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Content

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GENERAL RAPPORT

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1] Introduction

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The theme of the meeting of International Association of Supreme Administrative Jurisdictions held in Istanbul in 2016 is determined to be "Alternative Dispute Resolution in Administrative Matters". The main objective of the theme of the 2016 Congress is to raise awareness and share experiences with respect to alternative dispute resolution procedures based on substantial experiences of countries and different legal practices, to develop and strengthen existing practices in the light of available information, to facilitate resolution of administrative disputes through alternative procedures by introducing new practices to legal systems and to enable alleviation of workload before the administrative jurisdictions. The questionnaire prepared under such theme has focused specifically on administrative application of alternative resolution procedures rather than general application thereof and has been sent to all members of Association aiming to collect information on the objective, scope, parties, application and efficiency of such procedures.

It should be noted that, in assessment of the answers to the questionnaire, the definition of alternative dispute resolution procedures and "administrative matters" has been treated in a larger context in order to enable sharing of all practices in different countries. The members of the Association were invited to respond by taking into account exclusively the law applicable to the three themes selected and around which the commissions were formed: public contracts and public procurement, public service, and taxation and economic regulation. The present general report has been prepared based on the replies of 39 member states[1] responding to the questionnaire.

Without pretending to be exhaustive, the general report is built around four axes: the prior definition of alternative dispute resolution procedures, their evolution and the objectives they pursue (II), the presentation of these procedures in their diversity and with their national specificities (III), rules restricting the use of these procedures (IV) and the evaluation of the effectiveness of alternative dispute resolution procedures (V).

2] Definition and distinctive features of alternative dispute resolution procedures

2.1 Definition and Distinctive Features of Alternative Dispute Resolution Procedures

There exists no official definition of alternative dispute resolution procedures in most of countries. Nevertheless, ignoring all available different definitions and based only on the replies of member states, common points of definitions made with respect to legal practices in different countries give us a general definition of alternative dispute resolution procedures (ADR) as procedures providing the opportunity to settle disputes through alternative means other than those available in court room. Alternative resolution procedures applied by the parties before the court after exercise of judicial procedures (judicial alternative resolution procedures) are not considered an act of litigation even if held within the judicial process.

The features of these procedures are counted as the principle of discretion, provision of flexibility in direction of the agreement and decision-making process, mutual dialogue, principle of confidentiality and as being cost-efficient and these features are emphasised to be the essential differences between alternative and judicial procedures. Another interesting view is that a decision made as a result of dispute resolution procedures deemed alternative to judiciary lacks the quality of being final such as court decisions, otherwise such procedures should also be considered judicial procedures as well.

Pursuant to the principle of discretion, the choice to be made among ADR procedures other than judicial alternative procedures, selection of the person to be appointed as the executor of the alternative dispute resolution procedure and the decision whether or not to accept the conclusion reached at the end of the process shall be completely left to the will of the parties and the parties to the dispute should be entitled to withdraw from the alternative procedure at any time they wish.

Flexibility with respect to alternative procedures means lack of legal regulations providing strict and tight rules governing the resolution process and allowing the parties to act in a more flexible way taking into account also equity, good faith and customs, etc. in line with the needs and interests of the parties without contravening the laws.

The principle of confidentiality can be explained as privacy and confidentiality of the negotiations and sittings between the parties within alternative dispute resolution procedure and prohibition of use and if necessary destruction of information, documents and evidence submitted throughout the process without permission of the parties.

2.1.1 Alternative dispute resolution procedures and administrative appeals

Different views with respect to participation of an impartial and independent third person in alternative procedures constitutes the basis of different opinions with respect to whether or not administrative appeals can be considered alternative dispute resolution procedure. Because, with regard to applications made to relevant authority or supervising authority due to administrative acts or actions, one of the parties is an agent of the administration and exercise public force and in such negotiations no impartial third person exists and the parties are not in equal positions nor they have complete discretion to make their decisions. Moreover, it is observed that whether or not the administration has bound power or discretion significantly affects the process. In this respect, it is also held that administrative appeals cannot be considered alternative dispute resolution procedures, rather are among resolution procedures associated with alternative procedures.

Notwithstanding, further consideration must be given to the systems in which an independent advisory committee is consulted by administrative authorities reviewing the disputed decision and such committee issues an advice to the administrative authority with respect to the decision to be made.

With regard to administrative appeals, while it is observed that these procedures are considered by some countries as alternative procedures, some others define such procedures as "prolonged unilateral decision-making process" rather than alternative procedures required to be based on the principle of discretion, on the ground that these procedures do not give the parties the opportunity to make a choice between alternative procedures and judicial procedures.

[1] Algeria, Australia, Austria, Belgium,Cameroon, Canada, CzechRepublic, Chile, China, Colombia, Ivory Coast, Cyprus, Spain, France, Finland, Germany, Greece, Hungary, Israel, Lebanon, Lithuania, Luxembourg, Marocco, Mexico, the Netherlands, Niger, Norway, Peru, Poland, Portugal, Senegal,Slovakia, Slovenie, Switzerland, Sweden, Thailand ,Togo, Turkey, Ukraine,

2.1.2. Alternative dispute resolution procedures and arbitration

The replies differ as to whether or not the arbitration is an alternative dispute resolution procedure. The replies while consider the arbitration on the one hand as an alternative dispute resolution procedure as it constitutes an alternative to the judicial procedures, the arbitration on the other hand is defined as a procedure between ADR and judicial procedures on the ground that it is applied upon mutual agreement of the parties or a provision previously concluded by the parties, that it provides limited flexibility due to application of legal rules and the award made by arbitrators is final and binding. Further, arbitration is a more expensive way compared to alternative dispute resolution procedures.

2.2. Evolution of alternative dispute resolution procedures

The evolution of alternative dispute resolution procedures is motivated by objectives such as promotion of communication between citizens and administrative authorities, resolution of disputes without applying to judicial procedures, refraining from prolonged formalities, facilitating alternative resolution instruments beyond costly and slow judicial system and oldest applications of such alternative procedures appear to exist in Switzerland and Netherlands.

In Netherlands, administrative appeal procedures date back to the 19th century. A number of laws and ordinances provided for the right to ask another administrative authority to review the decision at dispute. The administrative authority reviewing the decision usually had any authority (in hierarchical terms) over the administrative authority who took the initial decision. The two most known administrative appeal procedures were the Kroonberoep (appeal to the Crown)[2] and the Gedeputeerde Staten-beroep (appeal to the provincial executive).

In Switzerland, the federal law adopted in 1850 regulating expropriation for public interest provides for reconciliation and concludes that alternative procedures can be more efficient than judicial procedures in certain cases. Among other alternative procedures, administrative appeals and complaint systems operated through petition and calls appear to have comparatively a longer history. Save for a few exceptions among beneficiary countries, these procedures appear to have started to be used since 20th century with an increase in 21st century.

A salient development is that alternative procedures once obligatory in Austria are no longer obligatory by the decision of the Court of Justice of the European Union (C-230/02, Grossman Airservice, C-410/01, Fritsch, Chiari & Partner). The justification was that making legal remedies conditional on exercise of reconciliation as stipulated by Legal Remedies Directive (89/665) is found by CJEU to be in violation of the objectives of the Directive which are expedition and efficiency.

It can be noted that 2008/52/CE Directive of the European Parliament and of Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters also had a partial impact on the development of the procedures in question, however such impact has been limited to civil and commercial matters.

Among regulations which partly cover administrative matters, incorporating such Directive in national law can be counted Law On Mediation No 202/2012 of Czech Republic and Portugal's Law on Mediation of 19 April 2013 covering all matters relating to public mediation, civil and commercial mediation, which was adopted after the enactment of Statutory Decree No 29/2009 dated July, 29. Such Directive was incorporated by France in national law through Statutory Decree No 2011-1540 dated 16 November 2011, it is stated that the definitions and principles in the law will apply to administrative matters by reference to the law No 95-125, however it

[2] This procedure was later repealed following the judgement of the European Court of Human Rights in the Bentham case, where it ruled that the Kroonberoep was not a procedure before an independent and impartial judge ex Article 6 of the European Convention on Human Rights. ECHR 23 October 1985, nr. 8848/80.

is provided that the application is limited to cross-border disagreements in which field no public force is exercised.

Netherlands, Cyprus, Luxemburg, Slovakia and Slovenia incorporated the Directive in their national legal system through a law however administrative matters are kept out of scope of such laws. Again in Hungary, the Law on Mediation of 2002 reinforced by provisions relating to judicial mediation in 2012 covers only private law matters excluding administrative matters.

Lithuania referred to the Directive cited in the Circular of the Ministry of Justice of 23 November 2010 No 1R-256, which envisages that an analytic action should be taken for development of alternative procedures, however no action covering administrative matters is taken in line with the Directive.

Finland criticised the Directive on the ground that its application is limited to civil and commercial matters and it does not cover public accounts, customs and administrative matters and responsibilities relating to the exercise of public force and this situation renders impossible the application of the Directive in public law other than minor exceptions.

It is observed that no single legal text governs the administrative matters with respect to exercise of alternative procedures and scattered legal regulations of different dates and hierarchical orders are applied depending on the need for alternative dispute resolution procedures. It is emphasised by generality of the countries that the law relating to alternative procedures is binding. However, it is considered that detailed regulations in alternative procedures could also minimize the flexibility required for such procedures.

2.3. The goals and objectives of alternative procedures

The main objective of alternative dispute resolution procedures is to allow parties to a dispute to reach a settlement through more simple, faster and cheaper procedures other than those used in judicial procedures.

Settlement of disputes without going to court room or without exercise of conventional judicial procedures when the dispute is before a court will improve the quality of judicial system by alleviating the workload and accelerating the judicial process and will serve to protection of human rights and the right to a fair trial in particular.

It is expected that such procedures will serve to secure establishment of culture of conciliation in the society instead of trial and also provision of social and legal peace.

Moreover, it is considered that fast and simple settlement of disputes will also contribute to the economy. Effective use of resources by preventing unnecessary costs and minimizing prolonged and uncertain judicial processes will ensure legal security of the parties taking part in the economy and will endorse growth of economic activities and encourage investments.

It is observed that administrative and hierarchical appeals ensure that the applicants are provided with a satisfactory new administrative decision or additional information and explanations with respect to the disputed decision as a result of which judicial legal remedies are avoided and further appeal to the same and uniform supervising authority constitutes a filter by presenting a uniform administrative position and it helps avoiding conflicting legal interpretations and applications in the same matter.

3] Alternative dispute resolution procedures exercised in administrative matters

While almost all member states replying to the questionnaire state that various alternative dispute resolution procedures (including administrative and hierarchical appeals and arbitration) are applied, when the question is limited to the application of alternative procedures in administrative matters, some countries state that alternative dispute resolution procedures are by no means used in administrative matters and public law.

While alternative procedures used in such countries in administrative matters differ, following procedures are listed in particular ; amicable agreement, reconciliation, mediation, ombudsman, applications made to specialized administrative or independent councils or authorities, administrative cycle, administrative appeals (appeal for review and hierarchical review), judicial alternative dispute resolution procedures, complaint system through petition and calls, arbitration, online dispute resolution.

Abovementioned procedures can be defined and detailed as follows based on applications observed in the reports of the countries replying to the questionnaire:

3.1. Settlement (agreement)

A settlement agreement is defined as a private law agreement in writing by which the parties resolve a dispute or prevent arising of a dispute; however, according to established precedents, in Belgium law, in order for an agreement be considered as settlement, the parties must must mutually compromise in favor of each other. However, this does not mean that one of the parties submit to the claims of the other party.

Settlement constitutes a final resolution which cannot be contested by the parties. Every person not considered by law having no legal capacity can enter into an agreement.

Settlement is frequently exercised by administrative authorities with respect to matters relating to public contracts.

In Lithuania, it is stated that a settlement agreement is the best way to resolve certain administrative disputes such as those relating to in-house personnel subject to exercise of public authority as well as non-contractual obligations of central or local administrations. The parties to a dispute can conclude the judicial process by mutual agreement at any stage of the process provided that the dispute is compatible and conditions relating to the form and content of settlement agreement are satisfied.

Similarly, the Statutory Decree No 659 on Performance of Legal Services at Public Administrations provides for resolution of administrative disputes through non-judicial procedures. Those who claim that their rights are violated by an administrative act may apply to the administration for the compensation of the damage in an amicable way within the time limit for filing an action. Those who claim that they have

suffered a damage due to an administrative act may also apply to amicable settlement before filing an action at administrative courts. Application to amicable settlement is subject to the preference of the concerned party in cases of damage resulting from administrative acts. This is not mandatory. Application for amicable settlement is required to be concluded by administrations within sixty days. If such application is not concluded within sixty days, the application is deemed to be rejected. Application for amicable settlement may be rejected by the relevant administration if it contains no specific subject matter or concrete request. Appeals not rejected by the Administration are referred to the legal dispute assessment committee and the report prepared by such committee is submitted to the courts authorized to make a decision and upon acceptance by such committees of the application for amicable settlement, the applicant is given at least fifteen days to sign the report of settlement and the invitation letter states that the applicant must show up on the specified date or have himself/herself represented, otherwise, he/she will be deemed to have not accepted the report of settlement and that the applicant has the right to apply to judicial courts for the compensation of his/her damages. Legal dispute assessment committee conducts all reviews and investigation including the expert review and determined the amount of damage after hearing the persons having knowledge of the case. In the case that the administration and applicant reach an amicable settlement on the amount of compensation and terms of payment, the report issued and signed by the parties has the force of a court decree. No action may be filed with respect to the subject matter and amount of the amicable settlement.

In Poland, a settlement agreement is allowed if parties submit joint statements about their intention to reach settlement before the public administration body. The content of the agreement can only be decided by the parties and the administration can in no way shape or modify the content of the agreement. No third party is authorized to execute the procedure of a settlement agreement.

3.2. Reconciliation

In Portugal, reconciliation involves participation of a third party, the power of the third party is limited to bringing the positions of the parties to a common point, however the decision is made by the parties.

Based on generality of the replies to the questionnaire, it appears that reconciliation is used in specific areas regulated by special laws rather than in administrative matters.

It is stated that there exist in Mexico Public Works Law, Public Procurement and Service Law, Private/Public Partnership Law and Mexican Hydrocarbon Law which regulate procedure of settlement to be executed before Mexican Ministry of Public Administration upon demand of either party to the dispute arising from a public contract made between public bodies and suppliers.

Supreme Audit Board established in 1970 in Belgium is authorized to conclude amicable settlement of disputes arising from public procurements signed by concessionnaires of public works or certain public authorities.

The objective of the Law No 5233 On Compensation of Damages Resulting From Terrorism and Fight Against Terrorism is to compensate the damages of real or legal persons suffering from terrorist acts and fight against terror, and the settlement procedure in customs provided for in the Article 244 of Customs Law No 4458 which is restated by the Law No 6111 aims resolution by administration of disputes between administration and obligors without going to court room in the shortest time possible.

Expropriation Law No 2942 provides that, if, after a decision of expropriation, an owner accepts the offer of the administration as to the payment of expropriation price in advance or in installments if required conditions exist or sale by negotiation or exchange with a property of the administration, following the negotiations held on the day determined by a reconciliation committee established within the administration, consisting of three persons and the agreement reached with respect to the price or exchange such transaction to not exceed estimated value as determined by the appraisal committee.

In Ivory Coast, the reconciliation procedure in public procurements is started upon an application to the Administrative Reconciliation Committee. Either the contracting authority or the administration or body authorized for the procurement apply to the Administrative Reconciliation Committee through a complaint addressed to the committee chair. Signature, execution and supervision of the disputed procurement is suspended by the application to the committee, the notice of resolution by the committee is issued upon approval of the minister or deputy minister responsible for the public procurement within 7 business days following the acceptance of the petition. Failure of the minister to reply within due time constitutes an approval of the notice. Decision of the minister responsible for public procurements can be contested at judicial courts.

3.3. Mediation

Mediation is known as an effort through which a mediator tries to establish dialogue between the parties in an impartial manner without imposing a resolution on the parties. Mediation enables the parties to avoid public administration in order to find an impartial and private sphere in which not only legal consequences but also psychological and sociological consequences can be taken into consideration.

Article 1 of the German Mediation Act defines mediation as a confidential and structured process in which parties using one or more mediators voluntarily and responsibly seek for a settlement of their conflict. A mediator is an independent and neutral non-executive who leads the parties through the mediation.

In Portugese mediation system, a third party is envisaged to bring concrete resolution recommendation by actively intervening in the dispute. It is pointed out that the dispute may be settled in line with the recommendation of the mediator in lieu of the parties, however, the responsibility relating to the decision rests with the parties and the mediator may not take a decision as opposed to the judge or arbitrator.

The Article 42 of the Statutory Decree of 4 April 2014 relating to the organization and procedures of Flemish administrative jurisdictions enacted by Flemish Parliament is shown as an example of mediation in administrative matters in Belgium. According to this provision, License Disputes Council may decide for mediation for resolution of a dispute brought to its examination either upon joint request of the parties or ex officio after obtaining the approval of the parties. Administrative judges, clerks, auditors or third parties jointly consented by the parties may be appointed by License Disputes Council as mediator. If the mediation reaches an agreement, the parties or either of the parties may ask License Disputes Council to approve the agreement and the Council can reject such request only on the ground that the agreement violates public order, regulations and urban rules. If no agreement is reached at the end of the mediation or License Disputes Council finds that conditions required for a successful mediation are not met, it is decided through an interim order to proceed with the trial. Request for mediation suspends time limitations for actions.

In Netherlands, mediation is based on the principles of equality and discretion and is considered to have success if the parties are willing to reach an agreement.

The instrument of mediation is considered to be no longer useful in cases where the conflict between the parties has escalated, or where parties fundamentally wish to get a court's decision.

It is stated that in Morocco contract-based mediation is exercised according to which the mediation agreement can be included in the original agreement (mediation clause) or the agreement can also be signed by the parties after the initiation of the action. If the parties reach an agreement through mediation, the result is notified to the court as soon as possible and the action is terminated.

While in France it is stated that mediation is exercised only for rare cross-border disputes and does not cover domestic disputes, in Mexico Electricity Industry Law provides for negotiation and mediation for use of lands in relation to the electricity services and activities.

Article 33b of the Federal Law on Administrative Procedures of Switzerland provides for administrative mediation in cases where the parties consent to the mediation, the administration has discretion and no imperative legal rule imposes a negotiated resolution.

3.4. Ombudsman

Ombudsman or in other words public arbitrator or State Mediator can be defined as mediator appointed by the law in the light of available definitions.

In Switzerland, Ombudsman is the supervisor of the administration either upon request of the citizens or by its own initiative. Ombudsman also assumes the function of facilitating dialogue between administration and citizens. Application to ombudsman is possible only if the law provides for that. The Confederation has no institutional mediator. However, certain cantons such as Vaud and Zug offers ombudsman-mediators.

In Norway, instead of bringing an administrative matter before the courts, citizens also have the opportunity to make a complaint to the Ombudsman, who supervises public administration agencies. The Ombudsman processes complaints that apply to government, municipal or county administrations, and may also address issues on his own initiative. Before a complaint can be made to the Ombudsman, all local and administrative appeal procedures must be exhausted. It is emphasised that public administrations comply with the recommendations of the Ombudsman in general, however, these recommendations are not legally binding.

In Niger, powers of State Mediator are limited to the complaints relating to the functioning of central administration, local authorities (regions and districts), public bodies and any body having public mission. The complaint can be filed by any legal or real person that claims that relevant public authority fails to fulfil the public service stipulated by the law in accordance with such law. Similar to the regulations in Norway, necessary attempts must be made at relevant administrations before the direct filing of the complaint with the mediator. It is stated that application to Ombudsman does not affect time limitations for filing action civil or administrative courts.

The duty of the Ombudsman Institution is to examine, investigate and submit recommendations to the Administration with regard to all sorts of acts and actions as well as attitudes and behaviors of the Administration upon complaint on the functioning of the Administration within the framework of an understanding of human rights-based justice and in the aspect of legality and conformity with principles of fairness. The Ombudsman rejects ineligible applications or after its examination and investigation reports its conclusion or recommendations, if any, to the relevant authority or applicant. The Institution prepares an annual report about its activities and

recommendations at the end of each calendar year and publicizes it by publication in the Official Gazette.

Primary duties of Administration and Human Rights Commissioner which is considered to be the most important non-judicial body in Cyprus with respect to protection of supervision of administration and protection of human rights are ensuring compliance with law, encouraging good administration, fighting against maladministration and protection or rights and particularly human rights of the citizens.

In Belgium, the Law of 22 March 1995 establishing "federal mediators" regulates applications to ombudsman. Concerned persons must make a request in relation to the acts or functioning of the administrative bodies in writing or verbally as Ombudsman has no right to make a decision ex officio. Unilateral, legal, individual or contractual matters as well as any disputes relating to the behaviors of the administrative authority, any act or behavior of the administrative authority or officers, acts in preparation of a decision, acts approving such acts, unofficial opinions, legal acts of administration, inaction of the administration can be subject of an application to ombudsman. Applications are rejected if the identity of the applicant is not known, the dispute is clearly unfounded, the concerned person has not applied to the relevant administrative authority to be convinced or if the dispute is same with any dispute which has been previously rejected without containing new elements. The decision of dismissal must be reasoned.

Ombudsman can make on-site examinations and ask for submission of any document or information relating to the dispute it deems necessary and can hear concerned persons if it deems necessary. While obliged to review the legitimacy of the behavior of the administration, Ombudsman can only recommend Administration to change its behavior or review its decision based on its examination, however such recommendation is not binding on the administration.

In Luxemburg the mediator is known to be the person who facilitates relationships between the administration and civil society. What is aimed here is to bring the administration and citizen closer and improve the relationships between the administration and citizens. The mediator is bound to the house of representatives and his/her duty is confined to hear complaints of citizens with respect to the functioning of the State and district authorities except for industrial, financial and commercial activities of public institutions bound to the State and district authorities. Mediator acts as a counsel to the complainant and administration and makes recommendations which he/she deems can provide amicable settlement of the dispute between administration and complainant. Mediator can make recommendations which aim to improve the functioning of the administration.

Higher Council of Public Service in Togo has been established under supervision of the minister responsible for the public service and is a consulting, dialogue and mediation body in which the administration, unions and civil servants are equally represented.

3.5. Applications made to specialized administrative or independent councils or authorities

In Turkey, regulatory and supervisory public authorities or in other words "independent administrative authorities" are independent agencies authorized to make executive decisions in the name of the State with respect to regulation and supervision duties relating to sensitive areas of public life such as capital market, competition, energy, tenders, radio and television broadcasting and banking services. Among these authorities are Radio and Television Supreme Council, Information Technologies and Communication Agency, Capital Market Board, Banking Regulation and Supervision Agency, Energy Market Regulation Authority, Public Tenders Authority, Competition Authority, Tobacco and Alcohol Market Regulatory Authority and Public Oversight, Accounting and Auditing Standards Authority.

These councils are designated to resolve disputes considered to take time in judicial procedures which have a more technical and complicated nature. The powers of such authorities are confined to the disputes arising in the field of their authority to regulate and supervise as stipulated in the legal regulations relating to such authorities.

In France, amicable settlement of administrative disputes are envisaged to be resolved by a third administrative authority which is institutionally independent form the administration that is a party to the dispute. Such bodies can enjoy large powers such as State mediator, Protector of Rights formed by merger of commission for protection of children, ethics and security and higher council for fight against discrimination and equality or operate as administrative bodies specialized in review of different specific disputes depending on the relevant public service or matter. Some bodies are designated for resolution of disputes relating to the functioning of public service of national education (national education mediator or academic mediator) or mail services (mail mediator). It is also stated that there are specialized administrative committees chaired by administrative judges and these committees issue opinions to facilitate resolution of the dispute and prevent the dispute from being brought to administrative judge without binding the administration which is a party to the dispute. It is explained that above case applies to damages incurred in relation to tax issues (provincial tax commissions), medicine (medical incidents, iatrogenic disorders and hospital infection regional conciliation and compensation commissions) or public works (establishment of amicable compensation committees relating to road regulation or urbanization activities such as tramcars or underground, road infrastructure or construction of underground parking lots).

Administrative Appeals Tribunal of Australia started to operate on 1 July 1976 as an independent court to review administrative decisions issued by administrative authorities. On July 1st, 2015 the Migration Review Tribunal was merged with Refugee Review Tribunal and Social Security Appeals Tribunal. The Tribunal is authorized to approve, modify, cancel and replace or send a decision back to the decision-making administration for the decision be reviewed.

The Tribunal may review administrative decisions under more than 400 laws and regulations. Most frequent decisions reviewed by the council relate to child support, Australian workers' payment, family support, paid parents leave, social security and student support, migration and refugee visas and decision relating to visas, taxation and rights of veterans ; the Tribunal also examines disputes relating to Australian citizenship, insolvency, civil aviation, customs, companies and financial services, information freedom, National Disability Insurance Program, passports and Australia Security Intelligence Authority.

The Tribunal reviews a decision with respect to its substance and takes into consideration new information relating to the material facts in order to reach a correct or appropriate decision. However, it is stated that this review is different than the judicial review by the Federal Court of Australia which is focused on the lawfulness of a decision having regard to the findings of fact made by the primary administrative decision maker.

In some cases, the AAT cannot review a decision until there has been an internal review of the primary decision or review by a specialist review body like the Veterans' Review Board. Federal Court must be applied to with respect to legal issues.

It is stated that in Canada Radio Television and Telecommunication Council provides the resolution by mediation of some disputes relating to the regulations of private and public television companies. The mediation procedure envisaged in the Regulation dated 1986 in relation to cabled broadcasting is referred to as an example.

It is stated that in Norway certain aspects of public services can be contested at higher administrative authority first and then at National Insurance Tribunal which, as opposed to what is understood from its title, is not a "court of law" but rather a specialized appeal tribunal. The National Insurance Court consists of a chairman/-woman, his/her deputy and about 25 other regular members, having professional expertise either in law, medicine or vocational rehabilitation. An administrative decision within the jurisdiction of the National Insurance Court cannot be challenged before the ordinary courts before the appeal has been decided upon by the former. While decisions of National Insurance Tribunal are reported to be contestable at the Court of Appeals, the figures of National Insurance Tribual shows that only 2% of the decisions are appealed.

Public Procurements Complaint Tribunal is established to review the complaints relating to legal violations in the field of public contracts and public procurements. The Tribunal having a secretariat consisting of ten members including the chairman and lawyer officers issues advisory opinions which have no force of law. A complaint filed at the Tribunal does not suspend the process awarding of a contract to a bidder, it only ensures faster and cheaper review compared to judicial procedures.

The Immigration Appeals Board is another example of a specialized quasi-judicial administrative body presented by Norway. Immigration Appeals Board considers appeals against rejection decisions by the Directorate of Immigration in asylum cases, other immigration cases and cases concerning citizenship. An administrative decision within the areas of asylum, immigration or citizenship is not challenged before the ordinary courts until an appeal has been considered such Board.

In Lithuania, the activities of the Chief Administrative Disputes Commission are regulated by the Law on Administrative Disputes Commission. The Chief Administrative Disputes Commission is composed by the Government of the Republic of Lithuania for the period of 4 years. This commission consists of 5 members having higher legal education. The Chief Administrative Disputes Commission shall consider complaints on the individual administrative acts adopted by central state administration bodies and their actions, as well as their refusal or delay to take action within the competence. The complaints submitted to the Administrative Disputes Commission shall be examined and the decision adopted within 14 days of their receipt at the latest. The decision is usually adopted by consensus in the presence of at least 3 members. It is stated that administrative dispute commissions are not regarded as public administration entities but are independent and separate bodies composed for the sole aim of resolving disputes of administrative nature.

In Spain, it is stated that a "specialized Body" established under the title of Central Administrative Tribunal for Contractual Actions designated for special cases required by Public Sector Contracts Law and EU Legislation exercises its power with full independence from the state authority with respect to its organization and duties.

In sports, as a part of the attempts carried out for resolution of disputes arising out of activities, supervision and control of the government in sports, following the Higher Sport Discipline Committee established by Physic, Culture and Sports Law of 30 March 1980 and considered as "Higher Sport Tribunal" in sports; newly established "Administrative Sports Board" is mentioned and while it is expressly stated that decisions of such Board cannot be contested at administrative courts, contentious judicial procedures can be initiated for such decisions.

3.6. Administrative appeals (appeal for review and hierarchical appeal)

Administrative appeals consist of two instruments as appeal for review and hierarchical appeal based on practices in member states. The most general definition of appeal for review is that whereby a concerned person requests an administration which has taken a decision to review its own such decision while a hierarchical

appeal is that where by a concerned person appeals an administrative decision at an administrative authority which is the supervisor of the administration which in origin has taken the decision. Administrative appeals are also divided into two sub-titles as mandatory and voluntary appeals. While voluntary appeals enable the concerned person to apply to administration or judicial courts mandatory administrative appeals are condition precedent for application to judicial courts, in other words, the law requires the concerned person to make administrative appeals before going to the court room. It is found that many countries has in place the practice of administrative appeals among which are Germany, Australia, Belgium, Algeria, Czech Republic, China, Israel, France, Ivory Coast, Finland, Netherlands, Switzerland, Cameroon, Cyprus, Lithuania, Lebanon, Luxemburg, Hungary, Niger, Norway, Poland, Portugal, Senegal, Slovakia, Thailand, Turkey and Greece.

Greece's report states that no alternative dispute resolution procedures are exercised in Greece and administrative appeals are divided into two sections as simple and special administrative appeals. It is stated that simple administrative appeals are subject to no time limitation and application for review made under simple administrative appeals is effective for modification or revocation of the act while hierarchical application is effective for only revocation of the act. It is explained that special administrative applications relate to the review of the compliance of the administrative act with the law; in order for an administration appeal qualify as such, the administrative authority to be applied to and the time period for application must have been provided for a special legal provision and such an application may only result in revocation of an administrative act. It is stated that also mandatory administrative appeals made before the judicial process must also have been regulated by a special law which provides for the authority to be applied to and the time period for application and such an application provides administration with the opportunity to review its decision in substance and correct its errors if any.

In France, concerned persons can exercise administrative appeals without being subject to a time limitation or procedure. As adjudicated by the State of Council of France, (CE, Sect., 30 Haziran 1950, Quéralt), a citizen may always make such an application and the administrative authority to which such application is made does not reject such application on the ground that no law provided for such application. In certain cases, a citizen has to make an administrative appeals before going to the court room; it is stated that more than 140 mandatory administrative appeals are available in France.

In China, citizens may exercise application for administrative review or judicial process at their own discretion alleging that their legal rights or benefit have been infringed by legal or real persons. However, in certain disputes relating to taxation or customs or disputes relating to administrative acts resulting in violation by administration of property or disposal rights of individual obtained in accordance with law, the law, requires the parties to make application for review before going to the court room.

In Ivory Coast, administrative appeal is mandatory with respect to excess of power against the decisions of administrative authorities and a condition precent to the action for cancellation. Public procurement contracts are also subject to administrative appeals and condition precedent to judicial applications with respect to the disputes arising out of signature, execution, regulation and supervision of public procurements (Public Procurement Law, article 166).

In Lithuania, tax disputes, objections against administrative acts of State Commercial Registry Center, objections against the condition in jails and detention house, objections against the acts of Office for Disabled and Assessment of Working Capacity must be reviewed through mandatory administrative appeals. In cases of mandatory pre-litigation procedures, certain body of pretrial investigation generally

belongs to the internal organizational system of particular institution of public administration and the examination of administrative disputes is one of its functions. For example, a dispute must be filed at tax inspection office within Ministry of Finance for tax disputes and at State Company Registers Center against the acts of State Trade Registry Center.

The key authorities of such pre-trial investigation in Lithuania are municipal commissions on the administrative disputes and the Chief Administrative Disputes Commission.

The municipal commissions are formed for 4 years by the decision of the Municipal Council and consists of 5 members. The Chairman and the Secretary must have higher legal education. Municipal commissions shall consider complaints regarding the individual administrative acts adopted by the municipal entities of public administration.

An application can be made at administrative court within 20 days from the date of decision of such institutions with respect to the administrative act at dispute.

In Lebanon, it is stated that two administrative appeals are available. The first administrative appeal is mandatory due to the Statute of State of Council which stipulated that no application may be made to State of Council if the act of administrative court is not appealed. If the administration has not taken a decision, the concerned person is required to request the competent authority to take a decision and failure of such authority to respond is deemed a rejection. The concerned person is required to submit to to such administrative authority the same claims and complaints to be submitted to the administrative judge.

Second administrative appeal is voluntary. This is the application for review whereby the concerned person applies to the administration for review of its decision. This application suspends the time limitation for judicial process.

In Belgium pursuant to the Law of 10 February 2003 relating to the Liability of the Personnel At Service of Public Entities, the indemnity actions filed with respect to a public service i subject to mandatory administrative appeal.

In Turkey, numerous mandatory and voluntary administrative appeals are available. These are regulated by relevant legislation. Pursuant to the Administrative Procedures Law No 2577 which is one of the most comprehensive regulation, before filing of an action by concerned parties, it may be sought from a senior office or, in the absence of senior office, from the office that has established the act to abrogate, revoke or amend or replace the administrative act within the time limit for filing an action. Furthermore, Statutory Decree Relating to Performance of Legal Services at Public Administrations Under General Budget and Administrations Under Special Budget published in the Official Gazette No 659 dated 02.11.2011 provides that those claiming that their rights have been violated by administration may file an action for indemnification within time limitation for such action. Those who claim that they have suffered a damage due to an administrative act may also apply to such procedure before filing an action at administrative courts. Application is subject to the preference of the concerned party in cases of damage resulting from administrative acts.

In Chili, it is stated that the integrity of judiciary is in place and no separate administrative court exists, however administrative and hierarchical appeals are exercised in all administrative matters.

3.7. Complaints through petition and calls

It is stated that complaint notification system through petitions and calls is an important administrative dispute resolution procedure in China. Article 2 of the

Regulations on Letters and Visits stipulates that, the term «letters and calls» means that citizens, legal persons or other organizations give information, make comments or suggestions or lodge complaints to the people's governments at all levels or the working departments of the people's governments at or above the county level through letters, e-mails, facsimiles, phone calls, visits and so on, which are dealt with by the relevant administrative authorities in accordance with law. It is reported that the number of administrative disputed resolved per year through this procedure is greater than the disputes resolved through administrative actions and applications for review. Currently, as all the settlement mechanisms of administrative disputes inside the administrative organs have been incorporated into the scope of «letters and calls», the precise scope of the system and its position have become increasingly blurred and are in urgent need of further reform and improvement.

3.8. Administrative cycle

The "administrative cycle" mechanism put in place by 1st paragraph of the Article 38 of Belgian Law on State of Council as amended by the Law of 20 January 2014 provides the State of Council with the opportunity to recommend the disputed institution to correct its act through an interim decision. The State of Council decides on the manner and time period of the correction which can be made only with respect to the matters mentioned in the interim decision. Proper correction of the fault terminates the dispute and prevents the act from being cancelled. When the opponent fulfils the interim decision, it also specifies the manner of correction and notifies the State of Council of such manner in writing. If the fault is not fully corrected, the administrative cycle is operated backwards and the application is rejected. If the fault is not corrected at all or in a proper manner or the recommendation is rejected within the fifteen days following the date of expiry of the correction period determined by interim decision, the disputed act is cancelled. If it is found by the administrative action chamber that the fault is not fully corrected or the correction produces new faults, the corrected act or new act, if any, is cancelled.

Administrative cycle technique which has its origin in Netherlands is has for the first time been applied in Flandre region through Flemish Region decree of 6 July 2012 amending various provisions of the Flemish Land Regulation Law relating to the License Disputes Council.

The Constitutional Court in its decision of 8 May 2014 No 74/2014 repealed the federal administrative cycle practice on the ground that the State of Council reveals its position on the dispute by issuing a recommendation in an interim decision, violates the principles of independence and impartiality of the judge, further, the fact that the concerned person is not given the opportunity to challenge the decision issued pursuant to the administrative cycle breaches the right to file an action at court.

Currently, the "administrative cycle" restated in Flandre Region is reestablished through a decree dated 3 July 2015.

3.9. Judicial alternative dispute resolution procedures

In Germany, the "Güterichter" (judicial arbitrator) was added to the Code of Civil Procedure by the «Law on the promotion of mediation and other methods of alternative dispute resolution» of 21 July 2012. Pursuant to the regulation, the judicial arbitrator is a judge of the court but not a member of the competent chamber to decide the case. He or she has no authority as a decision maker but may use all the methods of conflict resolution including mediation. The chamber competent to conclude the case refers the case to the judicial arbitrator after it hears the parties if it deems necessary and the case is suspended by the time the judicial arbitrator tries to reach an agreement with the parties.

The efforts of the judicial arbitrator aims to produce alternatives and options for long-term, shared and standing settlements. Therefore, instead of laws mutual balance of interest is taken as basis.

Judicial arbitrator procedure is exercised for administrative actions at administrative courts of any instance pursuant to the Article 173 of German Administrative Procedural Law. In practice this instrument is used by administrative courts in cases which are characterized by long-term relations between the parties including matters of civil servants, subsidy and social assistance law. It is also useful in covert neighborhood conflicts between the petitioner and the third party in public building or environmental cases.

In Germany parties can make a choice between «mediation" as an extrajudicial procedure attended by an independent and neutral non-executive mediator and the activities of a judicial «Güterichter" (a judge as judicial arbitrator) in a pending court case. However, in actions jointly filed at a court, in general, judicial arbitrator is preferred.

In France, the Law No 86-1 dated 6 January 1986 and the Law No 2011-1862 dated 13 December 2011 respectively give the administrative judges and judges of court of appeals the power to cause reconciliation. Furthermore, despite lack of a legal provision, the administrative judge can also apply to a conciliator outside the court upon consent of the parties.

In Austria, in case there are several parties with opposing claims involved in a proceeding, judges at administrative courts of first instance can carry out settlement proceedings. Throughout these settlement proceedings the judge tries to find a just solution representing an equilibrium between public interest and the opposing interests of the parties.

In Canada, there is a special-management action filed at Federal Court of Appeal pursuant to alternative procedure exercised in the judicial process, the judge in charge of the management of the action does not follow the general procedure described in the statute. The judge responsible for management of the case is equipped with powers to issue any instruction required to facilitate the fairest and most economic resolution of the dispute, to determine the time periods applied to measures to be taken in the action without taking into account the time periods prescribed in the statute, to arrange hearings for resolution of disputes, to examine and conclude petitions or to decide to examine the case.

The hearings held for resolution of disputes provide the parties with the opportunity to negotiate the case with counsels if any, determine the matters of dispute and to attend an alternative procedure governed by a judge or chief clerk that will help the parties inquire their interests and an acceptable resolution. This alternative procedure enables the parties to figure out the positions of each other and develop more creative solutions. In principle, the hearing for resolution of disputes may not exceed 30 days. In the case of resolution of the case during the hearing for resolution of the disputes, the settlement agreement is signed by the parties and attorneys and an agreement notice is submitted within 10 days following the date of agreement.

The Statute of the Supreme Tax Court of Canada contains provisions relating to the dispute resolution hearings. The Supreme Tax Court of Canada is entitled to hold a hearing during which the chance of partial or full resolution of the disputes are inquired on its own initiative or request of either party.

Quebec Administrative Court established under the administrative law of 1987 examines the disputes against decisions relating to licenses or permits provided for in economic, vocational or commercial laws, which are taken by ministries, public bodies or local administrations and provides the parties with a reconciliation service presided by one of the members of the court.

The mediation put in place in Poland on 1 January 2004 is defined as a court mediation related to the administrative courts of first instance in terms of function and organization. It is based on the Advisory Decision No Rec (2001)9 on the alternatives to the cases between the administrative authorities and private law parties in member states. Pursuant to the advisory decision, private law parties are entitled to request modification, cancellation or revocation of an act as the objective of mediation is to enable parties to reach an agreement. The basic reason for introducing mediation into proceedings before voivodship administrative courts was the intention to avoid the congestion in administrative courts, to enable the bodies to correct their errors that may have occurred during the administrative procedure and to address justified objections of the complainant.

Mediation can be applied to all acts and proceedings that can be brought to administrative courts including inactions. The sole restriction is that relevant petition must be submitted before the court sets a date for the hearing.

Mediation proceedings may only be conducted by a judge or law clerk. The obligation of the judge, or law clerk, in charge of mediation is to actively participate in mediation proceedings: the mediator should point to issues and offer acceptable solutions to the parties; the mediator should monitor compliance with the law of the solutions proposed and approved of by the parties. No third party can be authorized for execution of mediation proceedings.

The court may initiate and execute the mediation proceedings on its own initiative even if the parties do not request initiation of such proceedings. The mediation proceedings can also be initiated ex officio after the application of either party for mediation after the time period expires.

3.10. Arbitration

In general arbitration is a method for settlement of a dispute with the aim of finally settling a dispute, either present or future, where the parties transfer one or more jurisdiction to an arbitrator. The parties having recourse to arbitration waives from any intervention by the judiciary power on the subject. Arbitral award is deemed definitive judgement. Considering the national practice, arbitration is being recoursed to most often regarding public procurement contracts. The purpose of legally submitting to arbitration on public procurement is deemed to enable to effectively resolve disputes generated during the execution of contracts signed by the State with suppliers or contractors and to solve the problem in time , for example, a construction duly completed or having the required supplies.

In Belgium, arbitration is a settlement method titled as private justice whose source is private contract, concluding upon final ruling of the administrative body. Only ownership-related actions and those which can be settled despite not being related to ownership can be a subject matter of arbitration.

In Ivory Coast, it is stated that the resolution taken is final, yet recognition and approval is required for its enforcement.

While arbitration has been recognised since 1913 in legal and trade field in Morocco, it was legally rearranged on 6 December 2007, and its field of application was broadened in a way to include everybody having the capacity to execute an agreement on their rights with their free will.

On the other hand, the disputes regarding the contracts signed by the Government or local administrations may be a subject matter of an arbitration contract provided that the provisions on audit or curator are respected.

In Morocco, it is stated that principles and procedures envisaged by the legal arrangements regarding domestic arbitration and international arbitration were totally

separated from each other; international arbitration was recognised as a kind of arbitration at least one of the parties of which is abroad and which covers the international trade-related interests.

Regarding domestic arbitration, the arbitration must be agreed upon by the parties in writing in the form of an arbitration clause inserted to the arbitration agreement or contract for which the parties agreed to apply to arbitral tribunal upon the dispute arised. Mentioned contracts and articles, in the event of any failure to abide by them in terms both their content and form, are subject to firm legal rules which may result in being null and void.

For an action to which a public entity is a party to, it is stated that arbitral award may only be finalised upon enforcement decision of an administrative judge.

In Peru, the procedures of accepting arbitration and waiver from the powers of judicial authorities may only be made by the parties in writing. Arbitration awards are final and no appeal can be filed against them, except in the case of arbitration awards that have incurred in one of the causes for annulment, usually associated with the violation of due process, in which case the person can appeal to the judiciary.

Any dispute between the parties on the implementation, interpretation, termination, absence, ineffectiveness or invalidity of the contracts on public procurement may be resolved by conciliation or arbitration, as agreed by the parties; however, in practive all disputes are settled through arbitration.

In Peru, arbitration on public procurement may be private or institutional, depending on whether its organisation and implementation have been put in charge or not to an arbitration institution, pursuant to the agreement reached by the parties in the arbitration agreement. Institutional arbitration is conducted in an arbitration institution recognised by the Supervisory Board for State Procurement which is affiliated to execution.

Additionally, it is also pertinent to note that prior to procurement contracting (during the contractor selection process and even before the contract comes into force) disputes may also arise, which are resolved administratively by appeal. The appeal is heard and decided by the Public Procurement Tribunal (Tribunal de Contrataciones del Estado) which is part of the Supervisory Board for State Procurement (when the reference value exceeds 65 UIT3 -equivalent to US$75,833) or by the head of the board (when the reference value is less than 65 UIT4). The resolution that passed upon the administrative appeal puts an end to the administrative proceeding and clears the way for appeal, if applicable, before the Judiciary, by means of filing an administrative action.

In Portugal, Law on Administrative Courts Procedure Code provided for "arbitral tribunals and arbitration centers". It is stated that, upon a legal amendment, the validity of administrative acts may be subject to arbitration, apart from the disputes which may be resolved through arbitration. Accordingly, arbitral tribunals may be established for the trials below provided that it is not in conflict with other provisions of the law:

A. Contract-related disputes including rescission or being null and void of a resolution regarding administrative acts
B. Disputes related to civil responsibilities falling outside the scope of the contract in the framework of administrative law, including making the right of recourse active or compensation;
C. Unless a decision otherwise is in place, disputes regarding the validity of administrative acts;
D. Disputes regarding public employment, except for non-transferable rights, occupational accidents and occupational diseases.

In the event of the interests of third persons in question, establishing an arbitral tribunal depends on acceptance of the arbitration by the third persons.

The government may authorize establishing arbitration centers to deal with the settlement of disputes above, and in this framework the disputes with regard to legal relations regarding public employment, social protection systems determined by the state and those relevant to urbanization may be settled.

Arbitration centers have been assigned with reconciliation, mediation and consultation with a view to enabling that the administrative decisions can be objected against.

In Turkey, concession contracts and agreements relating to public services may provide for the resolution of disputes arising therefrom at national or international arbitration and only disputes containing a foreign element may be referred to international arbitration. However, the disputes containing a foreign element may be referred to national arbitration as well.

It is stated that in Niger, arbitration method is recourse to especially for public procurements and public service privileges.

3.11. Online dispute resolution

Online dispute resolution stands out as a distinctive practice among the alternative dispute resolution methods. In New South Wales Province of Australia, the Civil and Administrative Tribunal of New South Wales is the tribunal which conducts merits review of administrative decisions made by the New South Wales Government or its agencies. Under the Civil and Administrative Tribunal Act 2013, s 37(1), Civil and Administrative Tribunal may, where appropriate, use or require parties to use any one or more "resolution processes». In an effort to help the parties to reach an agreement at low costs and through alternative procedures in a more convenient way, Civil and Administrative Tribunal allows the parties to use digital technology which is called online dispute resolution.

In this procedure which was applied as a pilot implementation for 3 months in early 2012, for certain transactions of Consumer and Trade Affairs Department, the parties went online exchanged information about the dispute for 24/7 through a reliable portal without any need to go to Civil and Administrative Tribunal in person or any need for a meeting in person. The process was structured so as to assist parties to focus on the issues they wished to have resolved and to lead them to outcomes which would be acceptable to both sides so that, where possible, a negotiated agreement could be reached. Where agreement was reached, the parties could seek an enforceable order from the Tribunal to give effect to their agreement. Where agreement was not reached, or if either party chose to withdraw from the process, the dispute was listed for hearing before the Tribunal and was determined in the usual way.

Although the pilot implementation is not related to the examination of the content, it was observed that it enabled the parties to reach a solution at low costs in a short time, considering the results obtained. In this respect, mentioned procedure was deemed to be worth of further improvement by the Board as a resolution method, and it may make the activities of the Board more effective and facilitate access to the Board. Online dispute resolution is said to be further developed in 2016 within the context of examining content of the administrative rights.

3.12.Alternative Procedures Implemented in Tax-related Administrative Subjects

Belgian legislation has various provisions in place which allows settlement in tax law. For instance, sub-paragraph 2 of Article 84 of VAT Law envisages that Ministry of Finance may settle with the debtor unless it results in tax deduction or exemption. Settlement envisaged in such provisions may only be related to "financial matters"

or financial ambiguities, not "legal issues". Article 263 of Framework Law on Customs and Taxes allows settlement on fine imposed to, seizure and closing of a factory or atelier in the event of matters of extenuation and violation assumable stemming from negligence or fault.

In Morocco, Local Taxation Commissions and Tax Objections National Commission handle tax-related disputes.

Local taxation commissions is composed of; a judge, serving as the chairman of the commission, appointed by the Prime Minister, representative of the governor of the province where the Commission headquarters is located at, head of local tax assessment service or his representative serving as rapporteur secretary and a representative elected from among the members of the professional organization representing, at the highest number, the activity of the plaintiff group. Goal of the commissions is to reduce the number tax objections such as material mistakes, double or faulty taxation, eliminating ambiguity in tax provisions, etc.

An application is filed with the local taxation commissions through a written, justified and detailed petition addressed to the tax office, and relevant tax office fully refers the examination file to the commission. The taxpayer should explicitly state, in his petition, his request to appear before local taxation commission. Before local taxation commission meeting, the rapporteur secretary invites, upon the order by the chairman, all commission members, and such invitation includes, as an attachment, a list of all tax lawsuits to be discussed by the commission as well as the copies of the reports prepared by the inspector. Commission may hear the parties, either individually or collectively, upon the request of the parties. Commission may take decision faith at least three members including the chairman and taxpayer representatives. Decisions are taken with the majority of the members, and in the event of a tie, then the chairman has a casting vote. As of the date of application, there is maximum 24 months between two Commission decisions, and at the end of such period, if no decision has been taken by the Commission, the taxpayer should be informed, in writing, that such period period (24 months) has expired and he can apply to National Commission on Tax Objections within sixty days as from the date of notification of the said letter. In the event of no application, taxation may occur, but remedy of administrative objection continues.

The opinions such that a commission composing of a judge ensures all by-laws implemented accurately, facilitates the distinction between actual and legal issues, ensures compliance with procedures, notifications and rules, and a commission composing of a head of local tax assessment provides a guarantee, thanks to his technical education in tax field, both in terms of tax return and taxpayers, are accompanied by the criticisms such as absence of Commission members and slow decision-making process, superficial discussion on different issues which are subject matters of lawsuit, and most of the decisions are objected before National Commission on Tax Objections.

National Commission on Tax Objections is a standing committee, having its headquarters in Rabat, directly reports to the Prime Minister. It is composed of seven judges, affiliated to panel of judges, appointed by the Prime Minister upon the proposal of the Ministry of Justice, thirty public officers at least at inspector level holding degrees in tax, accounting, law or economy appointed by the Prime Minister upon the proposal of the Minister of Finance, and hundred persons from business cycle appointed by the Prime Minister upon the joint proposal of the Ministers of Trade, Industry, Tradesman, Pelagic Fishery and Minister of Finance. They are selected from among the members of the professional organisation represented at the highest number (industry, service sector, tradesman, pelagic fishery) The reason why both the taxpayers' representatives and the administration take place in the Commission is to explain different aspects of the activities or professions which they represent and know very well. Mentioned Commission is authorized to rule all the cases brought before it regarding determining the tax and fee bases, but it is authorized to interpret the provisions of by-law.

Commission is open to taxpayers and the administration. Both parties may apply against the decisions of local taxation commissions. If the taxpayer does not raise an objection against the decision of local taxation commission, the it means he implicitly accepts such tax and decision.

National Commission on Tax Objections informs the other party of the objection, as from the date the application is made, sends one copy of the petition received, and requests from the administration to send tax file regarding the action and period which is subject matter of the action. The file must be sent directly to the Commission within thirty days. Decisions are taken with the majority of votes, in the event of a tie the chairman has a casting vote. Commission may hold as many sessions as it deems necessary, may apply to the opinion of the expert or may request additional investigation or examination.

Decision must be taken within twelve months following the date when the application is made by the Commission, and such decisions must be detailed and justified. Otherwise, the administration shall all its rights to amend. Decisions of the Commission may be appealed before the judicial authorities as they are open the taxpayer and administration.

In Cyprus, application may be filed in the Tax Tribunal which is the independent body with authority to review decisions of the Director of the Tax Department.

Preliminary tax decision mechanism is a procedure introduced approximately 60 years ago in Sweden, which is linked to Supreme Administrative Court. Goal of the Board, an independent authority, is to enable the taxpayers to receive a final decision from Preliminary Tax Decisions Board on tax implications of a planned transaction requiring new or complicated interpretation of a tax provision, and thus to enjoy legal final provision. Following the application by the taxpayer, the Swedish Tax Agency is invited to participate as the other party before the Council. As a result, it is possible to define this controversial procedure as a preliminary judicial procedure.

The Council has a wide discretion in determining whether or not it is appropriate to issue an advance tax decision. Rather than being an administrative body, the Board serve as a semi-court and the preliminary decisions taken may be appealed before Supreme Administrative Court by taxpayer or Sweden Tax Board. A decision by the Council not to deliver an advance decision cannot be appealed.

Supreme Administrative Court apply a special procedure specific to these actions, and directly handles the content and gives priority to finalizing these actions. The Court has a broad discretion, can reverse a resolution or approve it by amending its rationale. The Court, on appeal, is of course competent to refer questions to the European Court of Justice for a preliminary ruling in advance tax ruling cases.

In Cameroon which envisages administrative application options for tax issues, pursuant to article L.119 of General Tax Law, the taxpayer believing that unfair tax assessment is in place to the detriment of himself or that excessive amount of of tax is cut, should apply to tax office, and if such application is rejected, then he should apply to Ministry of Finance preliminary administrative objection within 30 days. If the Ministry of Finance does not reply to the mentioned application, in due time envisaged in the relevant legislation, it means an implicit rejection. Likewise, in Lithuania, objection should be raised at the Tax Inspectors Department in Ministry of Finance for tax disputes. While in Luxembourg, as a principle, every taxpayer should apply to the director of tax office first, before applying to the judge (compulsory hierarchical

application). In economic arrangement field, generally it is possible to apply to administrative authorities against legal personality independent audit bodies.

In Mexico where alternative procedures, envisaged under certain administrative laws, are applied with regard to taxation and economy arrangements, what stands out among the alternative procedures is memorandum of understanding which is defined as reconciliation process on tax issues before administrative trial which is envisaged in Mexico Federal Tax Law as a result o 2014 tax reforms.

This procedure is conducted by the Mexican Office of the Taxpayers Advocate (Procuradurla de la Defensa del Contribuyente, PRODECON, Taxpayer Ombudsman) in Mexico, and its purpose is to procure the fairness and equity in the legal relationship between the taxpayers and the tax authorities.

Memorandum of Understanding may be applied on the basis of relevant inspection or verification process when the tax authority does not accept the facts or missing information in the documents issued by the taxpayer during an inspection or verification, and no application can be made for memorandum of understanding once final decision on the inspection is issued.

Once the taxpayer files the request, it has to be notified to the tax authority, then the Mexican Taxpayer Ombudsman will set a date for working tables to begin with the conciliation. The filing of this proceeding will suspend the audit or verification process until an agreement or a closing resolution is issued. Once the parties reach an agreement, an agreement is issued and signed; in the event of no agreement, final decision is issued and reconciliation process finally comes to an end.

The main factor that contributes to the developing and strengthening of Memorandum of Understanding is the simplicity of the procedure and the easy access through the Mexican Taxpayer Ombudsman. According to 2014 report published by Mexican Taxpayer Ombudsman, 332 application out of 873 received in 2014 for memorandum of understanding were finalized, 220 of which has yielded in a memorandum of understanding.

In Portugal, Law on Administrative Courts Procedure Code provided for "arbitral tribunals and arbitration centers". Powers of arbitral tribunals were arranged for the first time regarding tax issues, pursuant to Decree-law no 20 January no 10/2011 which approved legal regime on tax arbitration.

Pursuant to the said Decree-law, powers of the arbitral tribunals are limited to examining the illegality claims for the transactions regarding tax assessment, personal tax return, deduction at source and tax payments, as well as for the issues regarding tax accrual, other value determinations with the aim of receiving tax, and tax collections.

In Togo, a taxpayer who wants to raise an objection against a tax related to him, either wholly or partially, should first of all apply to the tax office in the place he is affiliated to. Such application is considered in General Tax Law as a compulsory administrative remedy. Regarding the objection, tax office conducts an inquiry and relevant decision is taken regarding in six months following the application. Tax office may enjoy extra time, which cannot be more than three months, provided that the taxpayer is informed thereof before the initial expiry date. The decision to reject the objection, either wholly or partially, must be notified to the taxpayer along with statement of reasons. This process suspends lapse of time periods and trial time before administrative judge. The decisions taken by the administration regarding controversial complaints which do not adequately satisfy the relevant persons may be taken to the administrative courts of intermediate courts of appeal. Fully satisfying decisions are binding for the parties and enforced.

In Ukraine, under Article 56 of the Tax Code, an application may be filed in writing to oversight authority (if appropriate - with duty-certified copies of documents, settlements and evidence) within ten days after the date when taxpayer receipted tax assessment notice or other decision carried by oversight authority that is being challenged. In administrative appeal procedure the burden of proof lies on the oversight authority. The oversight authority that considers complaint of taxpayer is obliged to make the reasoned decision and send it within twenty calendar days. The decisions on complaints of taxpayers maid by central executive authority responsible for national tax and customs policy and its implementation are final; these decisions cannot be challenged within further administrative procedure but they still can be contested in the courts.

In Turkish tax law, reconciliation is applied in accordance with the provisions of Procedural Tax Law No 213, Reconciliation By-Law and Pre-Reconciliation By-Law and is designed in two categories as reconciliation before and after assessment. Reconciliation before assessment is a right exercisable by the taxpayers before any assessment is made in the name of the taxpayers for whom a tax investigation has been launched. Reconciliation before assessment covers taxes, duties and levies to be imposed over the tax base or tax base differences found as a result of tax investigation and tax loss fine to be issued in relation thereto (excluding the fine to be imposed in case of causing tax loss due to offenses and penalties relating to smuggling) as well as irregularity or special irregularity penalties. At any time during the period starting with the start of the inspection till the final report is issued by the taxpayer being inspected; in the event of "invitation to reconciliation" by inspectors, reconciliation request may be made in fifteen days at the latest as from the date when the invitation letter is notified to the taxpayer. In the event that the taxpayer fails to attend the invitation of the reconciliation committee or to sign the reconciliation report in spite of attendance or wants to sign with a reservation note, the reconciliation is deemed to have failed, in which case taxpayer's reconciliation right after the assessment is abolished. If no reconciliation is reached in the meetings held with the reconciliation committee that has convened upon attendance of the taxpayer of its representative on the date and at the time designated for the reconciliation, the committee issues a report, as one copy is given to the taxpayer and one copy to the tax office. If no reconciliation is reached or obtained at the end of the negotiations, the tax office effects necessary assessment over the tax base proposed in the investigation report or difference between the bases. Right to seek remedy against the assessment made by the tax office with respect to the tax or penalty in relation to which no reconciliation is reached remains exercisable at law courts or administrative authorities within 30 days following the notification of such assessment. The taxpayer is entitled to accept the offer of the committee afterwards. Upon arrival of the report and investigation report in the tax office, the taxpayer may accept the offer of the reconciliation committee by the end of the time limit for filing an action which will start to run from the day following the notification to the taxpayer of the assessment by the tax office. If a reconciliation is reached at the end of the negotiations, the committee issues a report indicating the result of the negotiations. The negotiations minutes issued for the reconciliation is final and relevant tax offices commences to effect necessary acts. No matter for which a reconciliation is reached or is determined by a report may be brought to a law court or administrative authority.

Reconciliation after assessment is a remedy exercisable after the assessment of the tax and issue of the fine. If a reconciliation is reached at the end of the negotiations held on the designated reconciliation date, the negotiation report issued by the committee is final and neither an action nor a complaint can be filed at the law courts or administrative authorities with respect to the matters mutually agreed

upon and determined in the report. If also an action has been filed with respect to the same tax or tax loss besides a reconciliation request, the action is not addressed by the tax courts before the conclusion of the reconciliation process and if such action is addressed and concluded for any reason, such decision is void. In case of a reconciliation, such case is notified to the court and the case is rejected without being addressed. In the event that the taxpayer has both filed an action and applied for reconciliation, in case of failure to obtain a reconciliation, the tax office notifies the tax court of such failure.

4] Restrictions to alternative dispute resolution procedures as per subject

4.1. Restrictions to Alternative Dispute Resolution Procedures as per Subject

It is stated that in some of the countries which are subject matters of the survey, such as Austria, Germany, Cameroon, Niger, there is no restriction to legally have recourse to alternative procedures, even in the case of China, the scope of the alternative procedures are broadened considering the subject matter of the administrative action.

On the contrary, in some of the countries surveyed there are some restrictions in terms of persons, subject and time.

In Poland, three conditions are sought for concluding memorandum of understanding. Accordingly, structure of the action must be appropriate (the action must be subject to administrative procedure and related to the persons with mutual interests), making an agreement must facilitate and simplify the transactions, and there should not be any statutory provision to hinder signing a memorandum of understanding.

In the event of expropriation or unauthorized construction actions, it is impossible to execute memorandum of understanding.

In Australia, alternative dispute resolution procedures are not applicable to migration and migrants, social services and child support and security assessments conducted by Australia Security Intelligence Agency.

The reasons for this is as follows: for migration and migrants, there are different or additional rules specific to these issues; for social services and child support, this is unofficial and non-controversial and this requires immediate inspection and examination[3].

On the other hand, it was stated that the restrictions above regarding administrative decision types for Administrative Objections Board were not applicable to Federal Court.

In Belgium, as is the case for other contracts, public authority has to abide by some conditions when it wishes to use such contract technique. According to the mentioned conditions, applications to alternative procedures cannot be in conflict with a binding positive legal arrangement. No settlement can be made by a public administration that would result in denial of its mandate or some other institution's mandate, or restriction of its discretion or violation of general rules of law (public law).

Apart from general rules of law, in Belgium, as required by the relevant legislation, private contracts cannot be in breach of the laws on public order and ethics. Special position of the administration is explained by considering public law mandate rules and conditions regarding public order, whereas while deciding the boundaries of the public administration at the course of reconciliation at the point when the administration is involved for the sake of public interest and takes across the board decisions, is explained considering the administration's dependent mandate and discretion. If the administration holds exclusive dependent mandate, in principle, there is no discretion; thus, it is accepted not to have the power to settle. Taxation rate is given as a typical example for which no settlement can be made.

In general, tax law is accepted to be related to public order. For these subjects, the administration cannot apply to arbitration, nor can settle to the extend effecting main components of the tax, unless stated otherwise. In addition, there are some provisions in place which allows settlement in tax law. For instance, Article 84 of VAT Law envisages that Ministry of Finance may settle with the debtor unless it results in tax deduction or exemption. Similar provisions are included in Registry, mortgage and clerkship Law, Inheritance Fee Law and Various Fees and Taxes Law. Settlement envisaged in such provisions may only be related to "financial matters" or financial ambiguities, not "legal issues".

On the other hand, only ownership-related actions and those which can be settled despite not being related to ownership can be a subject matter of arbitration.

The action regarding the ownership is broadly interpreted, and accepted as regarding the monetary interests of at least one party of the action.

If the action is not related to ownership, then the lawmaker seeks ability to agree on. However, for this to happen, subject of the action must be transferrable, i.e. rights firmly attached to the person, public goods, public services or tax cannot be subject matters of arbitration. Likewise, assigning public duties, criminal issues and tax actions traditionally fall outside the scope of arbitration due to their public nature.

In Belgium, public legal personalities can only be a party to a mediation upon the Royal Decree discussed in the cabinet.

In Morocco; personal rights which are not subject matters of trade, disputes arising from unilateral transactions of the government, local administrations or other institutions with public mandate are kept outside the scope of arbitration. But monetary objections arising from them may be subject to arbitration except for those related to implementation of a tax law.

In France, public institutions, local administrations have the power to settle provided that they have explicit permission from the prime minister. The subject of the settlement still has to comply with public order, principles of non-competence of public legal personalities, legal compliance and gratuitous legal transactions prohibition. Public legal personality cannot make an illegal document stands effective, cannot pay an undue fee, and cannot waive from its powers.

In principle, arbitration is not allowed to the public legal personalities since Code of Civil Procedure of 1806 and as required by French public law general principle which has been reconfirmed by case law. However, it is stated that there are some

[3] Ensuring that a member is directly interested in inspection or audit was seen as the most accurate and effective way of making decision in these issues.

exceptions for some disputes in domestic law -particularly public procurement (article 128 of public procurement law) or articles of association (article L.1414-12-1 of general law of local administrations)- or for instance, in the event of an international dispute such as resolution of a dispute arising from the implementation of a contract executed between a legal person subject to French public law and a person subject toa foreign law (6 March 1986, Eurodisneyland).

As for the mediation in administrative issues, it is stated that it can only be applied to cross-border disputes, provided that it is not related to implementing public mandate privilege.

In Spain, the Public Administration may conclude memorandum of understanding or covenant contracts with individuals from both public and private law, provided that they are not contrary to law and aimed at meeting the public interest that are entrusted, within the scope, purpose and specific legal regime provided in each case by the provision regulating it.

Such conventional solutions can not contradict the Legal Order, and if it comes to matters within the competence of the Council of Ministers, the express approval of it is required. «The agreements concluded do not involve alteration of the competence of the administrative bodies and the responsibilities that correspond to the authorities and officials related to the operation of public services bodies».

The actions actual implementation of which are unlawful or those which forces one of the parties of a controversial relation to accept an issue are deemed in conflict with the constitution.

- Law 47/2003 - of November 26 on the General Budget, Article 7 prohibits in its article 7 to compromise, either judicially or extra judicially, on the rights of the treasury, as well as to submit to arbitration « the strife arising in respect thereof but by royal decree agreed in Council of Ministers, after hearing the State in full. «

-In Law 33/2003, of November 3rd, on the Assets of Public Administrations, only the transaction and arbitration of disputes arising in relation to the state capital are contemplated, although when expressly authorized by the Council of Ministers (by Royal Decree), and after consulting the State Council in full.

It is stated that, if the discretion provided for in the law by Canada is limited, any agreement concluded by a civil servant is null and void, that the government cannot waive from its priorities with a contract and it has special exemptions in the event of enforcement of the provisions of the contract.

In Lithuania, memorandum of understanding can be concluded in any lawsuit, except for the lawsuits regarding legality of regulating transactions of the administrative authorities. One exception is, as is the case for migrants' status actions, the actions for preventive measure taken for national security by public administrations or regarding supranational laws. In such actions, public administrations shall strictly abide by the legal arrangements and measures taken and cannot sign flexible memorandum of understanding (for instance, as is the case for the status of migrants).

In Luxembourg, preliminary administrative applications are limited with the legally foreseen times.

With respect to Public Contracts and Public Procurement, there are certain cases in which arbitration is not applicable, such as the disputes related with the administrative termination of a contract due to breaches of the contractors. The partial arbitrability of public contracts with an arbitration clause is possible and rests in the fact that such contracts involve both, acts of the authority that have a public nature and are not arbitrable (strict application of law), and private acts with commercial nature.

In Switzerland, mediation (even reconciliation) is subject to mandatory rules,

thus it is rejected in law on foreigners, administrative penal law and in the fields relevant to health and public security. Alternative procedures are deemed not to be appropriate when they are not in line with general principles on public law such as transparency principle (for matters which interest large masses) and equal treatment principle (e.g. tax law, public procurement law...).

Since public service is considered public order in Mexico, there is no alternative dispute resolution procedure applicable to public services. Arbitration is not allowed in tax-related issues. Arguments in this subject are based on that tax receivables are not open to negotiation and the government should stay the only authority to impose and collect tax and to decide on tax receivables. In March 2012, it was stated that a draft law opening the settlement way in tax issues (reconciliation and arbitration) for tax disputes was rejected by the commission in House of Representatives in August 2012, and no further step was taken for this purpose.

It is stated in Ukraine report that, examples for disputes for which pre-trial alternative procedures will not be accepted as a result of the administrative courts' experiences in mediation are as follows: appealing against regulations of executive, legislative authorities, bodies of local self-government and other public entities, cases about election or referendum procedure, limitations of the right to peaceful assembly, decisions, acts or omission of executive authorities, termination of powers of people's deputies, cases about considering of customs or tax bodies acts, based on the inquiries of the Security Service of Ukraine; cases about expulsion of foreigners and stateless persons or about refugee status, while it is stated that mediation may be applied unconditionally for issues such as illegally removing from public office, registering marital status, not giving information, etc.

It is said that the possibility to apply alternative dispute resolution procedures; to the public order-related issues by Algeria, to public interest-related issues by Thailand, to the issues affecting third parties' interests and rights by Check Republic, and to regulatory transactions as well as to the issues which are directly related to public interest such as environment, history, protecting cultural values and development plan implementations by Turkey is low. Another opinion expressed by Slovenia is that mediation is not possible for the administrative transactions based on public power which are subject to legality audit in administrative and constitutional courts, but alternative dispute resolution procedures, especially arbitration, may be used for the agreements, such as concession agreement, which are executed between the private law person and public authority hold mixed the features of private law and public law.

4.2. Parties to alternative dispute resolution procedures

4.2.1 Parties to Alternative Dispute Resolution Procedures

The question, who can apply to alternative dispute resolution procedures has been replied as all real and legal persons by most of the members countries including Germany, Lithuania, Canada, Cameroon, Colombia, Luxembourg, Mexico, Niger, Norway, Portugal, Ukraine, Senegal, and there is no restriction to this except for the exceptions envisaged by private laws. The answer to this question in Republic of China is that; other institutions with independent budgets may seek solution applying to these procedures; while in Poland it is stated that if they are a party to the transaction, social institutions not having legal personality may have recourse to mediation as well, which is a little bit broader.

In France, public legal personalities can only settle, provided that the power to settle is vested to the public institutions upon the explicit permission of the Prime

Minister. On the other hand, public legal entities cannot have recourse to arbitration in principle, except for the exceptions.

In Australia, breach of interest is sought for both real and legal persons to apply to Administrative Objection Board. Likewise, in the Netherlands, any real or legal person having interest may use administrative application methods, as it seems relevant party. "Relevant party" means any person whose interests are affected from any decision, and administrative authorities are deemed interest holders in their field of responsibility, while interests of legal persons include general and collective interests they represent according to their activity fields and activities. On the contrary, in the Netherlands, any real and legal person can use mediation, including administrative authorities that are governed by public law.

As for private legal arrangements, it is stated that the persons included in the relevant arrangement may apply to such procedures, such as customers of mail service, interest groups and suppliers of mail services in mail/telecommunication/publication law, all users of energy network, electricity suppliers, network operators or other companies operating in electricity or natural gas sector in energy law.

In Belgium any person not declared to be incapable can make settlement contract, sign arbitration contract, but except for the cases protected under private law, public legal persons may have recourse to arbitration only for disputes arising from contracts, and it can be authorized in other issues only by law or Royal Decree debated in the cabinet. Likewise, except for the cases envisaged by law or Royal Decree debated in the cabinet, public legal personalities cannot have recourse to mediation.

In Algeria, all real persons can apply to alternative procedures, while legal persons are restricted; public institutions cannot settle except for the issues arising from previously signed international agreements or public procurement, arbitration may be recourse to by the minister(s) if the subject is related to the government, or by the Governor or President of District Public Board if the subject is related to the province or district.

In Czech republic, pursuant to constitutional provision stating that public mandate may be exercised in a way stated in the law and within the borders set, administrative authorities subject to public law can have recourse to such procedures only when stipulated by law.

In Ivory Coast, there is dual division for the contracts in terms of reconciliation; only bidder real or legal person may apply to reconciliation commission for the disputes arising when signing the contract, while only relevant public legal persons, apart from contract partners, (contracting authority, authorized administrative structure and bodies in the tender concerned) ay apply to reconciliation commission for the disputes arising when performing the contract. Parties to the contract may apply to arbitration in equal terms.

In Switzerland, within the framework of mediation, decision makers are not only the parties but also those having the authority to object them. In a decision taken in 2010[4], Federal Administrative Court rules that the administration could not be a party in mediation action. As a result, Administrative Court has decided that in an action where no third party is involved, only an individual and a public institution faces, two parties does not exist, so article 33b of federal law on administrative procedure is not applicable.

In Ivory Coast, every real or legal person who is the address of a decision detrimental to him may have recourse to preliminary administrative procedures.

[4] 22 January 2010, Decision no A-6085/2009

4.2.2. Actors of alternative dispute resolution procedures other than the parties of the dispute

4.2.2.1 Participation of third parties in alternative dispute resolution procedures

In alternative dispute resolution procedures, the process is executed by a third person or body assigned with the consent of the parties. Member countries' legislation determines the persons or bodies will participate in the process and how, the criteria they should have and how they will be keep under supervision.

In general, in the member countries taking the survey, it is possible to leave the duty of executing Alternative Dispute Resolution Procedures to a third party by the parties of the dispute[5]. On the other hand, administrative or independent institutions or organization having expertise in mediation and reconciliation and their officers as well as the arbitrators or board of arbitrators executing the arbitration may serve in place of the mentioned third party.

There is no legal obstacle stated in Lithuania for third persons to execute settlement (memorandum of understanding-MoU) process.

Alternative dispute resolution procedures is not executed by third persons; in Mexico, except for when arbitration, or for tax issues, MoU is envisaged by law, and in Cameroon not at all. In Poland, reconciliation procedure is carried by the persons with conflicting interest applying to a public administration and signing a contract, thus, no third person is assigned.

The authority executing the procedure in preliminary administrative procedure, is generally a regulatory authority or its hierarchical superior, and uses its own public mandates. Thus, unless an exceptional arrangement is made by laws, no administrative institution can assign, in this procedure, a third as stated above in a way to exercise public mandate[6].

In judicial alternative dispute resolution procedures, for the disputes brought before the court, alternative process may be executed by the judge, clerk or a third person, if necessary. In some member countries such as Austria, Canada, Senegal, a third person cannot be assigned in processes executed directly by judge. Likewise, in Poland, mediation can only be executed by a judge or legal counsel before the court. On the contrary, in France and Algeria, judge, with the consent of the parties, may assign a mediator which may be executed by a third person or entity, whereas, in Netherlands, mediation has to be referred to a mediator included in Mediators Federation Quality Registry Center, who is approved by the parties.

In Austria, considering Administrative Objection Boar as a 'administrative court, in the existing implementation where the Chairman of the Board may refer any issue to alternative dispute resolution procedures, specifically to a person from inside or outside the Board, alternative dispute resolution procedures are executed by authorized officers or members from the Board, whereas in Federal Court, an action before the court may, wholly or partially, be referred to an arbitrator for arbitration, or to a mediator for mediation, or to an appropriate person to decide through an alternative **dispute resolution procedure.**

4.2.2.2. Participation of court and administrative judge in alternative dispute resolution procedures

Assessing the member country reports on survey, in some countries[7], administrative judges may participate in alternative dispute resolution procedures, as per their

[5] Switzerland (mediation), Senegal, Austria (mediation in environmental sustainability assessment), Czech Republic (mediation), Ivory Coast (contracts field), France, Netherlands (mediation), Portugal,

[6] Austria, China, Netherlands

in-judiciary and extra-judiciary duties; in some countries[8], administrative courts have no authority regarding alternative dispute resolution procedures, i.e. an administrative judge cannot serve as arbitrator or mediator.

In most of the countries where administrative judges may participate in the process through making suggestion or executing alternative dispute resolution procedures[9], the parties are not forced by administrative judges to apply to an alternative procedure, in- or extra-judiciary, but they are invited to such procedures, when deemed necessary by court or law, in some issues, and thus, alternative dispute resolution procedures may be executed.

On the contrary, in Canada, pursuant to article 386 of Federal High Courts regulation, High Court may rule that an action or dispute may be a subject matter of an agreement including mediation, mini trials, etc., and such alternative dispute resolution procedure to be executed by the judge in charge or head clerk cannot be rejected by the parties. likewise, in Spain (in issues restricted to value assessments subject to commercial activities) and in Poland, the court may start alternative dispute resolution procedure, either ex-officio or upon request.

Apart from the generalization above, in report on Ivory Coast, administrative judge's invitation for the parties to preliminary administrative procedure in an action for annulment, provided it is not expired, was considered as his contribution to alternative dispute resolution procedures.

In Belgium, there is no procedure in place in Council of State, even the roles of the mediators allocated by law, decree or decision ends upon an action taken before Council of State. On the contrary, pursuant to 3rd paragraph of article 42 of Decree of 4 April 2014 on organization and procedures of administrative justice authorities, administrative judges, clerks, auditors or third persons jointly presented by the parties can be assigned as mediator by License Objections Council.

4.2.2.3. Evaluation of alternative procedures executed by administrative judges

We can put under two titles the evaluations of member countries taking the survey, positive or negative, on alternative procedures to be executed by administrative judges.

4.2.2.3.1. Advantages of alternative procedures executed by administrative judges

- Judge is fair, has justice distribution duty and has the ethical authority which any other mediator could not have against the parties
- Professionalism, experiences and technical knowledge of judges may be benefited from in the field of law and administrative issues
- The conclusions of mediation executed by a judge are more reliable and easily acceptable by the parties
- Resolving the disputes through alternative procedures mitigate the work load and contributes to fast justice
- Judges participating in alternative procedures helps eliminating the of mediator and reconciliatory
- Assuming that judge will intervene, the parties avoid from possible illegal dispute resolutions
- Judges who are the guardians of public order and democratic values, participating in transformation of classical civil justice system together with the citizens, contributes reduce the distance between the lawyers and society.

[7] China (in public courts), France, Netherlands (MoU), Portugal (reconciliation),
[8] Czech Republic, Cameroon, Lithuania, Mexico, Ukraine
[9] Germany, Algeria, Senegal (full judgement actions on administrative responsibility), France, Netherlands, Switzerland, Lithuania

4.2.2.3.1. Disadvantages of alternative procedures executed by administrative judges

- Judge may excessively abide by the rules
- The parties may reach a mediation agreement under compulsory conditions.
- Judges' traditional judgement experiences may also cause some problems since they traditionally reach a judgement without seeking the participation and mutual agreement of the parties
- The conflict between judgement duty of judge which forces them to apply applicable laws and alternative dispute resolution approach which takes the judges out of artificial boundaries of the agreement and requires looking for solutions in sources which are totally outside of their duties within the framework of procedures providing confidentiality and flexibility.
- It keeps the judges busy apart from their judicial duties
- If the parties do not reach an agreement as a result of guiding parties by administrative judge towards a settlement, the parties may feel pressured to settle because it fears that refusing to settle may lead to a unfavorable outcome of the court proceedings
- An implicit work load may emerge since the judge executing alternative dispute resolution procedure will not provide judgement services for the said action

5] Effectiveness of alternative dispute resolution procedures

5.1. Legal framework of agreements concluded in administrative matters through alternative dispute settlement procedures

5.1.1 Legal and enforcement nature of the agreements made in administrative issues through alternative dispute resolution procedures

It is observed in member countries that the agreement made as a result of alternative procedure are generally binding for parties due to their characteristics of private law. The reason for requiring a judge intervention is to make an already binding agreement between the parties enforcing. In Ivory Coast, administrative judge is not authorized to approve such agreement, but he determine the existence of the agreement, if applied to him, whereas in Senegal, mediation and reconciliation agreement, in Czech republic and Netherlands reconciliation agreement is subject to the notary certification or approval by authorized judge, in Spain reconciliation before court can only have enforcement ability by submitting it to the approval of the authorized judge.

In France, in the event of settlement before the action, as ruled in the case law of Council of State, no application can be filed with the court, nor can judge's approval be requested. Its exception is correcting the situation arising after decision for annulment, or making settlement if an illegality impossible to correct or if it is impos-

sible to enforce the decision for special reasons. It is stated that this may be the case especially in public procurements and public service privileges.

In Australia, the parties may directly make an agreement for the issues falling outside the scope of duty field of Administrative Objections Board, and the resolutions reached through alternative procedures in Administrative Objections Boar may only be binding upon the approval of the Board. In Poland, approval of public administration is required for the MoU executed upon joint declaration of the parties in the presence of public body towards reaching reconciliation, and an approved agreement has the same effect with administrative instruments.

In Cameroon, it is stated that the agreements reached as a result of alternative procedures are binding for everyone, no approving body is legally governed in laws.

In Turkey, it is stated that, the decisions taken as a result of settlement and reconciliation do not have the same nature with court order, but these decisions cannot be appealed since they are binding and final for the parties pursuant to the relevant legal arrangements; however, legal remedy is possible for the issues which cannot be agreed upon.

In Portugal, a distinction is made according to the subject and it is stated that, mediation agreement may be applied without any need for approval by judicial bodies in the event that the parties are capable, content of the agreement is not contradicts with public order and the mediator is included in the list kept by the ministry of justice (except for mediation processes within the scope of public mediation), provided that the subject matter of the dispute resolved through mediation is not required to be approved by judicial bodies.

Considering the legal status of the resolutions reached as a result of judicial alternative procedures, while the content of the agreement reached through alternative procedures in Australia Federal Court should be registered upon the decision of the competent court, in Canada, it is deemed adequate to report and put in the court file the resolution reached as a result of a dispute resolution meeting in compliance with High Court Regulation by the parties. In Lithuania, agreement is approved by court order and judicial process is completed with the same order, and agreement is deemed to have the force of judicial decision. In France, it is stated that settlement results in definitive judgement between the parties and has legal enforceability; in this respect, settlement will put an end to the action which is being heard by the administrative judge, in such a case the judge should rule that application made to him becomes devoid of essence[10] or accept the withdrawal decision of the plaintiff, as the case may be[11]. In order to be able to conduct the audit assigned to him regarding approving a settlement agreement whose subject matter is in his duty field, the administrative judge launches and investigation, communicates approval request to anybody who can be a party to the action on resolving the same dispute and may order the parties to present anything and request from any relevant person to present his observations which may enlighten him. All of the ordinary research tools such as expert report, on-the-spot examination, inquiry, examining writing, etc. are provided to the administrative judge.

At this point, it should be noted that in some countries[12] there are some criteria sought for the agreements made through alternative procedures to be approved by judge: mediation or arbitration agreements cannot conflict with parties' will, law, public order and ethics, public interest or the interests of third parties, they cannot be gratuitous legal transactions, In France, it is even stated that settlement agreement would be invalid if the agreement is not approved by the judge.

In the countries where ombudsman and federal mediation are in place, it is observed that public administrations often abide by the recommendations of them, but these recommendations are not legally binding.

It is understood that arbitral awards become binding and enforceable once they are finalized, just like judicial decisions.

In many countries where administrative remedies are applied, the parties do not make an agreement at the end, and administrative authority takes new administrative decision.

In China, it is stated that the resolutions reached through alternative procedures in an administrative dispute are deemed administrative agreement, and thus subject to administrative justice, there is no arrangement in place regarding entry into force of administrative agreements or their legal consequences, they are implemented without being pre-examined by the court provided that they are voluntarily concluded in line with the laws; in some cases explicitly stipulated by law, these agreement are legally enforceable. For example, pursuant to Article 40 of the By-law on the Implementation of the Administrative Reconsideration Law of the People's Republic of China stipulates that «If a citizen, legal person or other organization who/ which refuses to accept a specific administrative instrument made by an administrative organ in exercising the discretionary power as prescribed in by-laws and regulations, and applies for administrative reconsideration but voluntarily reaches an agreement with such administrative body before a decision is made by the administrative reconsideration, must submit a written MoU to the administrative reconsideration organ. Administrative review body allows reconciliation, provided that public interests and legitimate rights of others are nor violated. It is explained that such a MoU is an administrative agreement and legally binding.

5.1.2 The procedures to be applied in case of violation of the agreements made on administrative issues through alternative procedure

The agreements made by and between the parties on administrative issues through alternative procedures are mostly deemed as instruments which are binding for the parties and may be subject matter of an action if not implemented and may create claims. In Cameroon, which is different from these generalization, it is stated that in the event of breach of the agreements made as a result of alternative procedures, direct enforcement is possible.

As for the types of actions that may be taken, although the countries do not give details, the examples for the actions that can be taken by the victim since the agreement made as a result of alternative procedures are not abided by -i.e. settlement agreement- with the aim of indemnifying the damages incurred are as follows: full judgement case before administrative court against the administration who is a party to the agreement[13], action for annulment by bidders of a tender or plaintiffs if they prove that contractor does not abide by the agreement[14], actions before general courts if the reconciliation agreement is violated[15].

In addition, when the agreements (e.g. MoU) are approved by the judge, or an agreement is a reached at the end of a procedure executed by administrative judge in judicial alternative procedures - in which case agreements are recorded with a report or court decision these agreements are enforceable and the parties may use private law procedures for applying the agreement provisions such as warning, enforcement, etc.[16]

As a result of administrative application, no agreement is made between the parties, new administrative decision is taken by the administration, and such new decision may be subject matter of an application filed with administrative court through legal action or directly with the High Court, as is the case of Sweden Tax Authority decisions.[17]

[10] Société Dolfus Decision of CE 12 November 1948 and Lebon 560
[11] Abbé Lemoine Decision of CE 8 December 1991 and Lebon 1171
[12] France, Spain, Senegal

[13] France, Cameroon
[14] Lower Austria Provinces
[15] Czech Republic
[16] Federal Court of Australia, France, Germany, Algeria, Switzerland, Lithuania, Portugal
[17] E.g.: Netherlands, Luxembourg, Sweden, Czech Republic

5.2. Evaluations on alternative dispute resolution procedures in administrative issues

5.2.1. Advantages of alternative dispute resolution procedures in administrative issues

* Dispute resolution through fast and simple procedures
* Flexibility for the parties

One of the most important advantages of these procedures is seen as providing flexibility for the parties. Because it allows parties to generate more creative solutions by including extra-legal aspects of the dispute in the agreement in line with their needs and interests through different methods which are not possible through traditional methods. This way the interests of the parties which cannot be expressed with legal terms can be taken into account.

* Lower costs when compared to judicial and arbitration procedures
* Providing efficient, effective, sustainable and long lasting resolution for the parties which balance their interests and needs

Thanks to mutually agreed flexible resolutions, alternative procedures ensures that the disputing parties regularly meet, make an effort collaboratively, this way the possibility to reach a result which can be accepted by both parties increases, and efficient, effective, sustainable and long lasting resolution for the parties are reached which balance their interests and needs

* Repairing and protective role in the relation of disputing parties

No party feels like having lost at the end of the process This contributes to repairing and long-term protection of the relation between the parties -i.e. an officer with his hierarchical superior, a public legal entity with contract partner or public service beneficiary.

* Provides mutual open and confident environment to disputing parties, while ensuring privacy

Non-public and confidential negotiations and sittings between the parties aiming at reaching an agreement within alternative dispute resolution procedure and prohibition of use in later processes (including judicial process) and if necessary destruction of information, documents and evidence submitted throughout the process without permission of the parties, enable protection of the parties and privacy of matter of dispute.

* Contributes to reducing the number of disputes referred to judiciary, and thus, mitigating the work load.
* Allowing resolution of dispute through compromise and preventing possible actions to be taken against the administration, and thus, strengthening the reputation of administrative institutions and bodies
* Contributes to later possible action process

Presenting to the court during subsequent trial process the materials and documents compiled, even if the parties do not reach an agreement through alternative dispute resolution procedures, provided that the consent of both parties are taken, facilitates the process.

5.2.2. Disadvantages of alternative dispute resolution procedures in administrative issues

* Third parties or boards to execute alternative dispute resolution procedures sometimes may not have adequate technical or legal knowledge
* The implementation fields of alternative dispute resolution procedures are very limited, particularly in administrative issues

* Citizens are not interested in alternative dispute resolution procedures since they do not have information about such procedures which are recently being introduced in member countries
* Administrative authorities show no interest to these procedures since they avoid taking initiative and are reluctant to take responsibility of the decisions taken as a result of negotiation with the aim of avoiding financial liability as the areas where they can exclusively exercise discretion are limited, in the event they exercise this right
* It not legally possible for administrative authorities to propose agreement in many issues due to its relation to public order, etc.

5.2.3. Evaluations on developing alternative procedures in administrative issues

Thoughts on developing alternative procedures mainly focus on three different opinions. In most of countries, it is stated that alternative procedures should be further improved considering their future practical benefits, whereas some countries are said not to look positively, either partially or wholly, to improve such procedures since they are not implemented or needed, and some countries[18] say that a future evaluation will be more reasonable after getting the results since the the relevant practices are very new.

Given increasing importance of developing alternative procedures in many jurisdictions around the world and introducing legal reforms in some countries which even foresee criminal mediation and the possibility of pre-trial and judicial alternative methods being a solution for excessive work load of the courts; existing practices in the countries should be improved, more appropriate resolution methods should be be offered to the parties and new procedures that will ensure their active role in dispute resolution should be adopted, institutionalised, enacted and to that end, relevant legal experts should be raised. In this scope, possible suggestions for improving alternative procedures include: offering basic and continuing training programs for administrative judges on alternative dispute resolution procedures with the support of administrative justice training centers' support; preparing a guide for applying mediation and reconciliation procedures; signing local-scale contracts among administrative judicial authorities, bar associations and administrations with the aim of setting a framework for alternative procedures and promoting them[19]; making ethical arrangements that the mediators and reconciliator will be subject to; enriching and modernising[20] legal texts on judicial alternative dispute resolution procedures.[21]

On the other hand in some countries, for example in Hungary, for the time being it seems that the question is not the further development of the alternative procedures but the very creation and introduction in the legal system of such procedures.

Main obstacles in front of the improvement of alternative procedures may be listed as; parties agreement liberty limited to general principles of administrative law (equality, public interest, proportionality) in administrative issues resulting in limited number of disputes resolved through alternative procedures[22], intensity of administrative institutions in resolution of administrative disputes leading to une-

[18] Ex: Belgium

[19] The success of the contract signed in 2013 between Grenoble Bar and Isere General Council and Grenoble Municipality and Local Public Duty Management Center under the protection of Grenoble administrative court is shown as an example. First of all, this contract to be applied regarding public duty, public contracts, urbanization and public good sets the maximum period (3 months) and cost cap (200 - 500 Euro, taxes excluded) for mediation procedures that these actors are engaged in. This contract also includes an ethics code which guarantees independence and adequacy of the mediators who are subject to a firm professional confidentiality. It is stated that, since the conclusion of the contract, mediation procedures has boosted in Grenoble Court (almost fifty procedures in three years).

[20] For instance, making legal arrangements for broadening the implementation area of mediation, covering mediation costs and being able to benefit from legal aid, in the event of recourse to mediation by the parties, stopping trial times until the end of such procedure, etc.

[21] See Report on France

[22] Germany, Switzerland

qual status between the parties during mediation procedures or inability to benefit from flexibility[23], constant unwillingness towards alternative procedures which are criticised for some reasons such as the parties and administrative judges are not well informed of alternative procedures, lack of an clear and functional guide so that the parties can have recourse to such procedures regularly, prolonging the ongoing trials and inability to ensure equality of weapons in the absence of clear and serious procedural rules[24], future detailed arrangements on alternative procedures leading to limitation of the flexibility which is necessary for such procedures. Such obstacles are seen to negatively affect the productivity and success rate expected from alternative procedures.

As for the countries which do not look positively, either partially or wholly, to the development of alternative procedures in administrative issues;

In Finland, Austria, Cyprus and Norway, it is stated that in administrative issues alternative dispute resolution procedures are not in place and there is no such tendency, either; whereas in Mexico Federal Tax and Administrative Court and Poland administrative courts, it is stated that alternative procedures are accepted as faster dispute resolution procedures since administrative disputes are finalised in reasonable time, even in a very short time.

In Germany, it is stated that judicial alternative procedures are not necessary to further improve, but particularly in land development issues (development plans, infrastructure planning), more broad use of pre-trial procedures is targeted. In the Netherlands, it is stated that, given that well-functioning administrative application procedures reduce the number of appeals filed to administrative courts, there is no need to improve alternative dispute resolution procedures, but a law is being drafted with the aim of launching and encouraging recourse to mediation in the field of administrative law.

MINUTES OF THE COMMISSIONS WORK

[23] Poland
[24] France

1] Report by the public contracts commission

Speech by Mr. Abdoulaye Ndiaye,
President of the Administrative Chamber of the Senegalese Supreme Court,
Rapporteur for the Public Contracts Commission

Madame Chair,

Heads of Courts,

Members of Delegations, Dear Guests,

On behalf of Senegal, the Rapporteur had the honor of presenting the report of Commission No. 1, on Public Contracts.

He wished to begin by describing the method used for the preparation of this report. Rather than identifying questions one after the other and providing the answers from each country, the emphasis would be on dealing with the themes stemming from the questions and answers supplied by countries depending on their similarity.

The advantage with that method was that it made it easier to understand the specific characteristics of the different systems and to conduct a comparative analysis of common elements.

The diversity of legal tradition was reflected by the organizational structure of court systems and affects the answers provided. The same held true for the division between legal proceedings and administrative business given that, in some countries, alternative dispute resolution and contracts came under the remit of judicial judges.

That said, Commission No. 1, chaired by Mr. Marc NADON of the Canadian Federal Court of Appeals, had been assigned two case studies.

The Rapporteur wished to thank all of the countries that participated actively in the work of the Commission, namely, Algeria, Belgium, Canada, China, Colombia, Côte d'Ivoire, France, Italy, Lebanon, Senegal, Sweden, Switzerland, Togo and Turkey.

The first case submitted to the Commission for analysis concerned the execution of a public contract for the expansion of a pool. It raised questions relating to unforeseeability, penalties for delay, the price set, and the exceptional nature of the additional work.

The second case had to do with the public procurement procedure launched by the General Directorate for Roads for the purpose of building a boulevard. The dispute was about the tender requirements, which were deemed non-compliant with the subject of the contract; legislation; the abnormally low tender; evidence of any document; and an unsuccessful tendering procedure.

These two cases had the advantage of addressing problems that arose during the two phases of public contracting, namely, award, which went from calls for tender to award, and execution, which began with signature and ended with delivery.

The Chair opened the meeting at 2.45 p.m. By way of introduction, he traced the history of alternative dispute resolution (ADR) and explained the spread of that approach. He felt however that ADR was relatively new from an administrative perspective.

Following those introductory comments, the Commission examined those questions in rich and productive discussions.

◆ ***On alternative dispute resolution: authorization of mediation, transaction and arbitration***

Answers were not clear cut for one group of countries: Algeria, Côte d'Ivoire, France and Sweden. Mediation was possible and could be entrusted to a third party.

For another group, namely Belgium and Switzerland, the margin for manoeuvre came from private law, given that the agreement was a private law contract and thus fell within the purview of judicial judges, not administrative contracts.

In Italy, neither mediation nor settlement were possible with public contracts, and judicial judges were competent as far as the execution of contracts was concerned.

◆ ***On the person of the ombudsman, a private individual, public entity or administrative body, its powers, competence, independence and remuneration***

Such entities existed for a group of countries: in Côte d'Ivoire, Senegal, Togo and Turkey, there were independent administrative authorities tasked with settling disputes and conducting mediation.

Ombudsmen needed to enjoy guarantees of independence and impartiality, and were remunerated by the State or the parties.

It emerged from the discussions that such ombudsmen did not receive any special training and were not empowered to determine disputes in the event of litigation.

◆ ***On the legal value of settlements, the suspensive or interruptive nature of mediation proceedings, homologation, and the appeal of settlement agreements***

Homologated settlement agreements had the same value as court rulings and that of contracts binding both parties. Proceedings had a suspensive nature with regard to limitation periods (Belgium, France), but were not suspensive in Canada. In general, it was possible to appeal settlement agreements. In Côte d'Ivoire, however, once such an agreement had been homologated, it could no longer be appealed.

◆ ***On arbitration, its legal value and the exercise of remedies***

Arbitration was accepted for public contracts in many countries: Algeria, Côte d'Ivoire, France, Senegal and Togo.

It was not authorized in Belgium and Sweden.

Arbitral awards were on a par with court decisions, and decisions taken could be appealed.

It should be noted that in Algeria, arbitral awards could be appealed within one month in the court before the court in which they had been handed down, unless the parties had waived their right to appeal in the arbitration agreement.

Conciliation recorded in minutes signed by the parties constituted an enforcement order and was not subject to any remedy at law.

On the other hand, judgments on appeals of arbitral awards were only subject to appeal in cassation, in conformity with the Code of Civil and Administrative Procedure.

◆ ***On prior appeals, competence, and parallel or concomitant appeals***

In some countries, prior appeals had to be lodged. That was the case for France, the member countries of the West African Monetary and Economic Union (WAEMU), and Colombia. Such appeals were not required elsewhere, as in Belgium and Togo.

On the one hand, there were prior appeals, informal or hierarchical appeals where the applicant contacted the administration directly with a view to the resolution of his claims, and on the other hand, there were prior appeals to an independent authority which, above and beyond mediation, rendered decisions on the points at issue. The latter decisions were subject to appeal before administrative courts.

With regard to competence in France and in the WAEMU member countries, in Switzerland, the administrative courts were competent, whereas in a number of countries, only judicial judges were competent. That was the case with China, Canada, Belgium and Colombia.

In Lebanon, mediation was not institutionalized. As far as mediation for public contracts was concerned, public entities required authorization by the Council of Ministers.

Although parallel appeals were authorized in Canada and France, they were not accepted in other countries such as Belgium, Italy and Sweden.

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◆ ***On the function of the judge and the remedies available to the parties***

In general, judges could propose mutual agreement procedures or decide to that effect by agreement of the parties. However, they could not impose such procedures under any circumstances. They could conduct said procedure or entrust it to a third party, and the parties could challenge the mutual agreement procedure before the judge.

◆ ***With regard to the case study case relating to public procurement procedure***

1) Who may have recourse thereto, to which dispute resolution modes, and within which timeframes

Anyone with an interest, bidders and bidders who were unsuccessful owing to infringements of the law, in China, any person on behalf of the general interest.

In some countries, dispute resolution for public procurement was handled by independent administrative authorities. That was the case for Côte d'Ivoire, Senegal, Togo and Turkey. On the other hand, in other countries such as France, the entire proceedings were handled by administrative courts, from the pre-contract referral arrangement to the contract referral arrangement and the dispute relating to execution.

In general, timeframes were very short: 30 days in Belgium, 12-15 months in Canada, one month after publication and six months in the event of non-publication in France for European law, and two months before signature for so-called "detachable" acts and after signature for direct appeals against contracts under domestic law, in Turkey five days or ten days, depending on the case.

2) What is the legal value of the decision rendered; what are the sanctions for non-fulfilment, what remedies are available, are parallel appeals possible?

Decisions handed down by independent administrative bodies had the same value as a court judgment.

In Turkey, out of 100,000 public tenders, there were 4000 to 5000 appeals, only 15% of which went to court.

Decisions could be appealed to the competent courts. Prior appeals to the independent authority were compulsory in countries where such appeals existed. However, that was not the case for Sweden, Belgium or Canada.

It emerged from the debates that differences were minor and clearly constituted a source of mutual enrichment. Although ADR could be useful with regard to the execution of contracts involving two co-contractors with clearly defined obligations, that was not the case with public procurement procedures. The latter were governed by treaties, the fundamental principles on transparency, the equality of candidates and public policy rules. As they involved authorities and economic operators, it was difficult to accept such alternative modes.

The Rapporteur apologized for any imperfections in the report and thanked participants for their indulgent attention.

Speech by Mr. Wehua Li, Judge on the People's Supreme Court of China, *Rapporteur of the Public Contracts Commission*

Two practical cases were discussed at committee 1 under the theme of public procurement contracts. In consideration of logical connections, observations about discussions concerning case 2 will be first presented. Observations about discussions concerning case 1 is then followed.

◆ ***Part I: case 2***

1.1. Basic principle of government procurement

Some countries have passed independent code of government procurement law. Some other countries have not passed independent code of government procurement law yet. No matter whether there is an independent code of government procu-

rement law or not, the administrative authority has to follow some basic principles. These basic principles include free access, equality and transparency. Certainly, the core principle should be equal treatment to all potential tenderers. Most disputes concerning government procurement are related to equal treatment to some extent.

1.2. Two stages of government procurement contract

Generally speaking, government procurement contract can be divided into two stages. The first stage is before signing of a procurement contract. The second stage is after signing of a procurement contract.

In some countries, the disputes which arise in the two stages are all public law issues. Government procurement contract are treated as public law contract. Therefore, these disputes are all handled by administrative judges. In some other countries, the disputes which arise at the first stage are public law issues. The disputes as to implementation of the government procurement contract which arise at the second stage constitute private law issues. The disputes as to signing of a government procurement contract which are put forward by a non-contracting party constitute public law issues.

In some countries, if a non-contracting party lodges a lawsuit, the subject matter should be the validity of the government procurement contract. The non-contracting party may sue to annul the contract. In some other countries, the subject matter should be the legality of the administrative authority's decision to award the contract. The non-contracting party may sue to abolish the decision.

1.3. Legal remedy as to the disputes which arise at the first stage

In some countries, it is required to apply to administrative authority first. If the aggrieved party is not satisfied with the administrative authority's decision, the party may challenge the decision before a judicial court. At the same time, the party is bound to the subject matter and claims made in its previous application to the administrative authority. In some other countries, prior application to administrative authority is not compulsory and the aggrieved party may lodge a lawsuit directly to a judicial court.

In some countries, the competent administrative authority to deal with application for review is the contracting administrative authority. In some other countries, the competent authority can be the contracting administrative authority or an independent committee.

ADR is not applicable. The main reasons include the time period for public procurement procedure is quite brief and the legality of an administrative act is not fit to be decided by mediation.

1.4. Scope of plaintiff for the disputes which arise at the first stage

In some countries, only tenderers who were not awarded the contract may lodge a lawsuit against the administrative authority's decision of awarding a contract. The subject matter of the lawsuit is administrative authority's decision on awarding the contract. In some other countries, an interested party who did not offer bidding may lodge a lawsuit to claim invalidity of the contract.

In some countries, all the potential contractors enjoy the right to lodge a lawsuit. The plaintiff can be an interested economic operator who was disqualified as for bidding due to certain conditions laid down in public procurement document.

In some countries, once the time limit for lodging a lawsuit against public procurement document expires, a party who is discontent with the public procurement document is not allowed to lodge a lawsuit. The reason is that the party have read the document and accepted it.

1.5. Time limit to apply for review or to lodge a lawsuit

Since application to administrative authority for review or lodging a lawsuit to a judicial court may suspend public procurement procedure, it is generally required that an aggrieved party may apply for review or lodge a lawsuit within a brief period. The stipulated brief period differs country from country. It can be 15 days, 30 days, 45 days, etc. Correspondingly, urgency procedure is applied in some countries for a timely settlement.

In some countries, there is no time limit for a party who claims invalidity of the public procurement contract.

◆ *Part II: case 1*

2.1. General notes

Over the last 30 years, ADR has been a hot topic worldwide. Since ADR is simple, less cost, efficient, and specialized, it is utilized both inside and outside the judicial court.

As being compared with court proceedings, the guiding principle for applying ADR is voluntariness. The parties may choose to or not to apply ADR. The parties may also choose when, where, and who to conduct ADR.

Some countries are active to push ADR forward. Some other countries are not. Although many countries have passed arbitration law, only a few countries have legislated as regards mediation.

2.2. Application of ADR in this case

As just explained in Part I, government procurement contract can be divided into two stages. The disputes which arise in this case are issues of the second stage in logic.

In some countries, the disputes are regarded as public law issues. While in some other countries, the disputes are regarded as private law issues. No matter what nature it is, mediation is applicable throughout the court proceedings. If arbitration was agreed in the contract, arbitration can also be applied to settle the disputes. When the case is pending in court proceedings, parties' choice of arbitration will terminate court proceedings rather than suspend court proceedings.

If mediation is applied in court proceedings, time limit of trying the case can be prolonged.

2.3. Several issues concerning mediator

Some countries lay down such conditions as expertise to be a mediator, while some other countries do not. If a mediator is chosen out of parties' confidence, no qualification is required as to be the mediator. In the case where a mediator is appointed by a judge, the mediator must fulfill certain quality. However, there is generally no clear criteria.

In some countries, the judges are forbidden to suggest mediation in court proceedings. In some other countries, the judge who is hearing the case may suggest application of mediation. Upon consent of the parties, the judge may even appoint a mediator.

In some countries, a mediator must be a real person. A public entity, an administrative authority or a civil servant is not allowed to serve as a mediator.

In some countries, a mediator gets paid by the parties. In some other countries, a mediator does not get paid by the parties, but get certain amount of allowance from the government.

2.4. Binding effect of mediation agreement

In some countries, once a mediation agreement is signed by the parties, the agreement becomes legally effective and binding over the signing parties. The agreement does not need to be confirmed by a judicial court. In some other countries, the mediation agreement needs to be confirmed by a judicial court for the aim to ensure its compliance with public order.

Although the mediation agreement is legally binding over the signing parties, an aggrieved party may lodge a lawsuit to annul the agreement.

2.5. Whether or not a judge can conduct mediation

The issue whether or not a judge can conduct mediation involves judicial neutrality and acknowledgement of the judicial role. As a judge, it is naturally expected to keep neural. Neutrality commands a judge not to receive a party alone. However, it is normal for a mediator to conduct mediation back to back. As a judge, its judicial role is to render a judgment according to law. However, as a mediator, its primary pursuit is to settle the dispute, no matter whether the dispute is settled lawfully or unlawfully. Sometimes, equity principle is applied in mediation. If a judge conduct mediation, confusion of different roles can possibly be caused.

In some countries, judges are encouraged to conduct mediation, since it is believed his or her familiarity with case facts is favorable to settle the case via mediation. Therefore, judges get trained about mediation in these countries. In some other countries, although a judge may conduct mediation, he must be excused if mediation is not successful and the case will be referred to another judge for trial.

Comment by Mr. Germán Bula,
President of the Colombian Council of State of Colombia
Rapporteur of the Public Contracts Commission

The speaker wished to recall that each body of legislation contained its specific characteristics and nuances, which had a major impact on the day-to-day work of lawyers and judges. For example, having a choice or on the contrary an obligation to initiate alternative dispute resolution was not the same thing. In that respect, Colombian legislation was more complex than it might seem from the report. On that point, the speaker wished to underscore the quality of the national report by the Chinese delegation.

Comment by Mr. Jacques Jaumotte,
Judge on the Belgium Council of State,
Rapporteur of the Public Contracts Commission

The speaker noted that as a member of the Belgian delegation, he had participated in the work of the Public Contracts Commission. He wished to ask a question that could perhaps not be answered right away but that perhaps echoed the comments made in other commissions. Recours to ADR posed problems in cases where several parties were concerned by the solution but only the administrative authority and one of those parties participated in the discussion.

Furthermore, that was one of the reasons why, in the reports of the Public Contracts Commission, a distinction had been made between the pre-contract phase, where a whole series of third parties were concerned, and the non-contract phase, where only the administrative authority and the person who signed the agreement were still in talks.

The speaker had the impression that throughout the administrative act or the administrative phase where that which could be decided following arbitration, mediation or settlement could directly affect third parties, it was very difficult to imagine such a dispute resolution mode if third parties were adversely impacted by the solution. It was almost necessary to provide third parties with remedies to solutions stemming from alternative dispute resolution.

The speaker wondered whether, as might be reflected by the body of reports, that conclusion might be common to the different commissions. Participants had examined the example of public procurement procedure, but it was also possible to give the example of a building permit: if the person requesting the permit met with a refusal and subsequently negotiated with the authority to obtain his permit under certain conditions, that could adversely impact the interests of third parties, in particular neighbours. The speaker failed to see how, at that late stage, neighbours could challenge the outcome of the mediation or settlement.

Comment by Mrs. Soumia Abdelsadok,
President of the Algerian Council of State,
Rapporteur of the Public Contracts Commission

The speaker addressed herself to Mr. Abdoulaye Ndiaye, who had done a very comprehensive and clear job. She merely wished to point out that in Algeria, arbitral awards were subject to appeal during one month before the court that had handed down the decision, unless the parties had waived their right of appeal in the arbitration agreement. On the other hand, conciliation recorded in minutes signed by the parties was not subject to appeal.

With regard to the comment by Mr. Jacques Jaumotte, the speaker remarked that in Algeria, an injured party could initiate third party proceedings against an arbitral award but not against conciliation, which meant the corresponding minutes were not subject to appeal.

2] Report by the taxation and economic regulation commission

Speech by Mr. Yves Gounin,
State Councillor, Council of State of France
Rapporteur for the Taxation and Economic Regulation Commission

The speaker was honoured to report on the working group devoted to tax issues. Although the title of the working group had been "Taxation and Economic Regulation", it had focused on taxation.

The working group had been relatively small with only some 20 delegates, half of whom were from Turkey, in addition to representatives from Mexico and Switzerland (Ms Florence Aubry Girardin), Australia (The Hon Justice Duncan Kerr, President of The Administrative Appeals Tribunal), and China, co-chaired by:

- Mahmut VURAL from the Turkish body Danistay;
- Manuel HALLİVİS PELAYO, President of the Mexican Federal Court of Justice for Tax and Administrative Matters.

The representation, which had been quantitatively small but qualitatively remarkable, reflected the specific nature of tax disputes in the countries in question. Some of the institutions concerned did not have fiscal jurisdiction (Belgium, Germany, Italy, etc.). For those empowered to take up tax matters, such competence was exercised by a category of highly specialized magistrates who formed a group, or even a caste, whose colleagues did not always understand them or their techniques and vocabulary.

The examination of the two case studies proposed by Turkey and France had provided an opportunity to review alternative dispute resolution methods for tax matters.

The Rapporteur's report was broken down into three parts: the reasons for using ADR; its perimeter, and its modalities. The reasons for using ADR for tax disputes were no different from the reasons for using it for general litigation. For the parties, it meant dispensing with lengthy, costly court proceedings. For courts, it meant avoiding backlogs. One specific criterion applied to tax disputes: it was a field where the administration enjoyed considerable leeway, leaving room for fair settlements that did not violate the law.

Nevertheless, the group raised two points that perhaps tempered the unanimity with regard to ADR. The first was the question of access to the courts: by establishing ADRs and making them compulsory, there might be a risk of restricting access to the courts, which constituted one of the fundamental principles of the rule of law and was enshrined in both domestic and international texts – even if the means derived from violations of Article 6 of the ECHR was inoperative in tax law. The second subject of concern was the following: whereas the suspension or interruption of time limits for appeals was necessary to leave time for conciliation and mediation proceedings, it gave taxpayers acting in bad faith an opportunity to delay payment of their tax debt, unless they were not granted any extensions.

With regard to the ADR perimeter, the group had made a useful effort to clarify the relevant terminology, as the same words did not apply to the same procedures from one country to another. The two other working groups had probably made similar efforts. Distinctions had to be made between conciliation, mediation and arbitration.

Conciliation brought the two parties together without bringing in a third party and proposed a non-binding solution. Mediation brought in a third party, a mediator, who could be a public organ like the tax ombudsman in Mexico, or a private entity, a collegial body (like the CDI in France) or a single person. Both mediation and conciliation led to proposals that were not binding on the parties. Finally, arbitration, like mediation, brought in a third party, an arbitrator, but unlike conciliation and arbitration, led to a solution that was binding on the parties.

The third and final point was clarifying at what stages of procedure ADR could be applied. To present that point, the Rapporteur wished to take up the very clear presentation by the Swiss colleague. She had referred to the procedure of (rescrit) (filing), which had not been considered initially but which, after due reflection, seemed to form part of ADR. It was recalled that rescrits consisted of answers by the administration to questions put by citizens and bound the administration to a certain extent by virtue of the principles of legal certainty and legitimate expectations. Like the other ADR methods, they made it possible to avoid court proceedings and thus merited a reference by the working group.

The Rapporteur noted that the aforegoing applied to the phase prior to tax assessment. Once the tax authorities had determined the tax amount, taxpayers had several options for challenging the amount without referral to the courts. The first option was that of seeking an administrative remedy from the authority that had taken the decision or its supervisor. That option existed in most countries, such as Turkey, Mexico and China. In some countries such as France, such a prior administrative remedy was compulsory: a case could only be referred to the courts if the taxpayer had already satisfied that obligation. It should not be viewed as an obstacle in terms of access to the courts, but rather as an effective means of avoiding litigation by allowing for a dialogue between taxpayer and administration before referral of a case to the courts.

Once a case had been referred to the courts, however, all of the participants were much more cautious as far as ADR was concerned. In the words of the Swiss colleague, "albeit possible in litigation that is at the disposal of the parties, arbitration is incompatible by nature with tax matters."

The Rapporteur said that he would conclude as he had begun, not by referring to the case of Turkey, because he had already shared everything he knew, but by stressing the original nature of tax magistrates. They were administrative judges with specific characteristics, but administrative judges who, like all of the participants, helped build the State based on the rule of law: a judge, if one dared paraphrase the French poet Verlaine, who was neither exactly the same or entirely someone else.

Comment by Ms Catherine Bergeal,
Secretary General of the French Council of State
Rapporteur for the Taxation and Economic Regulation Commission

When preparing for the Congress, the French delegation, especially with regard to the case study on tax matters, had indeed not envisaged rescrits (rulings) as an ADR method. Expressing herself on the basis of years of service as a tax judge and as a member of a working group that had met the previous year at the French Council of State to study the contribution of rescrits, their benefits and advantages, the speaker had to admit that, as the Rapporteur had emphasized, the rescrit in tax matters was indeed an ADR method. That was because in principle, it intervened even before the litigation had arisen, because the administration, in responding to a specific question put to it, explained its position and entered into undertakings that it was then obliged to respect, which therefore made it an alternative dispute resolution method, as the Swiss colleague had noted. In reality, it prevented litigation from arising. As far as tax disputes were concerned, rescrits had been significantly developed in recent years in France. In fact, the concept had been so successful that it had been expanded to other types of litigation, notably with regard to social security and social rights, which came under both judicial judges and administrative judges.

Comment by Mr. Jacques Jaumotte,
Judge on the Belgian Council of State
Rapporteur for the Taxation and Economic Regulation Commission

The speaker wondered whether the notion of rescrit could be translated in English by the notion of "ruling", in particular tax "rulings". If that were indeed the case, he had two questions. The first was to determine why the Rapporteur had said that there was a certain amount of wariness towards arbitration once litigation had come into being and that such wariness did not exist with regard to the principle of rulings or rescrits, which were settled before litigation even arose and which relied on the principle of legitimate expectations in the body benefiting from the rescript or ruling. The second question was that, more fundamentally, the working group would not tackle the matter that day, but it was well known that at the European level, problems related to rulings had been discussed. The speaker wondered whether over-reliance on that procedure, which occurred prior to litigation and enabled citizens to benefit from the principle of legitimate expectations, might not pose a more fundamental problem of equality in terms of taxation.

3] Report by the public service commission

Speech by Mr. Burakhan Nelikoglu,
Judge on the Council of State of Turkey
Rapporteur for the Public Service Commission

This report intended to reflect the information obtained and general opinions reached as a result of deliberations and consultations conducted within the framework of "Alternative Ways of Dispute Resolution Regarding Administrative Issues" by the "Public Services Committee," which has been set up as part of the 12th Convention of the International Association of Supreme Administrative Jurisdictions.

The committee has carried out its work based on two dispute practices which were developed earlier. One of the two practices in question is related to the dismissal of a public official, while the other is about the transfer of a public official due to health problems. In this context, deliberations and consultations at the Committee focused on the applicability of "Alternative Ways of Dispute Resolution" to administrative disputes involving public officials, and the relevant practices in different countries were shared in an attempt to develop different ways of dispute resolution.

The Committee avoided theoretical discussions on the definition of the concept of "Alternative Ways of Dispute Resolution," and approached the matter from the widest angle possible, discussing all different practices and ways of dispute resolution.

The Committee's sessions were attended by delegations from Belgium, France, Germany, Portugal, Thailand, Venezuela, Poland, Lebanon, Niger, Congo, Mozambique, Switzerland, The Netherlands, China, Spain, Ivory Coast, Ukraine, and Turkey.

In terms of methodology, the report will attempt to present the general picture observed and the general opinions reached, rather than presenting the individual practices and views shared by participating delegations regarding their respective countries. At the same time, separate headings/sections will be created for each alternative way of dispute resolution discussed by the Committee.

CONVENTIONAL ADMINISTRATIVE OBJECTIONS

It has been observed that administrative objections are interpreted and considered as applications lodged with the authority who has performed the administrative act, or his or her hierarchical superior, for the revocation, modification, or annulment of the administrative act. Administrative objections constitute an integral part of the legal systems of all participating countries, and while they are an optional right in the majority of these countries, it is compulsory in certain or all maters in a few countries.

While the number of such objections is very high, it was stated that they were rarely successful and had little effect on the resolution of disputes. It was observed that this situation resulted from a variety of different reasons, such as the busy schedule of the administrative authority who performed the administrative acts, its

certainty in the validity of its decision, and its unwillingness to reconsider the act; it was also noted that a similar situation exists in almost every country.

While it was stressed that administrative objections should play a more influential role in the resolution of administrative disputes, it was concluded that, a precondition, this required the development of more functional methods in processing objections, as well as adequate organizations and personnel.

◗ ARBITRATION

It was observed that arbitration - which is regarded as a dispute resolution method whereby the parties to a dispute agree to assign jurisdiction to an arbitrator - has not been recognized in almost all participating countries for the resolution of administrative disputes, particularly those involving public officials. While arbitration was observed in some limited areas in Portugal, it was understood that it was not applied to various disputes involving public officials, particularly disputes over disciplinary actions.

It was concluded that arbitration was not highly preferred with regard to administrative disputes because administrative law, which is dominated by concepts of public interest and public order, considers that arbitrators, who are not required to take these concepts into account, cannot be successful in resolving disputes.

◗ OMBUDSMAN

It was observed that there was an ombudsman in almost all participating countries, and that, despite different names, they shared similar functions. It was understood that decisions of the ombudsman represented recommendations, and were not binding on the administration in almost all the countries. In general, lodging an application with an ombudsman is an optional right. While its effect on the period during which an administrative lawsuit can be instituted varies from one country to the other, it does not restrict the right to file a lawsuit.

It is generally agreed that an application lodged with an ombudsman is highly unlikely to lead to the resolution of an administrative dispute.

◗ MEDIATION

It was observed that mediation is regarded as a process whereby a third party establishes dialogue between the parties in an effort to reach a compromise and presents potential solutions without trying to dictate them, and that this method is more preferred and applied more commonly in the participating countries, since it not only offers positive legal results, but also allows for an informal autonomous dialogue, thus ensuring a positive psychological result for those filing the objection.

The general picture which emerged from the discussions was that mediation should be considered in two parts, namely as those performed before and after the trial. While the experience gained as a result of deliberations over both types of mediation will be presented in this report, we also considered it necessary to first touch upon the assessments and discussions that were made regarding these types of mediation within the context of the principle of legality, the right to access a court of law, and public interest versus individual interest.

The principle of legality and mediation:

During deliberations made by the committee, it was emphasized that the principle of legality should be strictly followed, and that the administration should not have the opportunity to resort to mediation if the administration is subject to non discretionary jurisdiction. It was seen that there was a consensus among almost all of the participating countries on this subject. It was observed that there was even a form of control mechanism in that regard in some countries, and that an agreement reached among the parties was subjected to approval by a judge in order to verify that the agreement concluded through a mediator is in compliance with legal norms.

It was, however, pointed out that, even in cases where the principle of legality applies and the administration is subject to non discretionary jurisdiction, the parties could also find different solutions by taking advantage of the autonomy granted to them, on condition that it does not conflict with public order and legal norms.

Meanwhile, it was emphasized that while issues where the administration has wide discretionary powers was more suited to the mediation method, its application should be limited to specified issues.

Mediation in the context of public interest versus individual interest:

It was emphasized during the discussions that it would not be possible to use mediation if public interest is accorded priority and if legal norms protecting public order are applicable. In this context, the committee reiterated the conclusions reached about the principle of legality highlighted in the previous section.

It was, however, stated that the mediation method could be used more easily if individual benefits prevail.

Right to access a court of law and mediation:

The committee also discussed whether mediation was in conflict with the right to access a court, which is a constitutional right. It was argued that the right to access a court of law would be violated if it is compulsory to apply to a mediator, or if the judge has referred the dispute to a mediator even if the parties have not made such a request. It was also stated that applying to a mediator could also violate the right to access a court of law by causing a delay in the final resolution of the dispute, or by preventing a party from filing a lawsuit within the specified period.

It was, however, noted that there might not be such a problem if applying to a mediator depends on the mutual desire of the parties, and if the mediation process is also shaped by the requests and agreements of the parties.

Following these general assessments, we should proceed to issues that were specified for both types of mediation methods mentioned above.

Based on the existence or non-existence of a legal basis for the mediation method, the participating countries may be classified as follows:

- Countries which have made legal arrangements and have put them into effect.
- Countries which have transposed the European Union directive to their domestic laws, but rarely apply it due to the lack of a legal framework.
- Countries which have no legal arrangements.
- Countries which do not have a legal arrangement, but are currently debating the matter or are preparing to pass a draft law.

It should be stressed that while countries which do not have a legal arrangement are in the majority, the number of number of countries which do is also considerable.

With regards to the breadth and scope of the area of application of mediation in countries with the necessary legal basis, the participating countries may be classified as follows:

- Countries where no legal restriction is stipulated.
- Countries where, despite the absence of legal restriction, certain disputes are, by nature, not referred to mediation for reasons such as public order and the principle of legality.
- Countries that permit mediation regarding certain limited issues.

At this point, countries in the second group - in other words, countries where certain disputes are, by nature, not referred to mediation for reasons such as public order and the principle of legality - are in the majority.

Meanwhile, almost all participants stated that mediation is rarely used for administrative disputes because of the lack of awareness among the public regarding this method, the tendency of this method to delay the trial process, the general conviction that it is unlikely to be successfully, and the lawyers' reluctance to resort to this method as they believe it will limit their business.

Based on the experience shared by the participating countries, the information obtained with regards to the selection of mediators and their qualifications and powers was as follows:

- A mediator may be an individual, a public official, or a judge.
- If a judge is to serve as a mediator, he or she should not have been involved in the dispute before, and not act as a judge while acting as a mediator.
- Selecting individuals as a mediator would be more convenient, as the appointment of judges as mediators may lead to problems in terms of independence and impartiality.
- An individual should serve as a mediator voluntarily.
- Lawyers usually act as a mediator.
- A mediator, who is not a public official, should be accredited and overseen by a public agency.
- Ethical standards applicable to mediators should be set forth in advance.

Countries which have experience in this field emphasize the following points for ensuring the success of the mediation activity:

- In addition to the parties of the dispute, the mediation meetings should also involve the individuals who have a direct or indirect interest, and these individuals should also take part in the settlement. Otherwise, other persons may object to any decision made by the administration under a settlement and file a lawsuit.
- The action to be taken by the administration depending on the settlement reached should be included in the text of the settlement, which should also include all details relating to the action. Otherwise, it may be claimed that the action to be taken by the administration is in conflict with the settlement.

Finally, it would be appropriate to also mention that some countries which currently lack a legal framework regarding mediation have stated that they have started making preparations for a legal arrangement on this subject. It was understood that these countries consider mediation as a remedy for coping with the excessive workload of administrative courts, and that they desired to prepare legal arrangements as soon as possible. They also indicated that they are inclined to keep its area of application as broad as possible.

OTHER ALTERNATIVES BROUGHT UP DURING THE DELIBERATIONS

During the deliberations of the Committee, it was stated that "methods for amicable settlement" that would enable the parties to a dispute to reach a settlement should be tried independently of alternative ways of dispute resolution stipulated in the national legal systems; that the primary responsibility in this regard rested with the administration; that the administration should be open to dialogue; and that a dispute could be resolved through dialogue established based on the principle of good faith without using any legal method - an opinion which was supported by all the participants.

In that context, "good administrative practices" and "good administration right" were also brought up and it was stated that these emerging concept could be useful to the extent they were considered by the administration in the resolution of administrative disputes. While it was stated that examples of good administration - such as permitting individuals to be involved in the relevant phases of actions concerning them, and to express their opinions prior to any action that would have a negative effect on them - have yet to become binding legal norms, all participants agreed that a dispute could be avoided to the extent these guiding principles are observed.

CONCLUSION

As a result of the Committee's sessions, it was observed that there was a consensus among all participants about the fact that alternative dispute resolution methods represented an alternative to trials, and that they should be improved and applied on a wider scale. However, in the light of practices in the past, it was understood that they were rarely applied, and could not be applied extensively in the future in areas largely influenced by the concept of public order, public interest and the principle of legality, or in areas where the administration has limited discretion. For this reason, it was emphasized that they could be applied to administrative areas where individual interest is accorded priority and the administration has wide discretion.

Comment by Mr. Mehmet Ali Gümüş,
High Judge on the Turkish Council of State
Rapporteur for the Public Service Commission

The speaker began by thanking all of the Congress organizers and participants. He then made a comment that concerned all of the commissions, not only the third commission for which participants had just heard the report. Judges were responsible for settling disputes in general, but the issue at hand was settling disputes prior to referral to the courts. It was therefore fitting to report on the right to access to the courts defended by the European Convention for the Protection of Human Rights and Fundamental Freedoms, which implied a certain responsibility as far as judges were concerned.

Reconciliation could go through arbitration, mediation or an ombudsman, but before that there was a phase of negotiation, of bargaining, which required access to a maximum amount of information to obtain the best possible results. That also implied that parties had to be aware of the implications of intervention by the judge in order to enhance the effectiveness of negotiations and arrive at a more reasonable agreement. The speaker suggested that the commission discuss that in its report.

Comment by Associate Professor Dr. Selami Demirkol,
High Judge of the Plenary Session of the Administrative Chamber
of the Turkish Council of State
Rapporteur for the Public Service Commission

The commission was composed of participants from different countries and proposed three ADR approaches. The question that the speaker wished to raise was the following: "Why do we need ADR?" Naturally, the courts' very heavy workload was the first answer, but an agreement could be challenged before the judge. However, ADR offered two advantages: avoiding settling disputes in court and resolving them before they went to court. The problem was that the guarantee of a fair trial was not safeguarded by ADR methods. Parties were not always in a position to defend themselves, and the consensus on which ADR hinged was sometimes biased. The conclusion of the commission, to which the speaker had contributed, was that mediation or other ADR methods could not really be applied successfully to litigation concerning public officials. That conclusion would enable participants to clarify current legislative debates in their respective countries.

Comment by Mr. Mats Melin,
President of the Swedish Supreme Administrative Court
Rapporteur for the Public Service Commission

The speaker wished to thank the Rapporteur of the Third Commission for also having raised issues relating to ADR mechanisms within the framework of administrative law. Of course, it was important to draw the right conclusions in terms of the heavy burden of courts' ordinary work to enhance the efficiency of litigation procedures. Fundamentally speaking, however, administrative law meant applying the law to an individual, imposing upon him a burden such as taxes or granting him benefits such as social aid. The speaker merely wished to point out that alongside the proper application of the law, which also implied respect for legality and public order, there was the question of equality of treatment among individuals. Being capable of negotiating the scope of the burden that the State wished to impose or the benefit which the State wanted to grant could pose a problem in terms of equality before the law between citizens and companies.

Comment by Mr. Machatine Munguambe,
President of the Administrative Tribunal of Mozambique
Rapporteur for the Public Service Commission

The speaker's question was linked to the last comment, because the limitation of ADR methods in public law was primarily due to the standards of public order. Public law regulated the use of power by the State and limitations on the fundamental rights of individuals. As such, his question was the following: should public order be considered as a common denominator for all of the problems mentioned? Although only the Third Commission had mentioned public order in its report, the speaker felt that it could also be referenced with regard to contracts and taxation. The speaker therefore considered that one of the major limits on ADR was precisely that notion of public order given that there was a case in each of those fields where ADR was not possible because the cases involved the public order. That being so, he proposed including the question in all of the Commission reports, since all of those assumptions would be subject to limits when ADR was used.

Comment by Mr. Jean-Marc Sauvé,
Vice-President of the French Council of State
Rapporteur for the Public Service Commission

The speaker wished to endorse the last comments. It was amply clear that ADR could not justify a departure from the principle of legality and could not lead to the abandonment of the rules of public order that applied to the administration. As Mr. Mats Melin had said a moment before, the principle of equality had to be kept in sight. Notwithstanding, administrations had vast discretionary power, a factor which paved the way for ADR that took fairness into account. Thus, there was a narrow line to follow, and the speaker indeed felt that the subjects that had just been discussed were common to all three groups. For example, public procurement was governed by rules that were extremely strict most of the time, reducing possibilities for ADR. On the other hand, there was more discretionary power, more margin for appreciation in conjunction with the execution of public contracts, making it easier to resort to mediation. Given that the speaker had referred to the Third Commission and had just spoken about the First Commission, he wished to say a few words about the Second Commission and revert to the notion of rescrit or ruling. In that field as in others, it was necessary to combine the principle of legal safety or the principle of legitimate expectations with the principle of legality. Rulings, that is, the administration's interpretation of tax law, were not any old instrument. They did not justify turning the law on its head. Moreover, countries that allowed rescrits or rulings provided the possibility of checking the legality of such decisions, particularly once they had been published. Thus, in cases where interpretations of tax law were fanciful and blatantly and directly violated the law, remedies were available. Of course, there was the possibility of having such interpretations overturned. In any event, if some participants were interested, the speaker could provide details on French case law in that respect.

QUESTIONNAIRE

Alternative dispute resolution in administrative matters

Alternative dispute resolution procedures share the characteristic of offering parties a means of settling their disputes, flexibly and rapidly, without having recourse to the courts.

This questionnaire only bears on these procedures in as much as they are implemented within the field of administrative matters and, consequently, within the jurisdiction of the administrative courts.

Nevertheless, in the targeted domain, the questionnaire involves a broader definition of alternative procedures than is traditional.

For instance, these may be:

- procedures conducted before the administration, prior to referral to the court and without the court's participation, in the form of obligatory or optional preliminary administrative recourse;
- mediation or conciliation procedures conducted by third parties;
- procedures requiring the intervention of the administrative court, directly or indirectly, either prior to a jurisdictional procedure or during such a procedure.

Several factors have contributed to the contemporary development of these procedures for avoiding recourse to the courts. These procedures come in response to a growing demand for proximity and prompt dispatch of business. They are also the means to avoiding congestion in the courts. Consequently, reforms have been pursued for the purpose of developing their role in many States that are members of the Association, as is the case within the European Union.

Introductory questions

1. With what objectives are these procedures deployed? What advantages and benefits are expected to result from them?
2. Do alternative procedures such as those defined above exist in your country? If no alternative procedures exist in your country, do you plan to create such procedures? Can you articulate your current thinking in this domain?

I. The goals and the scope of alternative procedures

1. With what objectives are these procedures deployed? What advantages and benefits are expected to result from them?
2. Are alternative procedures used in your country in administrative matters? Since when? What factors contributed to their development and what is the proportion of administrative disputes that are resolved each year by such procedures?
3. Do rules restricting recourse to alternative procedures in administrative matters exist in your country? In your opinion, what are the types of litigation for which these procedures would not be appropriate?
4. Do instruments organising the use of administrative procedures in administrative matters exist in your country? If so, are these instruments legally binding (hard law/soft law)?
5. If your State is a member of the European Union, how was the Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters transposed into national law?

Caution! This question is only asked insofar as the said directive can weigh on "administrative" matters in accordance with your domestic law.

II. The stakeholders in alternative procedures

1. What categories of natural or legal persons have recourse to alternative procedures? Can all legal persons governed by public law use them?
2. Can the parties to an administrative dispute entrust the conducting of a mutual agreement procedure to a third party? What role is this third party called upon to fulfil?
3. Do standards regulating the activity of these third parties exist in your country (required qualifications, continuing vocational training, remuneration, deontology etc.)? Do authorities with responsibility for the supervision of compliance with these standards exist (public bodies, professional organisations, non-profit organisations – possibly operating under license, etc...)?
4. Can the administrative courts invite or oblige parties to litigation brought before them to pursue an alternative procedure? Can the administrative court entrust a mediation mission to a third party?
5. Can the administrative court itself conduct mediation proceedings? In your opinion, what are the advantages and drawbacks of a mutual agreement procedure conducted by a judge? In what types of litigation does the direct intervention of a judge appear most appropriate?

III. The procedures of alternative procedures

1. Can you detail the different alternative procedures applicable in administrative matters in your country? How do the parties choose between the various alternative procedures available?
2. Do administrative appeals, mandatory prior to referral to the administrative court, exist in your country? Do optional such appeals exist? How are they organised? Does the lodging of an administrative appeal modify the conditions governing the filing and review of subsequent recourse to the court? For example, can the parties present arguments, not produced during a prior administrative appeal, before the administrative court?
3. What are the general principles regulating alternative procedures (adversarial principle, impartiality, rules of confidentiality, time limits, etc...)? How much autonomy do parties have with regard to the organisation of the deployment of an alternative procedure?
4. Does the initiation of an alternative procedure allow the suspension or interruption of periods of limitation? And of time limits for judicial appeals?
5. Can the court intervene, even partially, during the course of an alternative procedure? If so, in what way?

IV. The efficacy of alternative procedures

1. Do you consider that alternative procedures are faster and/or less costly than court procedures? Can you provide a quantitative comparison?
2. What is the proportion of administrative disputes that are definitively resolved by alternative procedures? What are the factors in success, or failure?
3. What is the legal standing of an agreement reached by means of an alternative procedure? Can such an agreement be referred to the administrative court for approval?
4. What instruments and procedures are available to the parties in the case of a violation of the agreement reached by means of an alternative procedure, potentially approved by the administrative court?
5. Do you consider it necessary to further develop alternative procedures in your country? Why? In what form?