*Bundesfinanzhof*) is the highest court of tax law and considers appeals from Fiscal Court decisions.¹³⁹
- 4) Social law courts (*Sozialgerichte*) adjudicate cases pertaining to the social insurance system, which includes unemployment compensation, employees' compensation, and social security payments.
- 5) Labour law courts (*Arbeitsgerichte*) also have a three-tiered structure and hear disputes regarding collective bargaining agreements and working conditions. The Federal Labour Court (*Bundesarbeitsgericht*) is the highest court of labour law
- 6) The Federal Patent Court (*Bundespatentgericht*, abbreviation: *BPatG*) is a German federal court with jurisdiction over specific legal matters, including patent and trademark disputes, and was established on July 1, 1961.

For Intellectual Property proceedings in Germany, the Federal Patent Court has the authority to render decisions regarding appeals of decisions issued by the German Patent

¹³⁷ Schmeilzl B, 'Know Your Way around German Civil Courts' (*GermanCivilProcedure.com*, 30 October 2018) <<https://www.germancivilprocedure.com/know-your-way-around-german-civil-courts/>> accessed 25 June 2023

¹³⁸ 'Judiciary of Germany' (*Wikipedia*, 22 April 2023)
<https://en.wikipedia.org/wiki/Judiciary_of_Germany> accessed 25 June 2023

¹³⁹ *Ibid.*

and Trademark Office. Additionally, the Federal Patent Court has the authority to decide on appeals against decisions issued by the Federal Plant Variety Office's appeal committees. However, it does not have the authority to hear issues regarding the infringement of intellectual property rights; such cases are under the authority of the civil courts. The Federal Patent Court only determines whether property rights (patents, trademarks, utility models, topographies, designs, and plant variety protection rights) should be granted (i.e., registered) or denied.¹⁴⁰ The details of the court proceedings are as follows.

1. Appeal proceedings

The appeals process is one of the types of procedures. An appeals process is included in any and all codes of procedure that the Federal Patent Court is tasked with enforcing since it comes within its authority. In these instances, the Boards of Appeal of the Federal Patent Court render judgments as the judicial review of orders issued by the German Patent and Trade Mark Office and the Federal Plant Variety Office. The decisions are thoroughly reviewed both the question of fact and law. In this regard, the Federal Patent Court conducts its own investigation or applies the ex officio investigation principle.

The legal remedies of appeals to the Federal Court of Justice are available for second-instance decisions of the Federal Patent Court. The highest court of ordinary jurisdiction is the Federal Court of Justice, which has its seat in Karlsruhe. In principle, however, the Federal Court of Justice is obligated by the findings of fact of the Federal Patent Court.

2. Revocation proceedings

Revocation proceedings, also known as actions to declare a registered patent invalid, are handled by the Federal Patent Court in its position as a court of first instance. The Nullity Boards of the Federal Patent Court are the entities that are authorized to decide such matters. It is necessary to file a complaint against the patent holder in order to have the revocation procedures commenced before the Federal Patent Court. A patent revocation action is typically the consequence of patent infringement procedures.

¹⁴⁰ *Ibid.*

3. Investigation of the facts, preparation of the oral hearing

Section 73 of Act on the Protection of Trade Marks and other Signs provides that the Federal Patent Court shall investigate the facts *ex officio*. It shall not be bound by the pleadings and the motions to take evidence filed by the parties.¹⁴¹ Therefore, the Federal Patent Court applies the principle of *ex officio* investigation or conducts its own investigation.

3.2.2. Taiwan

The court system in Taiwan is divided into three levels: the District Courts, the High Courts and the Supreme Court. These courts have both civil and criminal case jurisdiction. In addition to civil and criminal proceedings, the Administrative Court also hears administrative cases if the individual's rights have been violated by an administrative agency's unlawful or improper act or omission to act, he may file a claim.¹⁴² The Administrative Court has two levels, namely the High Administrative Court and the Supreme Administrative Court.

In Taiwan, on July 1, 2008, the Intellectual Property Court (now "Intellectual Property and Commercial Court") was established. The Intellectual Property and Commercial Court is a "three-in-one" court that handles civil, criminal, and administrative cases.¹⁴³ For the

¹⁴¹ Act on the Protection of Trade Marks and other Signs of 25 October 1994 (Federal Law Gazette [BGBl.]) Part I p. 3082, as last amended by Article 5 of the Act of 10 August 2021, Federal Law Gazette (Bundesgesetzblatt) Part I p. 3490

¹⁴² Chang V and Chao M, 'Taiwan: The Legal System' (*The Legal System - Taiwan*, 25 October 2004) <<https://www.mondaq.com/corporatecommercial-law/29181/the-legal-system>> accessed 2 July 2023

¹⁴³ Taiwan Intellectual Property and Commercial Court Organization Act

Article 3 Jurisdiction of the Intellectual Property and Commercial Court includes the following:

1. First instance and second instance civil actions for the protection of intellectual property rights and interests arising under the Patent Act, Trademark Act, Copyright Act, Optical Disk Act, Trade Secret Act, Integrated Circuit Layout Protection Act, Plant Variety and Plant Seed Act, or Fair Trade Act as well as commercial actions under the jurisdiction of the Commercial Court in accordance with the Commercial Procedure Act.

2. Offenses under Articles 253 to 255, 317, and 318 of the Criminal Code, violation of the Trademark Act, Copyright Act, Trade Secrets Act, and cases under Paragraph 1, Article 35 and Paragraph 1, Article 36 of the Intellectual Property Case Adjudication Act, and appeals or interlocutory

administrative cases, first instance administrative proceedings and compulsory enforcement for the protection of intellectual property rights and interests pursuant to the Patent Act, Trademark Act, Copyright Act, Optical Disk Act, Regulations Governing the Protection of Integrated Circuits Configuration, Species of Plants and Seedling Act, or the Fair Trade Act.¹⁴⁴ The Intellectual Property and Commercial Court has jurisdiction over administrative actions related to intellectual property brought in the first instance.¹⁴⁵ The trial for the action in the first instance comprised three judges. Subsequently, an appeal against a judgment or decision of the Intellectual Property and Commercial Court can be filed to the Supreme Administrative Court.

For the adjudication of administrative actions, such as disputes regarding the scope and validity of the rights of patent or trademark, in which the Intellectual Property Court adjudicates the decision of the Taiwan Intellectual Property Office (TIPO) on behalf of the High Administrative Court. After that, the decision of the Intellectual Property Court can be

appeals against the decisions on criminal actions rendered by district courts in the first instance in an ordinary, summary, or plea bargain proceeding. Criminal actions involving juveniles shall be excluded.

3. First instance administrative actions and compulsory enforcement matters concerning intellectual property rights arising under the Patent Act, Trademark Act, Copyright Act, Optical Disk Act, Integrated Circuit Layout Protection Act, Plant Variety, and Plant Seed Act, or Fair Trade Act.

4. Other cases prescribed by law or determined by the Judicial Yuan to be within the jurisdiction of the Intellectual Property and Commercial Court.

¹⁴⁴ 'Intellectual Property-Judicial-Official Business-Intellectual Property' (*Judicial Yuan* (司法院)) <<https://www.judicial.gov.tw/en/cp-1603-79857-5d778-2.html>> accessed 3 July 2023

¹⁴⁵ Taiwan Intellectual Property Case Adjudication Act

Article 31 The administrative actions prescribed in Subparagraphs 3 and 4, Article 3 of the Intellectual Property Court Organization Act are subject to the jurisdiction of the Intellectual Property Court.

When other administrative actions are jointly initiated with the actions set forth above, or are filed in addition thereto, they shall be filed with the Intellectual Property Court.

For the purposes of enforcement set forth in the first paragraph, the Intellectual Property Court may establish an enforcement bureau, request the enforcement bureau of the civil division of the district court, or request an administrative agency, to administer enforcement matters on its behalf.

The Intellectual Property Court shall rule where a debtor opposes an enforcement order assigned in the preceding paragraph.

appealed to the Supreme Administrative Court. The Intellectual Property Case Adjudication Act was enacted by the Republic of China (Taiwan) in order to accelerate and improve the adjudication of intellectual property disputes. Article 33 of the Intellectual Property Case Adjudication Act indicated that in administrative proceedings involving the cancellation or revocation of a registered trademark or patent, the Intellectual Property Court must consider any new evidence presented on the same grounds for cancellation or revocation before the end of the oral argument. The summary procedure outlined in Section 2, Chapter 2 of the Code of Administrative Litigation Proceedings is inapplicable to administrative actions involving intellectual property, as stated in Article 30-1.

3.2.3. United Kingdom

Originating in medieval England, England and Wales share a unified court system based on common law principles. The Courts of Justice are ordinary courts with the authority to hear and adjudicate all civil and criminal cases, as well as administrative cases. In the English legal system, the legal process of justice comprises of: - an appeal as a remedy under the written law (Statute) and a judicial review as a remedy under common law. Judicial Review is one of the procedures in the United Kingdom's Constitution that provides people with a way to ensure that those carrying public office or exercising public authority remain accountable and exercise their authority within limitations and in the manner intended by Parliament.¹⁴⁶ In case the concerned party or those who have suffered damages as a consequence of the administrative action in question are dissatisfied with a decision made by the Adjudication and Dispute Resolution Boards, such party may appeal to the Appellate Bodies. The purpose of judicial review is not on the merits of a decision, but rather on its legality. In addition, the concerned party can file a lawsuit seeking the Court of Justice to examine the legality of such decisions by requesting an Application for Judicial Review. In England and Wales, the Application for Judicial Review may be filed on the basis of illegality,

¹⁴⁶ Commons H of, 'Judicial Review and Courts Act 2022' (*legislation.gov.uk*)

<<https://www.legislation.gov.uk/ukpga/2022/35/notes/division/3/index.htm>> accessed 26 June 2023

unreasonableness, or unfairness of procedure.¹⁴⁷ An Application for Judicial Review is typically filed to the Administrative Court of the High Court's Queen's Bench Division.

Judicial Review of Administrative Action is the traditional power of the high court under the common law (Inherent Power), as opposed to the power that the court derives from written law or the Statute in the case of Appellate Jurisdiction. The judicial review is a Supervisory Jurisdiction, as the courts are obligated to supervise administrative actions in accordance with both written and common law to protect the rights and liberties of the people. Consequently, the judicial review of the Court of Justice is limited to determining the legality (legal or illegal) of the decision by the administrative agency. The Court has no authority to review the merits of such a decision. If the Court determines that the administrative agency's decision is unlawful, the Court cannot issue its own decision in place of the original decision. In this instance, the court can issue an order revoking the decision and directing the administrative agency to reconsider the legality of the decision.¹⁴⁸

The Rules of Procedure of the High Court define a Claim for Judicial Review as an indictment that examines the legality of an administrative order, act, or omission in relation to the exercise of administrative power. Generally, the administrative law systems apply the Inquisitorial system, which the Court is actively involved in investigating the facts of the case. The court may issue injunctive relief during the court proceedings. The English legal system does not systematically list the grounds for the unlawfulness of administrative acts. In the early stage, the courts severely restricted the scope of judicial control over administrative acts, limiting the causes of administrative acts' unlawfulness to external factors such as lack of authority, failure to follow patterns, or disregard for procedures. Subsequently, the court broadened the scope of judicial control over administrative acts to include more internal

¹⁴⁷ *Ibid.*

¹⁴⁸ Narongdech Srukhsit, Karn Krueb Kum Trued Sorb Karn Kratum Tng Pok-kroong Nai Prated Ang Krid (1st edn, Winyuchon 2010) (ณรงค์เดช สรุโฆษิต, การควบคุมตรวจสอบการกระทำทางปกครองในประเทศไทย อังกฤษ (พิมพ์ครั้งที่ 1, วิญญูชน 2553)).

factors.¹⁴⁹ The unlawful administrative actions are categorized into the following three categories:

3.2.3.1. The decision maker went beyond their power: the Doctrine of Ultra Vires

The doctrine of ultra vires has long dominated the constitutional theory of judicial review.¹⁵⁰ Ultra vires (Latin: "beyond the powers") refers to an act by government agencies that exceed the authority granted to them by Parliament. In the past, courts greatly limited the control over administrative acts, assuming that if the law granted the administrative agency the authority to perform, then the administrative agency had the legal authority to make decisions. In case an administrative decision or judgment is made in error, the Court cannot control or order the revocation of those administrative acts because the administrative agency has decided to take action by virtue of the law. In other words, in the English law system, if the administrative agency has legal authority and exercises that authority within the confines of the law, it is free to make decisions that may be subject to error (Liberty of error). This is regarded as an error within the jurisdiction, i.e., the administrative agency has the legal authority and acts without exceeding its jurisdiction, albeit with an error decision. In such a case, the court has no power to examine and control the administrative act in question. As a result, the court can only control administrative acts in cases where administrative agencies exceed their jurisdiction or there is a procedural impropriety. Presently, the English courts have broadened the scope of administrative control by governing the question in law and fact which are factors or motives for administrative actions. If the administrative agency decides to take action based on the fact, but there is an error of fact, and if the administrative agency decides to take action based on the law, but there is an error of law. This action is

¹⁴⁹ Piyabutr Saengkanokkun, Khodmhai Pok-kroong Khong Prated Nai Europe (Faculty of Law, Thammasat University 2013) (ปิยบุตร แสงกนกกุล, กฎหมายปกครองของประเทศไทยยุโรป (โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2556)).

¹⁵⁰ 'Judicial Review in English Law' (*Wikipedia*, 17 February 2023)

<https://en.wikipedia.org/wiki/Judicial_review_in_English_law> accessed 28 June 2023

indeed an act outside the boundaries of the jurisdiction (*Ultra vires*) which can be revoked by the court because it is unlawful.¹⁵¹

3.2.3.2. The Abuse of Discretion

1) The Delay in Performing Discretion

In principle, when the parliament enacts a law to grant discretion to the government, then the government must exercise within the scope of such discretion. The administrative agency cannot restrict or limit the exercise of its discretion by, for example, establishing a policy in advance and applying it without considering the other related-specific facts of each case. Since the purpose of the parliament delegating discretion to the administrative agency is to provide the administrative agency with the ability to make decisions that are as appropriate as feasible to the events or circumstances in each matter. This legal principle is also applicable to the Tribunal procedure. For instance, if the Tribunal makes a decision based on the Rule of Thumb¹⁵² rather than its own discretion, the court may revoke the Tribunal's decision. Alternatively, if its discretion is constrained by the Policy Statement, the court may also revoke the decision. Nonetheless, if such policies or practices are not Over-right Policies, the Court may deem the decision to be acceptable.

2) Abuse of Discretion

In general, English courts refuse to review the merits of administrative discretion, notwithstanding instances in which the court itself has full jurisdiction to review administrative acts, such as appeals, on both the question of law and fact. Due to the application of judicial self-restraint by the English courts, it is inappropriate to exercise discretion by usurp the authority of the executive branch, thus the court will only review cases of discretionary abuse. If the court determines that the discretion was used for an improper purpose as prescribed

¹⁵¹ *Ibid.*

¹⁵² *In English, the phrase rule of thumb refers to an approximate method for doing something, based on practical experience rather than theory. 'Rule of Thumb' (Wikipedia, 30 June 2023)*
https://en.wikipedia.org/wiki/Rule_of_thumb accessed 1 July 2023

by law, was exercised in bad faith, and was ignoring relevant considerations or taking irrelevant considerations into account, then the administrative order or decision will be deemed unlawful and revoked.

3.2.3.3. Procedural Impropriety and Breach of natural justice

The procedures that the government is obligated to follow by law have two characteristics: Mandatory Procedural Requirements and Directory Procedural Requirements. In the event that an administrative agency takes action without adhering to the fundamental process will render the unlawful action. The rights of the private sector will be affected if the administrative agency does not comply with the procedures. Therefore, the procedure is essential procedure, and any procedure that helps the private sector in enforcing its rights is deemed essential. The court's decision stipulated that the administrative agency's declaration of the right to appeal, the appeal period, and the duty to give reasons for administrative decisions constituted an essential procedural process. In addition to stipulating the procedures that the administrative agency must follow, the administrative law system applies the principle of natural justice to demand that the administrative agency comply with specific procedures. The natural justice principle consists of the principle of the right to a fair hearing (*audi alteram partem*) and the rule against bias. These are Common Law principles that are applicable to all courts, tribunals, and administrations. Therefore, a decision made by the administrative agency that violates the principle of the right to a fair hearing or the rule against bias is unlawful.¹⁵³

In the UK (England and Wales), the Chancery Division of the High Court, the Intellectual Property Enterprise Court (IPEC), or a County Court with a Chancery District Registry are the primary venues for trademark enforcement. Within the IPEC, there is a minor claims track for straightforward and low-value claims that are heard by one of three district judges or deputy district judges.¹⁵⁴ Regarding intellectual property cases in 1977, the Patent

¹⁵³ *Ibid.*

¹⁵⁴ (*Trade mark litigation in the UK (England and Wales): Overview*)

<[https://uk.practicallaw.thomsonreuters.com/w-010-9492?contextData=\(sc.Default\)](https://uk.practicallaw.thomsonreuters.com/w-010-9492?contextData=(sc.Default))> accessed 1 July 2023

Court Act, which is part of the High Court, requires judges to act in this court must be specialists. The Patent Court will hear cases related to intellectual property, including patents, trademarks, and copyrights. However, these cases might be heard in a different division of the High Court. The High Court will adjudicate civil cases involving the infringement of intellectual property, including patents, trademark rights, product design, and copyright. Criminal cases involving the counterfeiting of patents, goods, or copyrights begin in the Magistrates' Courts and then proceed to the Regional Court and the highest court on appeal and can appeal to the higher court. Additionally, the third party may then appeal to the high court to argue against the appeals of the administrative decisions to the High Court. High court judges are not required to be IP specialists, and their procedures are based on approaches to general cases.¹⁵⁵

3.2.4. United States

The United States legal system resembles the English legal system due to the influence of the English Common Law system. In other words, it is common law, and the court applies a principle or rule established in a prior legal case apply to subsequent cases with similar issues or facts. The legal system of the United States is characterized by a single court system with jurisdiction to adjudge over all types of cases, whether private or public, including administrative cases, as opposed to the dual court system used in continental Europe such as France. Article 3, Section 2 of the United States Constitution¹⁵⁶ affirms the jurisdiction of the courts to try and adjudicate all types of cases.

¹⁵⁵ *Ibid.*

¹⁵⁶ Constitution of the United States of America

Section 2 The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

The Constitution of the United States of America places significant emphasis on the protection of individual rights and liberties. Consequently, the Court of Justice, particularly the High Court, has the authority to interpret the provisions of the law relating to rights and liberties in a manner that protects private individuals from the infringement of their rights and liberties by the State or the Administrative sector through actions such as the issuance of a law, rule, regulation, or order. This grants the Courts of Justice full power to examine the actions of the state, with no authority, especially the legislature, to prevent this judicial review, unless the case is unrelated to the act that directly affects people's rights and liberties. For instance, political or policy action, which is one of the real administrative powers and in which the executive branch acts based on political, social, and economic discretion. In such circumstances, the Court of Justice cannot be involved, even if there is a challenge to the court's jurisdiction.

In the United States, judicial review is distinguished by two characteristics. First, in the event that the Court of Justice has the power to examine and review the actions of the administrative agency. In other words, the Court will examine whether the administrative agency has exercised power beyond the law (*Ultra Vires*), abused its power (Abuse of Power), or provided legal equity to the parties or not (Due Process of Law). If the administrative agency has acted within the scope of its authority, has not acted arbitrarily, or has not violated the aforementioned principles of equity, thus, there is no authority for the court to perform judicial review. The United States Court of Justice will examine the *Ultra Vires* of administrative actions in the following circumstances:

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

- (b) Acts of arbitrary or unlawful ordering or unlawful act. The definition of arbitrary action is an administrative action without a legal basis or reasonable justification.
- (c) Acts that are contrary to or inconsistent with the provisions of the Constitution in protecting the rights and liberties of individuals.
- (d) Acts that are beyond the scope of authority specified by law or regulations.
- (e) Act with non-compliance with legal procedures. Many rules become effective at least 30 days after publication in the Federal Register. This is required by the Administrative Procedure Act (page 58) and allows those affected by the rule to prepare for the change. Therefore, it should follow the legal procedures to complete the process.
- (f) Acts lacking substantial evidence, especially when the administrative agency examines conflicts or disputes between the administrative agency and concerned party by the administration itself. (Mostly handled by different kinds of committees) or actions inconsistent with the facts.
- (g) Acts that unlawfully delay or restrain approval.

If the administrative action falls under one of those listed above, the administrative action is subject to judicial review. The court may decide that the action was unlawful or beyond its authority or Writ of Prohibitory, and the court may then order the administrative agencies to act properly. In addition, the Court has the authority to review the judicial proceedings or adjudication of administrative disputes or disputes between the administrative agency and the private party. In particular, those proceedings concerning the time, place, nature of the preliminary hearing, the relevant facts and laws, as well as the hearing of evidence procedure considering whether the administrative agency provided the injured person a chance to defend to their fullest extent or not, etc.

Second, in the event that the Court of Justice is unable to review the actions of the administrative agency. To prevent the court from interfering with the executive branch's duties in accordance with the principle of separation of powers. Consequently, judicial review is limited to issues of administrative actions that involve the question of law and fact. In reviewing factual issues, the court should not interfere with the primary facts, as this is a

matter requiring the knowledge and expertise of administrative officials. Otherwise, it may constitute an exercise the administrative power on behalf of the administrative agency. The question of facts to be examined by the court can be resolved only by hearing facts that misrepresentation of fact, or by listening to the facts is insufficient for consideration.

It can be said that the United States Court of Justice has broader control over the administrative body than the English courts, as its control extends to both administrative policy and general administrative principles. The reason is the United States Court of justice considers the Constitution's supreme principle as the source of executive and administrative control.

Since the United States of America is a single court system, it is a system in which the Court of Justice has jurisdiction over all types of cases, whether civil, criminal, or administrative cases, with judges who are qualified and knowledgeable in general law to judge administrative cases. Administrative cases are adjudicated by judges who are generalists and knowledgeable in general law. A case involving an order or decision on intellectual property law by the administrative agency, which is a dispute between the private party and an administrative agency. Thus, the aforementioned case is not a civil dispute between private parties over intellectual property, but rather a dispute between administrative officials or administrative agencies whose administrative order affects the rights of private parties. For example, decisions concerning granting, non-granting, or revocation of rights under intellectual property laws are within the jurisdiction of the Court of Justice. Copyright, patent, and trademark laws are adjudicated by District Courts. Currently, the United States has established a new Court of Appeals, the United State Court of Appeals for the Federal Circuit, for the appeal of the district court's decision involving Patent registration. On the other hand, the appeal of the district court's decision regarding copyright and trademark registration will be under the jurisdiction of Court of Appeals. In case of appealing of decisions of the United State Court of Appeals for the Federal Circuit and Court of Appeals shall be govern by the jurisdiction of the United State Supreme Court.¹⁵⁷

¹⁵⁷ *Ibid.*

3.3. Conclusion

As studied, in both the countries with single court system and dual court system, all judiciary systems perform judicial review based on the principles of administrative law, and explicitly declare jurisdiction over administrative cases involving intellectual property law. In Germany, it can be seen that the structure of the Federal Patent Court, which is the specialized court with jurisdiction over intellectual property cases that are adjudicate all trademark, patent, and copyright cases. The Federal Patent Court is primarily responsible for finding facts and evidence in the case, this is actually an inquisitorial system. In Taiwan, the cases within the jurisdiction of the Intellectual Property Courts are clearly classified as civil, criminal, and administrative cases, in order to provide comprehensive and appropriate procedures for each type of case. In the UK, judicial review over the administrative act is governed by the Inquisitorial system, and the courts have the power to issue injunctive relief during the proceedings. In the United States, the Court will examine whether the administrative agency has exercised power beyond the law (*Ultra Vires*), abused its power (Abuse of Power), or provided legal equity to the parties or not (Due Process of Law). Moreover, in the UK and US, it can be concluded that the Court has no authority to review the merits of such a decision. If the Court determines that the administrative agency's decision is unlawful, the Court cannot issue its own decision in place of the original decision. For all reason, the judicial review performed by these countries provide different approach, but remains within the boundaries of administrative law principles.

CHAPTER 4

THE PROBLEMS OF JUDICIAL REVIEW OF DECISIONS OF THE TRADEMARKS BOARD

4.1. Introduction

The purpose of this part is to analyze and demonstrate the existing legal problems of judicial review over the Trademarks Board's decision. In addition, it is also to analyze the legal uncertainties of the provisions of the Thai statutory in terms of the Court's power in delivering a judgment. Moreover, in consideration of the case under the jurisdiction of the Intellectual Property and International Trade Court, the law does not distinguish between general cases and administrative cases involving trademark issues. As a result, the proceedings in the Intellectual Property and International Trade Court are based on civil proceedings in both types of cases. In addition, the study found that the judicial review principle is not apparent when administrative disputes on trademarks are decided by the Intellectual Property and International Trade Court. Therefore, the part will also emphasize the problems regarding the judicial review of the decision of the Trademarks Board.

4.2. Analysis of the Problems of the Legality of Judicial Review Over the Trademarks Board's Decision

4.2.1. Background of the Problem

After the Committee on the Determination of the Powers and Duties among Court has rendered a decision no.9/2546 in the manner described above, there will no longer be any practical obstacles regarding the issue of the competent court. It is deemed that the decision of the Committee is reasonable and provides appropriate reasons that the case involving an appeal against the Trademarks Board should fall under the jurisdiction of the Intellectual Property Court based on the fact that the competent court must be expertise in the subject matter. However, there are still controversial issues in relation to such a decision

by seeing that its interpretations in ways inconsistent with relevant laws. Since the Committee decided that the Trademarks Board's decision involving the trademark application shall be primarily based on the trademark law structure and disputes regarding the Trademarks Board's decision must also fall under the jurisdiction of the Intellectual Property and International Trade Court. Thus, since the decision of the Trademarks Board is characterized as an administrative order, even though the case shall be adjudged by the Intellectual Property and International Trade Court, the judicial review of such order or decision should be conformed to the administrative law framework together with the special expertise and knowledge in technical issues. Consequently, the background of problems can be divided primarily into the problems listed below.

4.2.1.1. Problems in Relation to the Court Proceedings

Currently, the Intellectual Property and International Trade Court decides both general trademark cases and administrative disputes involving trademark law by applying the Accusatorial system. In general, the administrative procedure should be based on the Inquisitorial system in order to balance the power between parties. Consequently, in theory, the judicial review of the administrative action regarding trademark issues under the jurisdiction of the Intellectual Property and International Trade Court shall be governed by the principles of administrative law.

4.2.1.2. Problems in Relation to the Principle of Legality of Administrative Actions

The legality of administrative actions is an essential component of the Legal State, which requires government agencies to be bound by the legislation both provided by the legislative branch and government agencies self-imposed.¹⁵⁸ Regarding administrative order, which is a form of administrative act, the issuance of an administrative order that is unlawful at the time of its issuance will result in the order becoming void or an order that may later be revoked. The revocation or voidance of the administrative order could be caused either by the bodies of administration organizations themselves or by the body of the judiciary apart

¹⁵⁸ Worachet Pakeerut, Khodmahi Pok-kroong Pak Tue Pai (Nitirat 2011) (วรเจตน์ ภาคีรัตน์, กฎหมายปกครอง ภาคทั่วไป (นิติราษฎร์ 2554)) p. 73-75.

from the administration organizations. Otherwise, the unlawful administrative order may result in other consequences as stipulated by the applicable laws.

Regarding the legality of the administrative orders, two essential considerations can be distinguished: the consideration in terms of content, and the consideration in terms of formality.¹⁵⁹ In terms of formality, the legality of an administrative act will depend on the authority of the administrative body and the department that issues an order, the procedures involved in the issuance of administrative orders, the time period for issuing administrative orders, the legally required form of an administrative order, the reasons for the issuance of an administrative order, and the notification of the right to appeal the administrative order. In terms of content, the legality of an administrative order depends on its conformity with the Constitution of the applicable law to issue the administrative order, the authority prescribed by law to use an administrative order as an execution tool, the legitimacy of the discretion, the consistency with reasonableness principles, the absolute clarity of the order content, the possibility in the execution of administrative orders either the ground of laws and facts, as well as the consistency of the contents of administrative orders with the laws of the higher hierarchy.

As a consequence, in considering whether the appeal decision of the Trademarks Board is lawful, it cannot be considered solely on the basis of its conformity with the provisions of the Trademark Act; rather, it must be considered as a whole in terms of formality and in terms of content under the administrative law, as described above. Consequently, the competent court which is responsible for reviewing the legality of such a decision should therefore not only have expertise in trademark law but should also be experienced in administrative law in the meanwhile.

4.2.1.3. Problems in Relation to the Judicial Review by the Competent Court

In the previous chapter, it was determined that an appeal against the Trademarks Board's refusal is admissible in order to ensure that the Central Intellectual Property and International Trade Court has the authority to conduct a judicial review of the Trademarks Board's decision. However, it has been noted the Court, as a non-governmental judicial body, will be entitled to consider such decisions only on the legality of the decision. This differs

¹⁵⁹ *Ibid.*

from the Trademarks Board's limitless authority to examine Registrar orders, as previously stated. In which the Trademarks Board has the authority to consider both the merit and legality of the Trademark Registrar's order under the Trademark Act B.E. 2534 (1991). Thus, the merits of the decision cannot be a subject matter of judicial review by the court. If the Court decides that the decision is unlawful, the Court shall have a judgment to revoke the decision of the Trademark Board. Otherwise, the Court then may order the Trademark Registrar to continue with the registration of the aforementioned trademark in accordance with ordinary processes and procedures. The Court cannot alter the decision of the Trademarks Board's details or allow the trademark to be registered based on the Court's opinion. This problem appears in several of the Supreme Court judgments and the Central Intellectual Property and International Trade Court Judgment cited below.

According to the Act on Establishment of Administrative Courts and Administrative Court Procedures B.E. 2542 (1999), the Administrative Courts have the power to specify the decree under the scope of Section 72, which prescribes both the scope of the content and the scope of the period in order to be the criteria for the Administrative Courts to consider when specifying the decree in accordance to each category of the plaint. The scope of the content has only one content and cannot be determined in other ways; as a result, it becomes the limitation of the power of the court.¹⁶⁰ However, according to the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996), there are no specific provisions or rules in order to the limitation of the power of the court. Although Chapter 3 of the Act provided the procedure of Intellectual Property and International Trade cases, which only relied on the provisions of the Civil Procedure Code and the Criminal Procedure Code, there are no provisions or rules pertaining to the judicial review procedure. Despite the fact that the majority of trademark cases involve an appeal against the Trademarks Board's decisions, which are administrative actions, it is clear that there are no

¹⁶⁰ Pranee Suksri, Lak Khodmhai Tuepai Nai Tang Pok-kroong Nai Kam Pi Pak Sa Khong Sam Pok-kroong Soong Sud: Suksa Lak Kwam Dai Sud Suan [Principle of Proportionality] Lae Lak Kwam Sa Mer Pak [Principle of Equality] (Administrative Court 2018) (“หลักกฎหมายทั่วไปในทางปกครองในคำพิพากษาของศาลปกครองสูงสุด: ศึกษาหลักความได้สัดส่วน (Principle of Proportionality) และหลักความเสมอภาค (Principle of Equality)” (สำนักงานศาลปกครอง 2561)).

limitations on judicial review under the administrative law specified by the Act or relevant rules. The limitless power of the court can be seen in many Court judgments as shown in the examples below.

1) Central Intellectual Property and International Trade Court Judgment No. 130/2560¹⁶¹

The plaintiff is the owner of the service mark “Booking.com”. The registration was refused by the Trademark Registrar and the Trademarks Board on the grounds that the service mark “Booking.com” consists of the combination of the word ‘Booking’ and ‘.com’, which have ordinary meanings and reference to the character of the service. However, the Court held that there are no reasons or grounds why the Trademark Registrar and the Trademarks Board have raised such specific meanings of the word ‘Booking’ and ‘.com’ in order to reject the trademark registration. Thus, the Trademark Registrar and Trademarks Board's decision is inaccurate. Since the words “Booking” and “.com” have additional meanings, both related and unrelated to reservations and computers, therefore, it has no specific meaning to determine what they mean when the words are combined. In addition to the Trademark Registrar's and Trademark Board's considerations, “Booking.com” could be translated into other meanings. The mark must be in considering as a whole which cannot be separated into individual elements. Moreover, the defendant failed to prove that the mark might confuse or mislead the public as to the origin of goods. The plaintiff's service mark had been registered in many countries, and the trademark registrability criteria provided the same international standard. Therefore, the plaintiff's service mark has a distinctive character which is registrable under the Trademark Act B.E. 2534 (1991).

Moreover, the Court held that the plaintiff has submitted sufficient evidence to prove that it has continuously used its trademark “Booking.com” with the other products for a considerable period of time until the relevant public in Thailand becomes aware and recognizes that the plaintiff's products are different from others.

¹⁶¹ Central Intellectual Property and International Trade Court Judgment No. 130/2560

Hence, the trademark “Booking.com” is deemed distinctive through use and registrable under Section 7 Paragraph 3 of the Trademark Act B.E. 2534 (1991).

2) Central Intellectual Property and International Trade Court on Black Case No. Tor Por 69/2553 and the Red Case No. Tor Por 19/2554¹⁶²

The plaintiff is the owner of the mark “HYDRO SAFE”. The registration was refused by the Trademark Registrar and the Trademarks Board on the grounds that the mark “HYDRO SAFE” consists of the combination of the word ‘HYDRO’ and ‘SAFE’, which can be referred to the products containing water or hydrogen that are safe or capable of preventing the formation of moisture. However, the Court held that the plaintiff’s mark has sufficient distinctive character which is registrable under the Trademark Act B.E. 2534 (1991).

3) Supreme Court Judgment No. 4593/2552¹⁶³

The plaintiff is the owner of the trademark “LASERJET”. The registration was refused by the Trademark Registrar on the grounds that the mark “LASERJET” consists of the combination of the word ‘LASER’ and ‘JET’ which have ordinary meanings and are also considered as the general word. Therefore, the term “LASERJET” is not an invented word and directly refers to the quality and/or character of the covered goods primarily focused on the printer products, as the operation of a laser jet printer uses a laser beam to produce text and images. Therefore, the subject mark lacks inherent distinctiveness under Section 7 Paragraph 2 of the Trademark Act B.E. 2534 (1991). The plaintiff filed an appeal with the Trademarks Board against the Registrar’s decision.

In the Trademarks Board consideration, the Trademarks Board also rendered a decision that the mark lacks inherent distinctiveness. The Court also has an opinion that although the court’s consideration in this matter was the judicial review of the

¹⁶² Central Intellectual Property and International Trade Court on Black Case No. Tor Por 69/2553 and the Red Case No. Tor Por 19/2554

¹⁶³ Supreme Court Judgment No. 4593/2552

legality of the decision of the Trademarks Board, the court's primary concern should be the registrability of the plaintiff's "LASERJET" trademark. The Court held that the plaintiff has submitted sufficient evidence to prove that it has continuously used its trademark "LASERJET" with the other products for a considerable period of time until the relevant public in Thailand becomes aware and recognizes that the plaintiff's products are different from others. Hence, the trademark "LASERJET" is deemed distinctive through use and registrable under Section 7 Paragraph 3 of the Trademark Act B.E. 2534 (1991)¹⁶⁴ and the Department of Intellectual Property Regulation Regarding Well-Known Marks B.E. 2548 (2005).

It is evident that the Competent court reversed the Trademarks Board's decisions on appeal. Moreover, in Supreme Court Judgment No. 4593/2552, the Court held that although the court's consideration in this matter was the judicial review on the legality of the decision of the Trademarks Board, the court's main consideration should be whether the plaintiff's trademark "LASERJET" is registrable. Therefore, the Court recognizes its authority and duty to perform a judicial review of the legality of the Trademarks Board's decision, not the merit of such a decision. The court, however, has disregarded this principle. Currently, the Rules of the Intellectual Property and International Trade Courts are inadequate for the specific rule for the competent court's authority to use its discretion to revoke the administrative act in whole or in part solely based on their opinion.

Since the decision of the Trademarks Board is considered as an administrative order. Consequently, the legitimacy of administrative acts cannot be made based solely on the principles of trademark law, a ruling must simultaneously take into consideration both administrative content and practice, for example, the consideration of the legality principle of the administrative actions or the formality of the process through which the administrative

¹⁶⁴ Trademark Act B.E. 2534 (1991)

Section 7 Paragraph 3 A distinctive trademark may also include names and words not having the characteristics under (1) or (2) if it is used as a trademark with goods which have been widely sold or advertised in accordance with the rules prescribed by the Minister by notification and if it is proved that the rules have been duly met.

actions are issued, etc. However, in the above-cited Court Judgments, the Court only determined the issue of the registrable of a trademark solely based on the trademark law. Therefore, the merits of the decision cannot be a subject matter of judicial review.¹⁶⁵ Based on the current law, the Court can only determine whether the decision of the Trademarks Board is the legality of the administrative actions. Additionally, the Court is not authorized to determine questions of suitability of the subject matter. For all reasons, legal problems regarding the judicial review of decisions of the Trademarks Board under the jurisdiction of the Intellectual Property and International Trade Court can result in four main problems mentioned below.

4.2.2. The Issue Regarding the Suitability of Allowing the Intellectual Property and International Trade Court to Adjudicate and decide Administrative Disputes Involving Trademark Issues.

When determining the administrative disputes relating to trademark registration, it is considered as a dispute between the concerned individual and administrative agencies or officials. Therefore, the fundamental context of the actions by the Trademark Registrar and the Trademarks Board are administrative actions, which should be in compliance with administrative law. Also, the use of administrative authority and power by the Trademark Registrar and Trademarks Board directly affects the people's rights and liberties, which are regarded as administrative acts performed by government officials under the Administrative Procedure Act, B.E. 2539. The primary objective of this Act is to establish a mechanism to ensure that administrative acts do not exceed or violate the scope of their authority. For instance, the administrative act must be carried out by an agency authorized by laws, administrative agencies' actions need to be governed by the principle of impartiality, and the party should be given the opportunity to present his case or defense through the submission of oral or written evidence, and etc. Therefore, the issuance of the decision of the Trademark Board regarding trademark disputes must adhere to the minimum principles and standards governed by the Administrative Procedure Act, B.E. 2539.

¹⁶⁵ *Ibid.*

The notion of public law and private law are two principal areas of law that establish distinct aspects of the social environment and the relationships between individuals and entities. On one hand, private law, generally referred to as civil law, is the body of legislation that regulates the relationships and interactions that take place between individuals, organizations, and other private bodies. It is concerned with the rights of people, the duties they have towards one another, and the legal remedies that are available to them in their private affairs. Private law establishes equal bargaining power between parties, and the relationship between parties is made by freedom without limits of parties. Therefore, when the dispute arises and the contract was made freely negotiate the terms of the agreement, it shall be enforced in accordance with the agreed conditions of the contract. However, the agreed contract must not be expressly prohibited by the law, or against the public order or good morals.

On the other hand, the legal relationship between individuals and the government agency is one of the main concerns of public law, along with the structure, authorities, and responsibilities of various government agencies. Generally, public law concerns issues that affect the broader public or the entire society. The notion of public law includes the obligation to protect people's individual rights against the state authority. The public law that governs relationships between individuals and government agencies, which was unequalled between parties. It would be feasible for governmental agencies to make decisions on the rights of individuals. The government is responsible to ensure compliance with the law. For instance, a person dissatisfied with the decision rendered by an administrative agency may seek for a judicial review by the court of the matter. In which based on the principle of public law, the administrative procedure must be strictly applied in all situations. Public law jurisprudence, therefore, aims to be able to analyze or examine problems rationally in accordance with the public law system.

Due to the decision of the Committee on the Determination of the Powers and Duties among Court no.9/2546 considered that the case involving the appeal against the administrative decision of the Trademarks Board is characterized as a civil case under the jurisdiction of the Intellectual Property and International Trade Court, which is a specialized court under the Courts of Justice. This raises questions concerning uncertain proceedings

regarding the adjudication of administrative disputes involving trademark issues. The study thoroughly discovers that administrative disputes involving trademark law fail to be settled in accordance with the administrative procedure. Since the legal concepts, theories, and rules of public law and private law provide different applicability of a certain law in circumstances. By considering the concept of public law, the relationship between parties is asymmetric and unequal, as one party is the government sector and the other is a private individual with no administrative power. As a result, the applicable and enforcement of public law should be strictly enforced whether the interpretation or consideration of the administrative disputes. On the other hand, private law provides equal status in bargaining power between parties, and the relationship between parties is governed by unrestricted freedom. Thus, when the Intellectual Property and International Trade Court considers a case regarding an appeal against the decision of the Trademarks Board, which is characterized by administrative case, by applying the civil procedure. As a consequence, the individuals involved in the dispute with the administrative agencies are not treated fairly due to the unequal status of the parties.

Through analysis of legal concepts, theories, and rules of public law and private law, thus, problems arise when the Intellectual Property and International Trade Court considers administrative disputes involving trademark law to be governed by civil procedure. The Court applies the Accusatorial system of trial when resolving all types of cases. Generally, the administrative court shall apply the Inquisitorial system of trial, instead of the Accusatorial System, in order to ensure fairness for balancing the power of parties between concerned individuals and administrative agencies or officials. The current practice is contrary to the principles and methods of public law, since the decision of the Trademarks Board is administrative order, which should be in compliance with the administrative law. Therefore, current proceedings without amending the law can lead to many problems. In addition, the study found the problem that people may also have doubts regarding the fairness of the trial and the adjudication of cases since the Courts of Justice and the Administrative Courts apply different judicial procedures. This leads some individuals to believe that the trial and the adjudication of cases are not conducted in an equitable manner. It will be an observation in case the judgment rendered by the Intellectual Property and International Trade Court and

the Administrative Court provide different approaches for similar grounds of disputes or facts of the case that may cause public non-confidence in the judicial process.

4.2.3. The Issue Concerning the Court Proceedings of the Intellectual Property and International Trade Court, in Deciding on Cases Involving Administrative Disputes on Trademark Issues.

The Central Intellectual Property and International Trade Court as a specialized court separated from the Court of Justice. Generally, the Court of Justice applied the Accusatorial system. In the Accusatorial system, the court would maintain neutrality and the right of both parties to provide evidence by not interfering with the parties' search for evidence.¹⁶⁶ Moreover, besides the court proceedings provided by provisions of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) provides that where there are no such provisions and Rules on the issue, the provisions of the Civil Procedure Code, the Criminal Procedure Code or the Act for the Establishment of Kwaeng Court and its Criminal Procedure Code shall apply *mutatis mutandis*.¹⁶⁷ Additionally, the Intellectual Property and International Trade Court has established specific court proceedings, for example, the Intellectual Property and International Trade Court shall proceed with the hearing without adjournment until the hearing is over, the court shall promptly render a judgment or an order, and etc..¹⁶⁸

Administrative trademark disputes and civil trademark disputes are not segregated by the Intellectual Property and International Trade Court. This allows the Intellectual Property and International Trade Court to apply the Accusatorial system in adjudicating administrative cases regarding trademark law, which includes the proceeding of the judicial review of the

¹⁶⁶ Wanchai Boonbumrung, Tanakrit Woratanatchakul and Siriphan Polrob, Principle and Theory of the Civil Procedural Law Vol.1, 3rd published (Bangkok: Winyuchon Printing Press, B.E. 2556), page 158.

¹⁶⁷ Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) s 26

¹⁶⁸ Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) s 27

decisions of the Trademarks Board. The court proceedings performed by the Intellectual Property and International Trade Court are in accordance with the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996), especially the admissibility of evidence in civil procedure. In addition to the provisions of the Civil Procedure Code, the Intellectual Property and International Trade Court may require all parties to appear in court to mutually determine the course of proceedings. For instance, approaching mediation to achieve conciliation or applying of arbitration, allowance the parties to decide the time and place, and procedure for all necessary proceedings. When a witness is testifying on the specifics of any fact related to the case, and the witness is unable to recall such specific facts, the witness may, with the approval of the court, look into the witness's written notes as part of the testimony. In addition, if the witnesses reside a significant distance from the court, the court may permit them to hear trial witnesses via video conference.

As described earlier in the aforementioned provisions of law, according to Section 26 in conjunction with Section 30 of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) stated that *“Proceedings in the intellectual property and international trade courts shall be in accordance with the provisions of this Act and the Rules issued under Section 30. Where there are no such provisions and Rules on the issue, the provisions of the Civil Procedure Code, the Criminal Procedure Code or the Act for the Establishment of Kwaeng Court and its Criminal Procedure Code shall apply mutatis mutandis.”*. It can be concluded that all of the judicial systems described above are mainly processed by the Accusation system. In the Accusation system, the role of the judge is to remain impartial.¹⁶⁹ The system also provides procedure concept in the parties compete against each other, and the judge acts as a referee to ensure that the parties are treated fairly by not interfering with the parties' search for evidence and to ensure that the legal laws and procedures governing the civil proceedings are adhered to. In case the evidence presented by the parties to the court is defective or incomplete, the judge will

¹⁶⁹ Ltd AA, 'Inquisitorial and Accusation Systems of Trial' (*Law Teacher*, 17 May 2023) <<https://www.lawteacher.net/free-law-essays/common-law/inquisitorial-and-accusation-systems-of-trial.php>> accessed 18 June 2023

not interfere with the facts or witnesses of the parties as this would lead to unfairness in the judgment of the case.

In light of this, the Intellectual Property and International Trade Court applies the Accusation system in both administrative and civil trademark cases, therefore, the role of the Intellectual Property and International Trade Court is limited to being an intermediary to supervising the proceedings of the case and adjudging evidence obtained from the parties. The Court has no authority to summon additional witnesses or to assist either party in searching for evidence. The Court cannot issue a subpoena to a witness on its own if neither party has submitted a list of witnesses, including material witnesses and documentary evidence. According to the theory of the judicial system, which is divided into two systems, namely, the Accusation system and the Inquisitorial system. In the Accusation system, judges are impartial in assuring the fairness of due process. The majority of cases that proceed to trial are meticulously prepared through a procedure that supports the search for evidence and testimony prior to their presentation by the parties to the Court. In order to maintain neutral decision-makers, the Court will not interfere with the parties' search for evidence. This Accusation system mostly applies to civil cases. On the other hand, the Inquisitorial system is a legal system in which the court or a part of the court involved in the investigation of the case by the judge will participate in the process of fact-finding. The Court could even order the examination of specific pieces of evidence if they deem the evidence presented by the party insufficient. Mostly, the litigation process in administrative courts is significantly more inquisitorial. The majority of the procedure is carried out via written correspondence; the plaintiff submits a letter to the court, which then requests explanations from the administration; when the questions have been answered, the court may next ask the plaintiff for more information, etc. This method reflects the reality that administrative litigation is, for the most part, about concerns about formal processes and technicalities. Additionally, the Court may exercise its discretion to determine whether any evidence is persuading, rather than considering only the evidence required by law. The proceedings, therefore, rely mainly on the reliability of the case review and considering the interests of the state or the public order.

When determining the court procedure over administrative disputes concerning trademark law by applying the Accusation system in Civil Procedure law. Thus, the case will be applied the principle of the legal burden of proof which the party who alleges the fact in each issue shall bear the legal burden of proof of the fact under Section 84/1 of the Thai Civil Procedure Code. It meant that the defendant always bears the burden of proof. In addition, the Intellectual Property and International Trade Court place an emphasis on verbal proceedings. Particularly, the witness examination procedure is rigorously governed by the rules so that neither party can take advantage of the other. If the parties fail to comply with the formalities required by the law regarding the evidence, it may affect the case's outcome in a manner unrelated to its substance. As a result, the Court plays a minor role in administrative dispute proceedings regarding trademark law.

The analysis of the provisions of the law, theories, and the judicial system mentioned above shows that the adjudication of administrative disputes on trademark law by the Court is based on the system of Accusations, which is contrary to public law principles. Since the parties in the administrative dispute have unequal power, it is unfair to the parties in the lawsuit, particularly the concerned individual parties. In this case, one party is a government agency exercising administrative power, namely the Trademarks Board. Thus, the majority of documentary evidence is held by administrative agencies, making it difficult for the private sector to find evidence to support their claims. Hence, the application of the Accusation system over administrative issues involving trademark law under the jurisdiction of the Intellectual Property and International Trade Court is inconsistent with the principles of judicial review of administrative acts grounded in public law.

4.2.4. The Issue of Classifying Cases Under the Jurisdiction of the Intellectual Property and International Trade Court.

In court proceedings, it is necessary to explicitly define the categories of cases in order to properly adjudicate various cases or disputes, all include the competent court over the case, the system or process of trial, and the adjudication of cases. The classification of cases in the court is based on legal principles and the fundamental nature of the offense,

which can be divided into civil cases, criminal cases and administrative cases. The Court of Justice has jurisdiction over civil and criminal cases, while the Administrative Court is responsible for administrative cases. The fact that the Intellectual Property and International Trade Court fails to explicitly define the categories of cases that fall under its jurisdiction can cause controversies.

According to Section 3 Paragraph two of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) provides the definition of “Intellectual Property and International Trade Cases” which means civil and criminal cases under the jurisdiction of the intellectual property and international trade courts. Also, Section 7 of the Act provides that civil and criminal cases regarding intellectual property as a case under the jurisdiction of the Central Intellectual Property and International Trade Court and details as follow.

1. criminal cases regarding intellectual property matters including criminal cases regarding trademarks, copyrights and patents; criminal cases regarding offenses under Sections 271–275 of the Criminal Code; criminal cases regarding disputes over the layout–designs of integrated–circuits, scientific discoveries, trade names, geographical indications, trade secrets, and plant varieties protection;
2. civil cases regarding intellectual property matters including civil cases regarding trademarks, copyrights, patents and cases arising from agreements on technology transfers or licensing agreements; civil cases in connection with offenses under Sections 271–275 of the Criminal Code; civil cases regarding disputes over layout–designs of integrated–circuits, scientific discoveries, trade names, geographical indications, trade secrets and plant varieties protection;¹⁷⁰

In practice, the Intellectual Property and International Trade Court classifies administrative disputes involving intellectual property law, such as cases regarding appeals against decisions of the Trademarks Board, as civil cases. By studying the above-mentioned

¹⁷⁰ Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) s 7

provisions, however, the Court also includes the cases of appeal against decisions of the Trademarks Board, which is an administrative case, as a case under the jurisdiction of the Intellectual Property and International Trade Court. When the Intellectual Property and International Trade Court does not prescribe to separate administrative disputes from civil cases, thus, the Courts consider all cases in the same manner regardless of the nature of each case. In addition, administrative disputes can be arising from the neglect of duty, unreasonably delaying, or abuse of power by the Trademark Registrar or Trademarks Board. It can be seen that disputes originating from administrative actions relating to trademark law in each case have distinct characteristics of administrative acts; consequently, the resolutions in each case will be different.

Due to the fact that the Court does not explicitly classify cases by segregating administrative case involving trademark law from civil cases, as a result in administrative disputes is treated as general civil cases. Thus, it is resulted in the Court applies the Accusation system. Additionally, due to the unequal status of the parties in administrative cases and the fact that nearly all documents and evidence are in the possession of the state or administrative authorities, it is contrary to the judicial system that the Inquisitorial System should be applied in all administrative cases.

4.2.5. The Issue of Judges of the Intellectual Property and International Trade Court Lacking Sufficient Knowledge and Experience with Administrative Laws.

The knowledge and expertise of Intellectual Property and International Trade Court judges in the area of private law do not fully enable them to consider trademark-related administrative disputes. A study of decisions of the Intellectual Property and International Trade Courts revealed that the judges have control over the administrative agencies' discretion as well as control over the administrative expertise and experience and details as follows.

1. The control over the administrative discretion of the Trademarks Board by the Intellectual Property and International Trade Court.

The study found that the Intellectual Property and International Trade Court greatly oversaw the use of administrative discretion in considering the issuance of administrative orders. For instance, the Central Intellectual Property and International Trade Court Judgment No. 93/2562.¹⁷¹ The plaintiff is the owner of the trademark "*Orchestrating a brighter world*". The registration was refused by the Trademark Registrar on the grounds that the mark consists of words that have an ordinary meaning. The Trademarks Registrar and the Trademarks Board considered that the meaning of the mark can be referred to as the 'organization of the better world'. The Court held that the mark was first invented by the plaintiff and when it applied to the covered goods in Class 9, it is not directly referred to the character or the quality of the goods. Therefore, the plaintiff's mark cannot mislead the public as to the origin of goods and it can recognize that the plaintiff's products are different from others. Thus, the mark has inherent distinctiveness under Section 7 Paragraph 2 of the Trademark Act B.E. 2534 (1991). The Court also stated that the discretion of the Trademark Registrar and the Trademarks Board upon a wrong principle.

In such cases, it can be seen that the Trademark Registrar has ordered the rejection of the plaintiff's trademark on the grounds that the plaintiff's trademark has no distinctive characteristics that can be registered under Section 6 of the Trademark Act B.E. 2534 (1991). Such Registrar's authority provided under Section 16 of the Trademark Act B.E. 2534 (1991), stated that "If, in the opinion of the Registrar, the entire trademark or any essential part thereof is not registrable under Section 6, the Registrar shall refuse registration and shall, without delay, in writing notify the applicant of the order giving the grounds therefor". In this instance, it can be seen that the trademark law grants administrative authorities the discretion to decide whether or not to accept such trademark registrations. If the Trademark Registrar determines that the trademark as requested in the application for registration should not be registered in accordance with Section 6 of the Trademark Act B.E. 2534, the application for registration will be denied together with the detailed notification. However, if the Trademark Registrar determines that the trademark application should be registered pursuant to Section 6, the Trademark Registrar will issue an order to grant the trademark registration. This situation is viewed as granting administrative discretion to determine whether to act within

¹⁷¹ Central Intellectual Property and International Trade Court Judgment No. 93/2562

the scope specified by law. Also, Section 96 of the Trademark Act B.E. 2534 (1991)¹⁷² grants the Trademarks Board the authority to review all appeals and cancellation petitions filed under the act. Various versions of the Thai Trademark Appeal Board's Regulations on the Procedure for Examination of Appeal and Cancellation Petitions govern the responsibilities and authority of the Thai Trademark Appeal Board with respect to the examination of appeals. Therefore, decisions of the Trademarks Board are also considered as an administrative action by its administrative discretion.

In light of these facts, the Intellectual Property and International Trade Court rendered a judgment revoking the Trademark Registrar's order and the Trademarks Board's decision to reject the trademark registration, thus, judges have control over the administrative agencies' discretion. This is inconsistent with the principles of judicial review of administrative acts, which state that the courts are limited to reviewing administrative actions in order to ensure that discretion remains within the legal framework, the Court will not review the suitability of the content of such administrative order, as the legislature has delegated this authority to the administrative sector. The court will examine the discretion of the government in order to determine whether the government has abused its legal authority. If it was found that the exercise of administrative discretion breaches the limits prescribed by law, the Court may revoke such administrative action. However, if the administrative agency's exercise of discretion does not exceed the limits prescribed by law, but is nevertheless an inappropriate exercise of discretion, the Court lacks the authority to consider the appropriateness of discretion. Hence, the exercise of discretion by the Intellectual Property and International Trade Court on behalf of the Administrative Court to consider administrative disputes would

¹⁷² Trademark Act B.E. 2534

Section 96 The Board shall have the following powers and duties: -

- (1) to decide appeals against orders or decisions of the Registrar under this Act;
- (2) to consider and order on the petition for cancellation of trademarks, service marks, certification marks, collective marks or trademark license agreements under this Act;
- (3) to advise and counsel the Minister on the issue of Ministerial Regulations and notifications under this Act;
- (4) to consider other matters assigned by the Minister.

be contrary to the principle of separation of powers since the Intellectual Property and International Trade Court acted as the controller over the Administrative Court.

2. The control over the expertise and experience of judges of the Intellectual Property and International Trade Court.

The issue of the judges of the Intellectual Property and International Trade Court lacking sufficient knowledge and experience with administrative laws. Since the establishment of the Central Intellectual Property and International Trade Court as a specialized court separated from the Court of Justice. Thus, judges should have knowledge and expertise in particular areas of intellectual property laws because intellectual property cases are special cases that differ from general cases. The judges of the intellectual property and international trade courts, however, are appointed by judges who are trained and have gained expertise in judicial proceedings under private law and using the Accusatorial System in trials. Consequently, when judges have to adjudicate cases relating to administrative disputes, in theory, they must also possess the requisite knowledge, expertise, and experience in adjudicating cases in accordance with the principles of public law as well. Hence, the lacking of experience and expertise in public law resulted in the ineffective judicial review of administrative actions.

4.3. Conclusion

Current provisions of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) and the Rules for Intellectual Property and International Trade Case B.E. 2540 (1997) cannot provide clearly proceedings of the adjudication for administrative cases involving trademark law. In addition, the current practices of the Intellectual Property and International Trade Court for judicial review of the decision of the Trademarks Board, which is considered an administrative case, are inconsistent with the principle of administrative law. In order to conform to the administrative system

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

Since orders or decisions whether issued by the Trademark Registrar or Trademarks Board, affect the rights of individuals and thus result in administrative disputes. Thus, it can be concluded that the decision of the Trademarks Board shall be considered as the administrative order according to the administrative law. However, the study found that it is reasonable and provides appropriate reasons that the appeal case against the Trademarks Board should fall under the jurisdiction of the Intellectual Property Court based on the fact that the competent court must be expertise in the subject matter.

However, judicial review of decisions of the Trade Marks Board by the Intellectual Property and International Trade Courts under Thai law remains deficient and inappropriate in that the Court is empowered to decide the merit of cases rather than reviewing only legality of the Board's decisions. It is, therefore, appropriate to amend the law by, in particular, amending the Rules of the Intellectual Property and International Trade Courts to the effect of limiting the jurisdiction of the Court, in relation to judicial review, to reviewing legality of administrative decisions of the Trademarks Board.

In addition, the definition of “Intellectual Property and International Trade Cases” only refer to civil and criminal cases under the jurisdiction of the Intellectual Property and International Trade Court, pursuant to Section 3 of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996). It can be concluded that the Act does not prescribe administrative cases involving trademarks, copyrights, and patents. As a result, trials in civil cases and cases involving administrative disputes are conducted in the same way, and the Court uses the Accusatorial System of trial when resolving disputes. Consequently, the Inquisitorial system, which is commonly applied to administrative cases, has not been applied by the Court in the trial and adjudication of administrative cases before the Intellectual Property and International Trade Court. Based on the research of the other foreign intellectual property judiciary system, especially in Taiwan

and Germany, those issues were explicitly specified by law. For example, in Taiwan, the cases within the jurisdiction of the Intellectual Property Courts are clearly classified as civil, criminal, and administrative cases, in order to provide comprehensive and appropriate procedures for each type of case. In Germany, the Federal Patent Court applies the principle of ex officio investigation or conducts its own investigation, also known as the Inquisitorial system, to ensure that private parties in administrative cases are treated properly.

The author considers that the Intellectual Property and International Trade Court using the Accusatorial System in the trial and adjudication of administrative intellectual property cases would not be appropriate or genuinely equitable. Since both parties have unequal status, as one is a state with significant administrative power and the other is a private individual with no administrative power. Therefore, there are legal problems regarding the judicial review of the decision of the Trademarks Board under the jurisdiction of the Intellectual Property and International Trade Court that can cause uncertainty in the trial. Thus, the problems regarding the suitability of allowing the Intellectual Property and International Trade Court to adjudicate and decide administrative disputes, as well as court proceedings, the categorize the case, the lack of sufficient knowledge and experience of the judges of the Intellectual Property and International Trade Court.

The author proposes amending provisions of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) and the Rules for Intellectual Property and International Trade Case B.E. 2540 (1997) in order to rectify and resolve the aforementioned legal problems. Therefore, the Intellectual Property and International Trade Court should apply the Inquisitorial system to administrative cases, including the appeal against the decision of the Trademarks Board, by requiring the Court to play a significant role in gathering facts and evidence. Moreover, the law should provide distinguish between administrative and civil cases, which is appropriate and consistent with the Thai legal system. In order to resolve the lack of sufficient knowledge and experience of the judges of the Intellectual Property and International Trade Court, it should have regulations requiring judges in the Intellectual Property and International Trade Courts should also possess a competent knowledge of the matters relating to administrative procedure apart from the matters relating to intellectual property or international trade. These proposed

amendments would not only uplift the standard for administrative proceedings of the Intellectual Property and International Trade Courts under Thai law to be consistent with international standards but also guarantee that the individuals can receive fair and lawful processing for their claims.

5.2. Recommendations

The author proposes amending the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) and the Rules for Intellectual Property and International Trade Case B.E. 2540 (1997) to provide the Intellectual Property and International Trade Court clear authority to try and decide administrative cases. Additionally, the amendment of law will provide the Court with its limitation in performing judicial review to consistent with the administrative law principles and practices.

5.2.1 Recommendation for Problems of the Suitability of allowing the Intellectual Property and International Trade Court to Adjudicate and Decide Administrative Disputes Involving Trademark Issues.

According to a study of both countries with a single court system and countries with a dual court system, there are specialized courts or divisions that handle intellectual property disputes and appeals against the Trademark and Patent office. However, those courts have clearly specified the types of proceedings or types of cases. In Germany, the Federal Patent Court or *Bundespateentgericht* has specified types of proceedings on the appeal and revocation proceedings. In such instances, the Boards of Appeal of the Federal Patent Court review orders issued by the German Patent and Trademark Office and the Federal Plant Variety Office as the judicial review instance. The decisions are thoroughly reviewed based on both of in terms of facts and law. In order to accomplish this, the Federal Patent Court applies the principle of ex officio investigation or conducts its own investigation.

Consequently, the case under the jurisdiction of the Central Intellectual Property and International Trade Court should be amended to apply comprehensive specifications to

include administrative cases and use the Inquisitorial approach for administrative case. Such comprehensive specifications can be as follows:

- (2) Amending Section 3 of the of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) to include administrative cases shall fall under the jurisdiction of the Intellectual Property and International Trade Court. To illustrate, Section 3 of the of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) should be revised to:

“Intellectual Property and International Trade Cases” mean civil, criminal, and administrative cases under the jurisdiction of the intellectual property and international trade courts.

- (3) Amending Section 7 of the of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996), by adding subsection (12) for ‘administrative cases of appeal against a decision of the competent official under the law relating to intellectual property protection or of the Trademarks Board or of the Board of Patents or the Minister under the law relating to intellectual property protection’. To illustrate, Section 7 of the of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) should be revised to include:

“Section 7 The intellectual property and international trade courts shall have jurisdiction over the following matters:

... (12) administrative cases of appeal against a decision of the competent official under the law relating to intellectual property protection or of the Trademarks Board or of the Board of Patents or the Minister under the law relating to intellectual property protection

Cases falling under the jurisdiction of juvenile and family court shall not be under the jurisdiction of intellectual property and international trade courts.”

- (4) Amending the Rules for Intellectual Property and International Trade Case B.E. 2540 (1997) by adding ‘Title 4 Administrative cases’ as follows.

“Chapter 1 General Provisions:

Rule 54 Administrative cases within the Intellectual Property and International Trade Court shall apply inquisitorial approach for administrative proceedings in accordance with Section 7 (12) of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996)”

Consequently, the purpose of amendments of provisions of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) and the Rules for Intellectual Property and International Trade Case B.E. 2540 (1997) is to apply the appropriate principles of administrative court proceedings to administrative cases within the jurisdiction of the Intellectual Property and International Trade Court. According to the aforementioned principle, the court is actively responsible for gathering facts and evidence in the case. This aims to narrow the gap on inequality in the status of both parties, particularly private parties, in order to achieve true fairness and maximize the public's benefit or public interest in delivering justice to all people equally.

5.2.2 Recommendation for Problems of the Issue Concerning the Court Proceedings of the Intellectual Property and International Trade Court, in Deciding on Cases Involving Administrative Disputes on Trademark Issues.

As mentioned in the previous topic, the author found that in order to provide a solution for the issue concerning the court proceedings of the Intellectual Property and International Trade Court, the Court shall apply the Inquisitorial system for administrative proceedings. Therefore, the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) and the Rules for Intellectual Property and International Trade Case B.E. 2540 (1997) should be amended to provide comprehensive proceedings for administrative cases. The comprehensive amendments were provided in the previous topic.

Therefore, administrative cases involving intellectual property law, such as disputes involving the appeal against the decision of the Trademarks under the Trademark Act B.E. 2534, which is a form of the administrative case, should necessitate judicial review by

applying the Inquisitorial system. The court is responsible for the investigation for the trial and the court has the discretion to investigate the facts as broadly as it deems necessary. Thus, the Accusatorial system shall not be applied by the burden of proof rests with the concerned parties, as in civil cases.

5.2.3 Recommendations for Problems of the Issue to Categorize the Case Under the Jurisdiction of the Intellectual Property and International Trade Court.

Based on the study of the classification of intellectual property cases in Taiwan, which applies a dual court system for trial and adjudication, and has established an intellectual property court specifically for intellectual property cases, particularly similar to Thailand. The cases within the jurisdiction of the Intellectual Property Courts are classified as:

1. Civil actions to protect the rights and interests of intellectual property.
2. Offenses under the criminal code or violation of intellectual property rights and interests.
3. Administrative actions and compulsory enforcement arising to protect intellectual property rights and interests.

In addition, Section 31 of the Taiwan Intellectual Property Case Adjudication Act outlines administrative cases within the Intellectual Property Court's jurisdiction, including the administrative actions concerning intellectual property rights arising under the Patent Act, Trademark Act, Copyright Act, Optical Disk Act, Integrated Circuit Layout Protection Act, Plant Variety, and Plant Seed Act, or Fair Trade Act. It can be seen that, in Taiwan, the cases under the Intellectual Property and Commercial Court can be classified into three categories based on the type and nature of the facts. Consequently, the trial of the Intellectual Property and Commercial Court in Taiwan is more efficient as a result of the separation of administrative disputes involving intellectual property law from civil disputes involving intellectual property law.

Thus, in the study of the problem of categorizing the types of cases under the jurisdiction of the intellectual property court, as compared to countries that have established special courts to hear specific cases, the author found that the concepts of the case category by distinguish between the civil cases and administrative cases shall be applied. In order to

provide the appropriate solution for the problem, the recommendation is amending Section 7 of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) as mentioned earlier in topic 5.2.1. Since an existing type of cases that fall under the jurisdiction of the Intellectual Property and International Trade Court are unclear. Accordingly, the case under the jurisdiction of the Central Intellectual Property and International Trade Court should be amended to apply comprehensive specifications to include administrative cases. Such comprehensive specifications can be fulfilled by adding Section 7 subsection (12) for ‘administrative cases of appeal against a decision of the competent official under the law relating to intellectual property protection or of the Trademarks Board or of the Board of Patents or the Minister under the law relating to intellectual property protection’, as available under Taiwan court jurisdiction as well as the provision under Section 8 (4) of the Act on Establishment of Labour Courts and Labour Court Procedure B.E. 2522 (1979).¹⁷³ To illustrate, Section 7 of the of the Act for the Establishment of and Procedure for Intellectual Property and International Trade Court B.E. 2539 (1996) should be revised to include:

“Section 7 The intellectual property and international trade courts shall have jurisdiction over the following matters:

... (12) administrative cases of appeal against a decision of the competent official under the law relating to intellectual property protection or of the Trademarks Board or of the Board of Patents or the Minister under the law relating to intellectual property protection

Cases falling under the jurisdiction of juvenile and family court shall not be under the jurisdiction of intellectual property and international trade courts.”

Consequently, the distinguishing between administrative and civil cases is appropriate and consistent with the Thai legal system. Additionally, it ensures that administrative judicial proceedings are conducted in accordance with the fundamental principles without any doubts under the jurisdiction of the Central Intellectual Property and International Trade Court.

¹⁷³ The Act on Establishment of Labour Courts and Labour Court Procedure B.E. 2522 (1979)

Section 8 (4) Labor court shall have jurisdiction over the following matters:

(4) cases of appeal against a decision of the competent official under the law relating to labor protection or of the Labor Relations Committee or the Minister under the law relating to labor relations;

In addition, the Intellectual Property and International Trade Court should provide officials with specialized knowledge in intellectual property and international trade law, administrative law, and administrative procedure law for public. In order to provide the appropriate knowledge of impartiality for each type of cases, and to avoid causing confusion in the system of inquisitorial and adversarial.

5.2.4 Recommendations for Problems of the Issue of The Judges of The Intellectual Property and International Trade Court Lacking Sufficient Knowledge and Experience with Administrative Laws.

In the study of judicial review under other countries jurisdiction, it was shown that in the UK, judicial review over the administrative act is governed by the Inquisitorial system, and the courts have the power to issue injunctive relief during the proceedings. The unlawful administrative actions are categorized into the following three categories:

4. The decision maker went beyond their power: the Doctrine of Ultra Vires
5. The Abuse of Discretion
6. Procedural Impropriety and Breach of natural justice

Moreover, the purpose of judicial review is not on the merits of a decision, but rather on its legality. Accordingly, English courts will not review the merits of administrative discretion, although the court itself has full jurisdiction to review administrative acts on both the question of law and fact. Since the principle of judicial self-restraint by the English courts, thus it is improperly usurping the authority of the executive branch. The court can therefore only examine disputes involving an abuse of discretion. If the Court determines that the administrative agency's decision is unlawful, it cannot issue its own decision in lieu of the administrative agency's decision, but it can revoke the administrative agency's decision.

In the United States, the Court will examine whether the administrative agency has exercised power beyond the law (*Ultra Vires*), abused its power (Abuse of Power), or provided legal equity to the parties or not (Due Process of Law). If the administrative agency has acted within the scope of its authority, has not acted arbitrarily, or has not violated the aforementioned principles of equity, thus, there is no authority for the court to perform judicial review.

Consequently, it can be concluded that in many countries, courts are limited in their power to review the legality of administrative acts. It was referred to when the law provides administrative authority the power to perform its duties, the court will not interfere with such power unless such administrative action is unlawful based on the legal basis specified in each country's regulation. Additionally, the judicial control over the exercise of administrative discretion by foreign courts is limited to instances where discretion is exercised inappropriately or beyond its authority specified by law. Therefore, in cases where discretion is exercised within the boundaries of the law, the court should not interfere by judicial control over such exercise of administration. Consequently, the Rules for Intellectual Property and International Trade Case B.E. 2540 (1997) should be amended to the effect of limiting the jurisdiction of the Court. Such amendment can be as follow:

- Amending the Rules for Intellectual Property and International Trade Case B.E. 2540 (1997) by adding in the part of 'Title 4 Administrative cases' as follows.

"Chapter 2 Judicial Review Procedure:

Rule 55 The judicial review procedure must be directed at the process of decision-making rather than with the merits of the decision in question."

Therefore, judicial review shall seek to determine whether an administrative decision was properly made by focusing on the law, not on the merits of the decision. The Court will only need to consider whether the decision-making process was consistent with natural justice, whether factors considered by the decision-maker were correct under the legislation, and whether the decision-maker acted within their powers.

In addition, judges of the Intellectual Property and International Trade Court should follow the mentioned above judicial review principle and gain sufficient knowledge and experience with administrative laws. Moreover, the intellectual property and commercial court judges' knowledge and expertise in private law differs from the knowledge and expertise required in considering public administrative law cases. In order to provide the appropriate solution for the problem, the recommendation is issuing regulations regarding judges in the Intellectual Property and International Trade Courts should also possess a competent knowledge of the matters relating to administrative procedure apart from the matters relating to intellectual property or international trade. Since it cannot be denied that the most of cases

filed by the concerned party is concerning the appeal against the decision of the Trademarks Board which is an administrative agency. Therefore, the Court shall not perform a judicial review on the merits of the Trademarks Board's decision by reversing the decision of the Trademarks Board. Thus, rather, the Court's authority is limited only to deciding the legality of the decision and rendering the judgment to either revoke the decision or continue with the registration. In addition, the Trademarks Board and the Trademarks Registrar should acquire knowledge of administrative law, as their orders and decisions are also based on administrative structure. Also, in order to reduce the administrative cases regarding appeals against the decision of the Trademarks Board and orders of the Trademarks Registrar in the future.



REFERENCES

Books and Book Articles

Administrative Court, Pra Kard Pratarn Sarn Pok-kroong Soong Sud Rueng Satarn Tee Tang Lae Wan Perd Tum Karn Khong Sarn Pok-kroong Klang (Thai government gazette Feb 28, 2001) (ศาลปกครอง, “ประกาศประธานศาลปกครองสูงสุด เรื่อง สถานที่ตั้งและวันเปิดทำการของศาลปกครองกลาง” (ราชกิจจานุเบกษา 28 กุมภาพันธ์ 2544)).

Adriano EA, ‘Natural Persons, Juridical Persons and Legal Personhood’ (2015) 8 Mexican Law Review 101

Bhatia T and Khurana P, ‘Economic Aspect of Trademark’ [2020] SSRN Electronic Journal

Bishop W, ‘A Theory of Administrative Law’ [2018] Administrative Law 335

Chueathai S, Kham Athibai Lak Rattathammanoon Tuapai (2nd edn, Thammasat University 1992) (ชาญชัย แสวงศักดิ์, คำอธิบายหลักรัฐธรรมนูญทั่วไป (พิมพ์ครั้งที่ 2, โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2535)).

Colston C [1999] Principles of Intellectual Property Law

Corwin ES, ‘The Doctrine of Due Process of Law before the Civil War’ (1911) 24 Harvard Law Review 366

Drescher TD, *The Transformation and Evolution of Trademarks: From Signals to Symbols to Myth*, vol 82(3) (Trademark Reporter)

Dyzenhaus D, Hunt M and Taggart M, ‘The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation’ (2001) 1 Oxford University Commonwealth Law Journal 5

Elliott DW, *Judicial Control of Administrative Action: Sourcebook* (Captus Press 2011)

Emruli S, Nuhui A and Kadriu B, 'Trademark Protection, Absolute and Relative Grounds for Refusal of Trademark' (2016) 1 *European Journal of Multidisciplinary Studies* 291

Feng J and Xie J, 'Performance-Based Advertising: Price and Advertising as Signals of Product Quality' [2007] *SSRN Electronic Journal*

Hall AB, 'Modern Democracies. James Bryce' (1923) 28 *American Journal of Sociology* 491

Harrison J, 'Substantive Due Process and the Constitutional Text' (1997) 83 *Virginia Law Review* 493

Harvard Law Review Vol. 40, No. 6, Apr., 1927, vol 40 (The Harvard Law Review Association 1927)

Hongsiri R, Sarn Pok-Khronng Lae Karn Domnarn Kadee Nai Sarn Pok-Khronng (12nd edn, Winyuchon 2023) (ศาลปกครองและการดำเนินคดีในศาลปกครอง ฤทัย หงส์ศิริ (พิมพ์ครั้งที่ 12, วิญญูชน 2566)).

Na Pomphet B, Akkasarn Prakob Karn Sorn Wi cha Khodmhai Pok-kroong (Faculty of Law, Chiang Mai University) (เอกสารประกอบการสอนวิชากฎหมายปกครอง (Administrative Law) (คณะนิติศาสตร์ มหาวิทยาลัยเชียงใหม่))

<<https://www.law.cmu.ac.th/law2011/journal/e1531818728.pdf>> accessed 9 July 2023.

Office of the Council of State, Sarn Lae Ong Korn Eun Nai Kra Buen Karn Yutitum (Office of the Council of State 2018) (สำนักงานคณะกรรมการกฤษฎีกา, ศาลและองค์กรอื่นในกระบวนการศาลยุติธรรม' (สำนักงานคณะกรรมการกฤษฎีกา 2561)).

Paeruang S, 'Problems of Non-Traditional Trademarks Protection Under Thai Law: A Case Study of Motion and Multimedia Marks' (thesis, Thammasat University 2020) 21

Pakeerut W, Kham Sorn Wa Duay Rat Lae Lak Khodmhai Maha Chon (2nd edn, Thammasat University 2014) (วรเจตน์ ภาคีรัตน์, คำสอนว่าด้วยรัฐและหลักกฎหมายมหาชน (พิมพ์ครั้งที่ 2, โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2557)) p. 165–178.

Pakeerut W, Khodmahi Pok-kroong Pak Tue Pai (Nitirat 2011) (วรเจตน์ ภาคีรัตน์, กฎหมายปกครอง ภาคทั่วไป (นิติราษฎร์ 2554)) p. 73-75.

Pakeerut W, Kwam Ru Bueng Ton Kiew Kub Kodmhai Pok-Khron: Lak Karn Phuen Than Khong Kodmhai Pok-Khron Lae Karn Kratum Tang Pok-Khron (2nd edn, Winyuchon 2003) (วรเจตน์ ภาคีรัตน์, ความรู้เบื้องต้นเกี่ยวกับกฎหมายปกครอง: หลักการพื้นฐานของกฎหมายปกครองและการกระทำทางปกครอง (พิมพ์ครั้งที่ 2, วิญญูชน 2546)).

Parness JA, *The Concept of a Unified Court System* (DePaul University 1974)

Piyabutr Saengkanokkun, Khodmhai Pok-kroong Khong Prated Nai Europe (Faculty of Law, Thammasat University 2013) (ปิยบุตร แสงกนกกุล, กฎหมายปกครองของประเทศในยุโรป (โครงการตำราและเอกสารประกอบการสอน คณะนิติศาสตร์ มหาวิทยาลัยธรรมศาสตร์ 2556)).

Sawangsak C, *INTERNATIONAL ASSOCIATION OF SUPREME ADMINISTRATIVE JURISDICTIONS* (General Information of Thai Administrative Court) (Winyuchon Publication House 2022)

Sawangsak C., Kham Athibai Kodmhai Pok-Khron (31st edn, Winyuchon 2022) (ชาญชัย แสวงศักดิ์, คำอธิบายกฎหมายปกครอง (พิมพ์ครั้งที่ 31, วิญญูชน 2565)).

Schmeilzl B, 'Know Your Way around German Civil Courts' (*GermanCivilProcedure.com*, 30 October 2018) <<https://www.germancivilprocedure.com/know-your-way-around-german-civil-courts>> accessed 25 June 2023

Singkaneti B, Lak Khodmhai Kiew Kub Karn Kwub Kum Fhai Pok-kroong (7th edn, Winyuchon 2020) (บรรเจิด สิงคะเนติ, หลักกฎหมายเกี่ยวกับการควบคุมฝ่ายปกครอง (พิพม์ครั้งที่ 7, วิญญูชน 2563)).

Singsuwong S, Karn Aut Torn Kham Sang Tang Pok-kroong (Krisdika Bureau of administrative law 2017) (ศุภวัฒน์ สิงห์สุวรรณ, การอุทธรณ์คำสั่งทางปกครอง (สำนักงานคณะกรรมการกฤษฎีกา 2560) p. 6-7

Suksri P, Lak Khodmhai Tuepai Nai Tang Pok-kroong Nai Kam Pi Pak Sa Khong Sarn Pok-kroong Soong Sud: Suksa Lak Kwam Dai Sud Suan [Principle of Proportionality] Lae Lak Kwam Sa Mer Pak [Principle of Equality] (Administrative Court 2018) ('หลักกฎหมายทั่วไปในทางปกครองในคำพิพากษาของศาลปกครองสูงสุด: ศึกษาหลักความได้สัดส่วน (Principle of Proportionality) และหลักความเสมอภาค (Principle of Equality)' (สำนักงานศาลปกครอง 2561)).

Ministry of Commerce, Kham Sang Tang Tung Ka Na Kam Ma Karn Krueng Mhai Karn Ka (Department of Intellectual Property, Legal Division 2020) (กระทรวงพาณิชย์, 'คำสั่งแต่งตั้งคณะกรรมการผู้ทรงคุณวุฒิในคณะกรรมการเครื่องหมายการค้า' (กรมทรัพย์สินทางปัญญา กองกฎหมาย 2563)).

Narongdech Sruekhsit, Karn Krueb Kum Trued Sorb Karn Kratum Tng Pok-kroong Nai Prated Ang Krid (1st edn, Winyuchon 2010) (ณรงค์เดช สรุโฆษิต, การควบคุมตรวจสอบการกระทำทางปกครองในประเทศไทย (พิมพ์ครั้งที่ 1, วิญญูชน 2553)).

Suksri P, 'หลักกฎหมายทั่วไปในทางปกครองในคำพิพากษาของศาลปกครองสูงสุด: ศึกษาหลักความได้สัดส่วน (Principle of Proportionality) และหลักความเสมอภาค (Principle of Equality)' [2018] <http://search.admincourt.go.th/>.

Tingsamit W, Kham Athi Buy Krueng Mhai Karn Ka [Commentary of Trademark Law] (Nititham 2002) (ว้ส ดิงสมิตร, คำอธิบายกฎหมายเครื่องหมายการค้า (สำนักพิมพ์นิติธรรม 2545).

Virutpich V, Lak Karn Phuen Than Khong Kodmhai Pok-Khrong [Findamental principles of administrative law] (2nd edn, Winyuchon 1997) (วรพจน์ วิศรุตพิชญ์, หลักการพื้นฐานของกฎหมายปกครอง (พิมพ์ครั้งที่ 2, วิญญูชน 2540)).

Virutpich V, Kho Kwam Kid Lae Lak Tarn Bang Pra Karn Khong Kodmahi Pok-kroong (6th edn, Winyuchon 2023) (วรพจน์ วิศรุตพิชญ์, ข้อความคิดและหลักการพื้นฐานบางประการของกฎหมายปกครอง (พิมพ์ครั้งที่ 6, วิญญูชน 2566)).

Wattanarung P, Lak Kodmhai Maha Chon [PRINCIPLES OF PUBLIC LAW] (14th edn, Ramkhamhaeng University Press 2019) (ภูริชญา วัฒนรุ่ง, หลักกฎหมายมหาชน (พิมพ์ครั้งที่ 14, สำนักพิมพ์มหาวิทยาลัยรามคำแหง 2562)).

Wayuphap P, Kgam Ati Buy Rabub Sarn Lae Pra Thammanoon Sarn Yu Ti Tham (8th edn, Winyuchon 2019) (ไพโรจน์ วายุภาพ, คำอธิบายระบบศาลและพระธรรมนูญศาลยุติธรรม (พิมพ์ครั้งที่ 8 วิญญูชน 2554)).

Wertheimer HW, 'The Principle of Territoriality in the Trademark Law of the Common Market Countries' (1967) 16 International and Comparative Law Quarterly 630

WIPO Intellectual Property Organization, *WIPO Intellectual Property Handbook: Policy, Law and Use* (WIPO 2008)

Wisarutphith W, *Judicial Control of the Exercise of Administrative Discretion*, vol 1 (Bot Bundit 47 1991)

——, *Introduction to Law: Basic Principles of Administrative Law and Administrative* (3rd edn, Winyuchon 2006)

Articles

(*Wagamama Ltd v. City Centre Restaurants Plc*, [1995] FSR 713 (ch. D.) (Eng.))
<http://www.peteryu.com/intip_msu/wagamama.pdf> accessed 25 May 2023

Acharya M, 'Functions of Trademarks in India' (*cleartax*, 25 May 2022)
<<https://cleartax.in/s/functions-trademarks-in-india>> accessed 28 May 2023

Admin, 'Locus Standi: Meaning and Essential Ingredients of Locus Standi' (*Legal Study Material*, 6 December 2021) <<https://legalstudymaterial.com/locus-standi-meaning-and-essential-ingredients-of-locus-standi/>> accessed 6 May 2023

Ariyanuntaka V (*Intellectual property and International Trade Court: A new dimension for IP rights enforcement in Thailand*) <<https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/th/th027en.html>> accessed 6 May 2023

Austin GW, 'The Territoriality of United States Trademark Law' (SSRN, 13 April 2006)
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=896620> accessed 28 May 2023

Central Intellectual Property and International Trade Court, 'History - Central Intellectual Property and International Trade Court' (*Central Intellectual Property and International Trade Court*, 30 April 2020) <<https://ipitc.coj.go.th/th/content/page/index/id/191441>> accessed 2 June 2023

Chang V and Chao M, 'The Legal System - Taiwan' (*The Legal System - - Taiwan*, 25 October 2004) <<https://www.mondaq.com/corporatecommercial-law/29181/the-legal-system>> accessed 2 July 2023

Charvet J, 'The Idea of State Sovereignty and the Right of Humanitarian Intervention' (*JSTOR*, 1997) <<https://www.jstor.org/stable/1601447>> accessed 29 April 2023

Commons H of (*Judicial Review and Courts Act 2022*)
<<https://www.legislation.gov.uk/ukpga/2022/35/notes/division/3/index.htm>> accessed 26 June 2023

Ip W, 'Thailand's Struggles to Protect Translation Rights for Foreign Literary Works' (*WE IP*, 20 July 2022) <<https://weintellectual.com/thailand-translation-rights-for-foreign-literary-works/>> accessed 23 May 2023

Ltd AA, 'Inquisitorial and Accusation Systems of Trial' (*Law Teacher*, 17 May 2023)
<<https://www.lawteacher.net/free-law-essays/common-law/inquisitorial-and-accusation-systems-of-trial.php>> accessed 18 June 2023

McKenna MP, 'The Normative Foundations of Trademark Law' (*SSRN*, 16 March 2006)
<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=889162> accessed 23 May 2023

Mirandah, 'Thailand: New Regulations of the Thai Trademark Appeal Board Bring Changes to Procedures and Formalities of Appeals' (*International Trademark Association*, 15 July 2020) <<https://www.inta.org/perspectives/law-practice/thailand-new-regulations-of-the-thai-trademark-appeal-board-bring-changes-to-procedures-and-formalities-of-appeals/>> accessed 1 April 2023

Ramirez S, 'The History of Trademarks All around the World' (*iGERENT*, 30 June 2021)
<<https://igerent.com/history-trademarks-all-around-world>> accessed 21 May 2023

Unacademy, 'Principles of Natural Justice' (*Unacademy*, 9 June 2022)

<<https://unacademy.com/content/upsc/study-material/law/principles-of-natural-justice/>>
accessed 9 May 2023

Visrutipich V, 'Thailand - Association Internationale Des Hautes Juridictions Administratives' (*Association Internationale des Hautes Juridictions Administratives International Association of Supreme Administrative Jurisdictions*, 23 November 2022)

<<https://www.aihja.org/en/membre/thailand-supreme-administrative-court/>> accessed 11 July 2023

'Application Filing Basis' (*United States Patent and Trademark Office - An Agency of the Department of Commerce*, 18 May 2023)

<<https://www.uspto.gov/trademarks/basics/application-filing-basis>> accessed 29 May 2023

'Bullet Money' (*Wikipedia*, 17 April 2023) <https://en.wikipedia.org/wiki/Bullet_money>
accessed 23 May 2023

'Due Process' (*Wikipedia*, 15 July 2023) <https://en.wikipedia.org/wiki/Due_process>
accessed 10 July 2023

'Intellectual Property-Judicial-Official Business - Intellectual Property' (*Judicial Yuan (司法院)*) <<https://www.judicial.gov.tw/en/cp-1603-79857-5d778-2.html>> accessed 3 July 2023

'International Trademark Rights' (*International Trademark Association*, 1 February 2021)
<<https://www.inta.org/fact-sheets/international-trademark-rights/>> accessed 28 May 2023

'Introduction to Trademark Law and Practice': (*United Nations*)

<<https://digitallibrary.un.org/record/50302>> accessed 26 May 2023

'Judicial Independence' (*Wikipedia*, 6 July 2023)

<https://en.wikipedia.org/wiki/Judicial_independence> accessed 10 July 2023

'Judicial Review in English Law' (*Wikipedia*, 24 July 2023)

<https://en.wikipedia.org/wiki/Judicial_review_in_English_law> accessed 28 June 2023

'Judiciary of Germany' (*Wikipedia*, 22 April 2023)

<https://en.wikipedia.org/wiki/Judiciary_of_Germany> accessed 25 June 2023

'Madrid Protocol' (*United States Patent and Trademark Office - An Agency of the Department of Commerce*, 31 August 2022) <<https://www.uspto.gov/trademarks/laws/madrid-protocol>> accessed 30 May 2023

'Marrakesh Agreement Establishing the World Trade Organization' (*Agreement on Trade-Related Aspects of Intellectual Property Rights*)

<https://www.wto.org/english/res_e/booksp_e/sli_e/5MarrakeshAgreementEstablishingtheWTO.pdf> accessed 27 May 2023

'Natural Justice and Procedural Fairness at Obsi' (*Ombudsman for Banking Services and Investments (OBSI)*) <<https://www.obsi.ca/en/how-we-work/resources/Documents/Principles-of-Natural-Justice-in-Ombudsmanship.pdf>> accessed 9 May 2023

'Natural Justice' (*Wikipedia*, 15 July 2023) <https://en.wikipedia.org/wiki/Natural_justice> accessed 9 May 2023

'Overview: The TRIPS Agreement' (*WTO*, 2022)

<https://www.wto.org/english/tratop_e/trips_e/intel2_e.htm> accessed 2 June 2023

'Reputation and Its Risks' (*Harvard Business Review*, 1 August 2014)

<<https://hbr.org/2007/02/reputation-and-its-risks>> accessed 28 May 2023

'Rule of Thumb' (*Wikipedia*, 30 June 2023) <https://en.wikipedia.org/wiki/Rule_of_thumb> accessed 1 July 2023

'Understanding the WTO - World Trade Organization' (*WTO*) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_text_e.pdf> accessed 27 May 2023

'What Is Judicial Review?' (*Armstrong Legal*, 23 November 2020) <<https://www.armstronglegal.com.au/administrative-law/national/judicial-review/what-is-judicial-review/>> accessed 17 May 2023

'What Is the Department of Intellectual Property?: Price Sanond: Lawyers in Bangkok, Thailand' (*Price Sanond*, 5 November 2020) <<https://www.pricesanond.com/knowledge/intellectual-property/what-is-the-department-of-intellectual-property.php>> accessed 23 May 2023

Gupta R, 'Judicial Control over Administrative Actions' (*Law column*, 24 June 2021) <<https://www.lawcolumn.in/judicial-control-over-administrative-actions/>> accessed 29 April 2023

Judgements/Decisions

Thai

Central Intellectual Property and International Trade Court on Black Case No. Tor Por 128/2548 and the Red Case No. Tor Por 9/2550 (Decided Case)

Central Intellectual Property and International Trade Court on Black Case No. Tor Por 69/2553 and the Red Case No. Tor Por 19/2554 (Decided Case)

Central Intellectual Property and International Trade Court Judgment No. 130/2560 (Decided Case)

Central Intellectual Property and International Trade Court Judgment No. 93/2562 (Decided Case)

Decision of the Committee on the Determination of the Powers and Duties among Court no. 9/2546

Supreme Court Judgment No. 470/2509

Supreme Court Judgment No. 875/2509

Supreme Court Judgment No. 3543/2545

Supreme Court Judgment No. 1793/2549

Supreme Court Judgment No. 4205/2549

Supreme Court Judgment No. 7024/2549

Supreme Court Judgment No. 7715/2549

Supreme Court Judgment No. 773-776/2550

Supreme Court Judgment No. 4593/2552

Supreme Court Judgment No. 4676/2558



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Publications

Kunlavee Punumpai, 'Judicial Review of Decisions of the Trademarks Board', Independent Study of Master of Laws in Business Laws, Thammasat University, 2023

