GENERAL REPORT

Hon Brian Tamberlin QC
Deputy President
Australian Administrative Appeals Tribunal

Mr President, distinguished guests, ladies and gentlemen

I wish to add my warmest welcome to you at this 10th Sydney Congress of the IASAJ and I trust you will find it rewarding both personally and professionally.

I wish to thank the authors of the papers dealing with the three basic themes for this Congress. I am greatly indebted for the enormous amount of work, research, and thought that has gone into their preparation and this is readily apparent on the face of the reports themselves. It is fitting that the authors should receive due credit and that their fine work should be acknowledged on the public record.

I have reviewed detailed responses from over 40 countries to the questionnaire sent out and these responses include papers from all Continents to address the core topics selected for discussion at this conference.

The responses provide a rich and stimulating database for discussion comparison and appreciation of the ways we can approach three central aspects of our tasks, which go to the heart of judicial review and control of administrative decisions, in the many administrative systems represented here today.

The three themes selected for our 10th Congress and the issues they raise are:

- Competence and Jurisdiction: This topic concerns the matters which can be reviewed and the matters excluded from review by Administrative Courts;

- Procedure: This topic concerns the manner in which Administrative Courts and Tribunals go about reviewing administrative acts, decisions, rules and regulations which are the subject of review jurisdiction;

- Power – This topic concerns the decisions and orders we make. The way we approach acts under review. What remedies we grant. How we can modify decisions. How we enforce decisions of the Administrative Courts in the event of refusal or failure by the Executive to comply.

The National Reports cover legal and administrative systems embracing jurisprudence and statutory provisions of what can be broadly described as the civil law countries and the common law countries.

This report is intended to give a general overview of the responses given by members. Such an overview cannot, of course, cover all the detailed and numerous specific exceptions and qualifications detailed in the national reports so that the position of members is broadly

stated. The specific applications, principles, and reasons for exceptions can be elaborated and considered in the smaller discussion sessions.

The topics have been broken down into a number of sub-topics and what I propose to do in this Report is to summarise the range of approaches set out in the papers in response to the questionnaire.

I now turn to the topics.

1. Competence and Jurisdiction

1.1 What types of acts are subject to control or review (administrative regulations \individual decisions)?

This issue poses questions as to the range of administrative acts which can be annulled or reviewed by the Administrative Court or Tribunal. It raises two different topics:

1.1.1 The nature of the act that can be reviewed or annulled.

1.1.2 The form and effects of the act

1.1.1 The nature of the act that can be reviewed or annulled

Unilateral acts

The specific question is whether the review includes general regulatory acts, rules, or norms, which apply broadly or in the abstract without being directed to individuals, or whether the review includes only acts directed to individuals by way of decisions or specific-directed norms. Another distinction raised in the reports is between unilateral acts which are specific controls imposed on a person without there being any mutuality in the form of any participation, knowledge, or involvement of that person in the action as a party to the act in question. These include regulatory acts such as a regulation limiting the speed of vehicles in urban areas, or the prohibition of alcohol on festive days, in particular public places. However, it is necessary that a challenge is made to the act by an individual or entity. Administrative Courts and Tribunals cannot act of their own initiative in reviewing administrative acts.

Examples, referred to in the reports, of administrative regulations are “decrees”, “rules”, “bylaws”, “regulations”, “ordinances”, “codes”, “planning schemes”, “an environmental plan”, tariff schedules” or “general directives”.

Examples of individual decisions are refusal of an application for approval, failure to deal with an application, a decision to expropriate particular property, and a decision not to carry out a duty.

Most of the courts are competent to review general binding rules – apart from statute law. In some countries, though, the administrative courts or tribunals do not have the competence to quash general binding rules. That is the case, for example, in China and the Netherlands where administrative procedure law excludes competence to rule on administrative rules and regulations with general binding force taken by administrative organs. In Slovakia, only general binding rules taken by local authorities can be challenged before the administrative courts. In Austria, only the Constitutional Court has competence to quash general binding rules made by the Federal State or the Länder.

In most of these cases, though, the reports indicate that an indirect review is permitted. More generally, this indirect review also arises in many other countries (Australia and France for example).

"Indirect control" means that general administrative regulations, bylaws or norms can be appealed indirectly by way of challenge to a "decision" on a particular application, which is made pursuant to those rules. For example, in relation to the field of town planning (urbanisation), where a decision is made to refuse an application to develop land or erect a building, a court reviewing that decision can examine, in the process of review, the validity of the regulatory scheme under which the approval has been given if that is challenged. In this way the administrative act or regulation of a general nature (i.e. a town planning ordinance) is challenged indirectly as opposed to mounting a direct challenge to the regulatory scheme by seeking an annulment order directly before any decision is made under it. This indirect challenge arises in Australia and China for example.

Apart from these examples, as a general overview, almost all countries permit direct or indirect review of both general and specific and individual rules and decisions. In Germany, for example, the administrative courts are competent to decide all matters of administrative law except constitutional matters.

Contracts

There is much variation in practice between countries as to whether and to what extent they will review contracts entered into by administrative authorities. In some cases, the review of these contracts belongs to the civil jurisdiction because they are mutual acts, whatever the content of the contract may be (even if it creates a relationship based on public administrative law) – as is the case, for example, in Belgium, Luxembourg or

Senegal. In other words, the administrative courts in these countries are only competent to quash unilateral acts. But in many countries, the administrative courts consider in such situations that unilateral acts (for example schedule of tariffs in the contract) may be severable (detachable) and therefore can be considered and examined as a reviewable unilateral act, leaving the rest of the contract to be controlled according to the ordinary law of contract. For example, an agreement between an administrative authority and an individual, which sets out tariffs in respect of a highway to be constructed by the other party to the contract, may sometimes include a unilateral act in the contract, namely a tariff schedule. This schedule may be challenged in some Administrative Courts by a highway user although the other provisions of the contract may not be challenged because they confer mutual rights, which are for the civil courts.

1.1.2 The form and effects of the act

Form

The reports indicate that a broad view is taken in relation to the form of the act under review and the way in which it is communicated. As an example, it does not matter if the administrative act is set out in a document, a formal order, a circular, a communiqué or even a press release. In some cases the act complained of can be oral or be manifested by a physical act such as demolition of a building or seizure of property or deprivation of liberty.

Generally, the Administrative Courts and Tribunals of all countries look to the content and substance of the administrative act and are not bound by the form in which the act is embodied. In some countries, there is a requirement that the act be communicated or embodied in writing. In the Netherlands, oral decisions are generally not reviewable for instance, whereas in others such as France, oral acts can be challenged. In Belgium, the act can be explicit or implicit, oral or written. In some limited circumstances, it is only possible to review some specific decisions or acts and not general rules.

Effects

The main criterion that can be found in the reports is the "executory character of such acts" (Cyprus) which looks at the effect they have on the personal situation of the citizens. In other terms, an act can only be reviewed if it has "legal consequences" (Netherlands) and this excludes preparatory measures and acts or decisions of an advisory or confirmatory nature. For example, there may be many internal preliminary steps of investigation and recommendations involving "choices" before making a final administrative decision on an application. It is only the "final" or "operative" decision that can be challenged and not the earlier steps leading up to it. Although some of these

steps may involve choices and selections, they may not themselves have legal effect. A question can arise as to whether the act in question has the necessary degree of finality to be challenged. This concept is very important in relation to the Australian Administrative Appeals Tribunal, for example, and in the Federal Court where review is in respect of administrative "decisions".

An important consideration, then, is whether the "act" is at such a stage where it has legal consequences:

In some instances (France for example), jurisdiction will be attracted even if the act in question has not come into effect (materialised). This jurisdiction to challenge a future act illustrates the far-reaching nature of the review process in that country. Also, whether a Tribunal will review such acts may depend on the practical necessity, the degree or urgency, and the serious nature of the impact of the future acts.

In two recent cases in Australia, the legality of a general set of proposed federal banking regulations dealing with inter-bank charges, in connection with credit cards (*Visa* and *Mastercard*), was considered by the Federal Court as a matter of urgency before the regulations came into effect. The review was by way of judicial review, which included grounds that the regulations controlling the inter-bank charges were *ultra vires* and also were manifestly unreasonable. The challenge was permitted because the banks needed an early decision and certainty as to whether the regulation of the Credit Card charges was valid, in advance of the regulations coming into effect. The Court in fact held that it had jurisdiction to review the decisions and it upheld the validity of the regulatory scheme. In Korea, internal regulations which are not binding outside the administrative institution can be reviewed, because it can naturally be expected that functionaries will perform according to such internal regulations. Standing also exists to seek withdrawal of regulatory administrative dispositions which have already lapsed if there is a possibility that such a disposition may be repeated. This type of control is similar but not identical to the notion of a control of "non-materialised acts" which are referred to in the responses of some civil law countries.

On the contrary, in all cases, inaction or failure to make a decision is made reviewable by the Courts or Tribunals. The failure to carry out a duty, function, or obligation or to make a decision within a prescribed time (delay) is treated as if it was refused and it can be reviewed and failure or refusal is treated as a reviewable act.

1.2 According to which criteria are the jurisdiction or competence of a Court or Tribunal (hereafter Court) determined? Are there certain decisions of the executive or public authorities, which cannot be submitted to review by reason of the nature or substance of such decisions?

This subject raises three topics:

1.2.1 Criteria of competence

1.2.2 Matters (subjects) of competence

1.2.3 Exclusions of competence

1.2.1 Criteria of jurisdiction and competence

The criteria for jurisdiction often exclude matters of private or penal law or issues of constitutionality. In some countries, constitutional issues will be referred to the Constitutional Court for separate determination, as in France and Germany (also in Algeria, Benin, Burkina Faso and Luxembourg). Once the constitutional question is decided, the matter may be sent back to the Administrative Court. Where matters of private or penal law are involved, the issues raised and the legality of the decision are within the exclusive jurisdiction of the judicial Courts. Some matters may raise both private and public law issues. This can raise questions of which body will hear the matter and whether matters can be separated.

Disputes as to jurisdiction are sometimes resolved by a specific Tribunal of Conflicts as in France. Also, they can be dealt with by legislative provisions more closely defining the criteria for competence of competing jurisdictions. Decisions on administrative matters concerning the judiciary and the legislature are excluded in most cases. In common law countries, conflicts of jurisdiction do not often arise in relation to administrative law matters (the United Kingdom, Australia, Canada or the United States). In these countries, there is a system of final judicial review by the highest judicial Court, which exists together with a separate Tribunal structure. In these cases, the judicial Courts have the final say on questions of law with the Tribunals deciding questions of fact or merits on appeal from the administrative decision.

Four main criteria are relevant to indicate that a matter is administrative.

The first one, which seems the most important – but is often combined with one or two of the other criteria – is the existence of a "relation juridique administrative" as described in the report of Portugal, which is concerned with the public object of the act and the application of norms of public law. In another words, "only acts decisions or omissions of

the Administration emanating from the exercise of executive or administrative authorities in the domain of public law and not private law are amenable to review" (Cyprus). This criterion, which looks to the administrative nature of the act, has been variously described in many reports as "public administrative acts", "acts performed in the exercise of a public power", "executive acts", "governmental acts", "acts in the course of carrying out a public service", and "acts serving a public purpose", for example. In New Zealand, a common law country which has a Judicial Court review system of administrative acts, the criteria for review and the type of acts that can be controlled are those involving the exercise of a statutory power or a statutory power of decision. These expressions are specifically defined in some detail in the New Zealand legislation. In New Zealand, broadly speaking, any exercise of statutory power that has public consequences can be reviewed. The key concepts are "statutory power" and "public consequences".

The public nature of the Act – which involves the competence of the administrative courts- usually derivates from it relating to an activity of public service or manifesting special – prerogative- powers . Whether it involves the exercise of a public or statutory power or a personal, private action or decision. The reference to the public nature of the Act is contrasted with acts of a private nature, which can be subject to review by judicial Courts or specialised Tribunals.

Organisation of the public service is a classic instance of competence for administrative review in many cases. Where a contract is made with a private body which is to serve a public purpose, acts of that body can be challenged. In some instances, there can be public services that are not administrative in nature and these may be excluded from being subject to review because they are subject to a review by special bodies or Courts exclusively, or they go to the ordinary Courts. In some instances, public administrative acts and services that have an "industrial" or "commercial" character will be excluded although they have a governmental or public nature, and are exercises of public power. This is the case for example in France, Lebanon, and Niger.

The underlying rationale in relation to the exclusions of industrial or commercial acts, or administrative acts of an industrial or commercial character, is that these bodies are competing with private enterprise in the open marketplace and they should not be unduly restrained or hampered by administrative law fetters on their ability to perform competitively.

In some jurisdictions, for example Algeria, some matters that would generally be considered administrative matters are assigned exclusively to the civil Courts. These include matters relating to public roadways, and compensation for damage caused by vehicles belonging to the administration. Switzerland has an exclusion in relation to decisions concerning the type of vehicles that can circulate on its roads. Also, in some cases there are exclusions from administrative review of matters such as public contracts and taxes.

The second criterion, which many of the reports refer to, is the identity of the person performing the act or involved in the case – usually as a defendant.

There is often some indication as to whether an act can be reviewed when there is a public body or authority which is a party to the proceedings, or when public funds are being expended by the body making the regulation. In Thailand for instance, the competence of the administrative courts relies both on the character and nature of the dispute and on the identity of the respondent which has to be an "administrative agency", which means a Ministry, Sub-Ministry, Department, or Government agency regardless of its name which is given the status of a Department, provincial administration, local administration, State enterprise established by an Act or Royal Decree or other State agency. Indeed, some other responses refer to whether the act under challenge is an act of a legal body established under public law such as a state, commune, or regional authorities or municipality. One paper refers to "a legal act having juridical consequences in the exercise of a public function".

In a few countries, this criterion –the identity of the body involved in the dispute or performing the act- is taken as conclusive to determine the competence of the administrative courts. This is the case, for example, in Algeria or Colombia. But in most cases the identity of the person or body performing the Act is not conclusive. It emerges from the reports that it is not essential that the regulation, decision, or act must originate from a public body or the Executive of the State. Private persons, legal entities or associations entrusted with exercising public powers or functions are subject to review. The Tribunal will also look to the purpose of the Act or the contractual provisions. In Kenya, for example, statutory powers may be conferred or duties imposed on bodies, which are in origin, non-statutory private bodies. Therefore the exercise of this statutory power can be controlled by judicial review. This is the same in France and in many other countries.

The third and fourth criteria are mainly found in common law countries, where the reviewable nature of the administrative decision involves consideration as to whether the decision is based on public administrative law, such as standards of procedural fairness, *ultra vires*, and principle limiting administrative discretions, which distinguish the field of private and public law by reference to the norms and context in which the act or decision is made. The Canadian report, for example, underlines that, in general, whether a decision of the Executive or public authorities can be submitted for review is not so much dependent on the nature or substance of the decision, but rather it will depend on the particular legislation from which the decision flows and on whether it provides a right of review.

The nature of the remedy will often attract jurisdiction. For example if an order in the nature of a prerogative writ is sought. In such cases, the jurisdiction of the Court requires that the Court be satisfied that a board, commission or tribunal, for example, has acted outside or has refused to exercise its jurisdiction; has failed to observe a principle of natural justice or procedural fairness that it was required by law to observe; has erred in law in making a decision or an order, whether or not the error appears on the face of the record; has based its decision or order on an erroneous finding of fact which it has made in a perverse or capricious manner or without regard for the material before it; or has acted or failed to act, by reason of fraud or has acted in any other way that was contrary to law. In some cases where what is sought is a purely subjective right, for example, when the claim is simply for compensation caused by actions of a public body, the matter is not for the administrative courts. But if annulment is sought, the matter is for the administrative court. This is the case for example in Belgium, Luxembourg and Indonesia. It also used to be the case in Italy.

In Luxembourg, it is a precondition that the decision-maker is an administrative authority. However, the jurisdiction of the administrative Tribunals is only enlivened when the decision impacts upon a *droit objectif* (that is to say, a rule of law applicable in the territory) and this impact forms the essential part of the administrative litigation. Alternatively, administrative review jurisdiction will arise if the decision impacts upon a *droit subjectif politique* (that is to say, an inherent individual right in the sense of a human right which is recognised by the rule of law, and which is of a political nature). Political rights are determined either narrowly – the right to vote and stand for election, or widely to include social security. Importantly, if a decision impacts upon a *droit subjectif civil* (that is to say, an inherent individual right of a civil nature, which is

effectively all individual rights not classified as political), it falls outside of the administrative review jurisdiction.

In a recent Australian case (*Hicks*), a decision of the Federal Court, the failure by the then Minister for Immigration and Citizenship to consider making a request to the United States Government to send back a Guantanamo Bay prisoner David Hicks who had been denied a trial by United States Courts, so that he could be tried under Australian law, was held by the Federal Court to be the type of decision which was arguably reviewable by the Court on judicial review and on an application for a *habeas corpus* writ. The circumstances were that the Minister had indicated that such a request to bring him back might be successful, but the Minister refused to consider making it. The case raised the question whether as a citizen Mr Hicks had any right to require the Australian Government to consider taking steps to protect him from continued incarceration in Guantanamo Bay where he had been held for over 5 years without trial. There have been similar decisions in the United Kingdom in the cases of Abbasi (2003) and Al Rawi (2007). In these cases the Courts considered, however, that the Minister's decision after giving consideration to the request could not be challenged.

On this first set of issues, the reports generally indicate a wide range of matters in respect of which the Courts have jurisdiction and a broad scope for review. The main concepts used to give jurisdiction are that the decision or rule should relate to the exercise of public administrative powers conferred by public law for the purpose of carrying out a public law or public service, or in the course of acting in the public interest, and it is not critical that the act is performed, or the decision is made, by a public or private body.

1.2.2 Matters (subjects) of competence

There are a number of examples in the reports, which indicate areas where administrative review regularly occurs.

Some reports refer to decisions concerning the exercise of direct administrative power and compulsion against a particular person (including an arrest by the police in Austria).

The matter of public service employment is also frequently referred to. In Belgium, the administrative court is competent to review general binding regulations and individual decisions concerning the civil servants working in the Parliament, the services of the ombudsman, the constitutional court, and the judicial jurisdiction. The French administrative jurisdiction can also review individual decisions applying to civil and

penal judges, and general binding acts organizing the judicial public service. This competence in relation to public employment may be variable and depend on the administrative nature of the relationship between the public body and its employee. In Kenya for example, disputes arising out of the employment of persons who have an employment contractual relationship will be private law disputes. Also in Kenya, the fact that the employer is a public body, or that there is a degree of public interest in the activities performed by the individual is not sufficient to make the matter a public one.

Many other areas are mentioned in the reports, such as public health, environment, urbanism, land management, cultural heritage, public utilities, promotion, compensation for land acquisition by the government, freedom of information, and the taking into care of children or adult drug-abusers and psychiatric care (Sweden). Amongst these matters, local elections are also frequently mentioned (Cameroon, France). Sometimes this matter is expressly excluded.

1.2.3 Exclusions of competence

In all jurisdictions, the subjects of review can be granted, limited, or competence can be excluded, by specific legislation concerned with specific regulatory frameworks. For example, a statute dealing with extradition can exclude from review a decision to seek information from an overseas source of information.

It is interesting that almost every report mentions the fact that some decisions, which could be considered as administrative, are explicitly excluded from review – in most cases by a statute law – but sometimes as a result of case law.

Only two countries mentioned that in their jurisdictional system there were no rulings of the Executive or public authorities which cannot be submitted to review by reason of the nature or the substance of such decisions (Austria and Colombia).

In all other jurisdictions, four matters concerning particular decisions that are not reviewable due to their nature or substance have been mentioned.

The first matter includes acts taken by public authorities concerning subjects that are considered as being political and not administrative. Some reports (Egypt) explain such a restriction of competence on the ground of the separation of powers.

These matters may not be the same in all countries. The main ones mentioned are:

- Acts related to foreign policy and international relations, such as decisions nominating an honorary consul (Cameroon), the signing of a bilateral Memorandum between two countries (Thailand).
- Acts related to national security and/or military actions. For example, a decision to send armed forces overseas would not generally be reviewable because this is a political act. The suspension order of a military officer is also mentioned. Other matters that have been raised in the reports as exclusions from jurisdiction are matters concerning rights of entry for suspected terrorists, confiscation of terrorist propaganda material based on questions of national security, and the grant of visas. In the Confederation of Switzerland, applications for Swiss citizenship are excluded for constitutional reasons from review because this is within the province of the cantons.
- Acts related to the relations between constitutional powers and relations between Parliament and Government. New Zealand gives an example of a decision by a Minister to introduce a Bill into Parliament to confirm a Deed of Settlement with Indigenous people.
- Acts related to national or regional elections. In Norway, the legality of parliamentary elections may not be reviewed by the administrative courts. The act of an executive power inviting citizens to vote is also mentioned several times as an exclusion (Egypt). Italy also refers to the nomination of senators for life.

In these cases, it has been emphasised that the relevant criterion to exclude review is not the identity of the authority that has taken the decision but the nature of the act. South Africa refers to a case in which "the distinction between conduct of an administrative nature and conduct of an executive nature was at issue", namely the dismissal of the head of national security agency. Spain refers to the fact that the administrative activities of the Constitutional organs such as the Cortes (Houses of Parliament), the parliaments of the Autonomous Communities, the Constitutional Court, the Court of Audit, and the institutions of Jurisdictional Power are subject to review. Thailand states that where a constitutional organ (parliament or the executive), exercises administrative power under an Act, the exercise is subject to review.

The second matter refers to the distinction between an act intended to have internal legal consequences and one intended to have external legal consequences on relationships between an administrative body and individuals or entities. An act or

decision with external consequences is reviewable, whereas an act that has only internal consequences is not considered to be within the category of reviewable acts.

An example given by the Netherlands of internal consequences and a non-reviewable act is that of directions within a department about documents to be drawn up. This is considered normally to have little or no significant impact on individuals and to pertain solely to the carrying out of the internal operation of the body and for this reason it would not be reviewable. Poland also excludes review of acts concerning submission of subordinates to superiors or relating to refusals to appoint to an office or to designate to perform a function in public administration authorities, unless such obligation of appointment or designation arises from the provision of the law.

Some reports indicate that mere general legal opinions, guidelines or interpretations by administrative bodies (circulaires), which are not binding, can generally not be reviewed because they do not affect specific rights, but where they are directed specifically to the circumstances of a particular person or entity, they can be reviewed. They are not generally reviewable in the abstract. This aspect is referred to by a number of countries including the Netherlands and China.

The third matter, to which some reports refer, though not often, is related to public policy or the organization of bodies providing public services.

In some instances, such as cases involving roadways and traffic regulations of types of vehicles, review is excluded. In other cases involving medical urgency, such as a person's priority for entitlement to the use of transplant medicines, priorities in assignment of operations, decisions on sickness insurance, urgent matters on public contracts, and international aid are excluded.

Other exclusions include circumstances where an employee who was dismissed from the public service could not make a claim arising from a restructuring of the public service. Likewise, a decision to close a birth ward in a hospital. Also judicial acts concerning the working of the judiciary are excluded. However, in some cases some "administrative" types of acts within the legislative or the judiciary have been the subject of challenge.

Sweden refers to parliament limiting the jurisdiction of the Courts by means of prohibitive laws (privative or ouster provisions), which purport to prevent Courts investigating matters. Sweden gives as an example a law dealing with agricultural support where the Supreme Administrative Court disregarded such an exclusion under Swedish law because of a conflict with European Community law and decided that the matter could be

reviewed and assigned it to the administrative Court. In common law countries these attempts to limit Court jurisdiction are interpreted in a very strict and narrow way.

The fourth matter referred to in a few reports is the exclusion from review of acts due to the wide margin of the discretionary power on the ground of which they are taken. In Austria, an administrative discretion can be so wide as to be excluded from review. Where there is no binding rule or set of criteria, a decision may not be reviewable because the discretion or permissible margin of judgment for the administrative body is so wide the Courts consider it cannot be challenged by reference to any standard which a Court or Tribunal can apply.

In many jurisdictions, limitations on the range of acts that can be challenged are narrowly interpreted, thus reinforcing a broad approach to administrative review.

A noteworthy example of this trend towards a broader approach is discussed in the French report concerning the more extensive jurisdiction, which has been attracted in relation to the administration of prisons and the rights of prisoners. Poland also takes a generous approach to laws giving jurisdiction and a narrow approach to exclusionary laws. For example, a law excluding a complaint against challenging an assignment of a soldier to a particular duty was interpreted so as not to exclude a challenge by him to a decision as to the remuneration in that post. The Polish jurisprudence in this area is interesting because overall it adopts an expansive approach to administrative review jurisdiction reinforced by a strict and limiting interpretation of regulations stipulating limitations on jurisdiction.

In the report of South Africa, examples are given of refusals to exercise jurisdiction where there is a grossly unreasonable delay in an application to challenge an administrative act, and also where there is an inability of a review Court to give effect to what is described as "substantive legitimate expectation".

2. Procedure

2.1 Where can these rules be found? By which statute or regulations are they defined?

In all reports the rules are embodied in comprehensive codes of procedure covering all stages of the procedure. The detailed procedures can be found in the particular rules in each country specifically referenced in the reports. All Tribunals have also developed jurisprudence in relation to the application of the Tribunal rules. In Australia, this jurisprudence has also been elaborated by a series of "Practice Notes"

of a practical nature arising as the result of decisions on issues of procedure, which set out the particular steps to be taken in a concrete way to prepare the case for hearing. For example, the Practice Notes deal with matters as to the use of technology in proceedings, time limits for taking steps, case management, the way evidence is presented by each party, the way in which the presentation of documents is to be managed using electronic discovery, the form of written pleadings and particulars which set out the issues for decision, the way submissions prior to the oral hearing are to be presented in writing, preservation of documents and evidence, and the manner in which expert reports are to be prepared, presented and certified by the experts.

Are the various procedural steps in the hands of the parties and/or the Court and what role do they respectively play?

In most cases it is the parties who set the area of dispute and define the nature and limits of their claim and the remedies which they seek in their complaint (for example, annulment, injunction, remittal for further hearing in accordance with the declared law, reinstatement, damages and/or compensation). The Court does not control the number of issues strictly or the way they are formulated. The Court or Tribunal will generally be bound both at first instance, and even more so on appeal, by the scope of the dispute and the remedies selected by the parties and this will confine the submissions and the evidence, which can be submitted in reference to those issues.

In some reports there is reference to the Court having power to move outside this limitation of issues to provide what it sees as the best solution. In Poland, the lower Tribunal adjudicates within the limits of particular case, not being bound, however, by the charges and demands of the complaint as well as the legal basis referred to. On the contrary, the Supreme Administrative Court may not, on its own initiative, commence any examinations in order to determine other defects of the challenged resolution than presented in a cassation appeal. In Tunisia and in the federal tribunal in Switzerland, the court may also control any topic affecting the legality of an act – whatever the claims of the parties are.

In a majority of countries, within the limits of the claims, the inquisitorial procedure gives the judge wide powers to conduct the preliminary procedures and lead the case to an end. Provided the procedure remains contradictory, the tribunal can address any order to the parties in order to have the case solved as quickly as possible and in an effective way. By "contradictory" is meant the giving of a full

opportunity to each party to be aware of and respond to the evidence, documents and submissions of the other party. Some reports justify the use of inquisitorial methodology in the administrative cases, rather than accusatory procedures, by the fact that administrative procedures should aim at striking the balance between the parties, one of which is a private citizen and the other a State organ.

Is there a prosecutor? If so, which role does he/she play?

This question raises three different subjects in the reports:

The existence of a public "prosecutor" in front of the administrative courts.
The role of the judge-rapporteur
The role of the public magistrate.

First, it appears that in a few cases, there is a "Parquet" before the administrative courts. In Portugal, the Public Ministry intervenes actively in the procedures that are under the jurisdiction of administrative courts. It is the initiator of public action; it acts to oversee legality and public interest as a representative of the State in order to present and defend the public interest. In Poland, a public prosecutor and the Commissioner for Citizens' Rights (Ombudsman) may participate in any proceedings. The Ivory Coast, Bulgaria, Algeria, Spain and Slovakia, amongst other countries also indicate that a public prosecutor could bring the public action before the administrative courts, at least in some matters.

In most cases, though, there is no "prosecutor" or representative of the government interest, other than the Respondent to the challenge. Many reports point out that the administrative agency whose act is challenged will have a legal representative to elaborate the case and to present considerations relating to the public interest from the viewpoint of the particular administrative body or department in question. Generally, this could be perceived as partisan because in such a case the representative appears as a party, and has a limited aspect of the public interest to promote. It is interesting to note that in Sweden until 1995, the appellant did not have a counterpart and the Court both decided the case and represented the public authority.

Secondly, most of the civil law countries indicated that a magistrate-rapporteur plays a central role in the proceedings by guiding the parties through the procedure leading up to the decision-making stage, giving assistance as to the true issues and the documents which form most of the dossier, and ensuring that the cases are ready for hearing or decision. The powers are usually very wide. The rapporteur is responsible

for ensuring that the proceedings are fair so that each party is given all documents, information and submissions provided by the parties to enable a full and proper response to the contentions of the other side. The rapporteur can order the production of any document required for the resolution of the case and order enquiries. In Switzerland, the case is handed to a "juge d'instruction" (investigating judge) who can take any steps to protect the *status quo ante*, even if this is not sought by the litigants. In most cases, the role of the magistrate-rapporteur implies proposing a solution of the case to the other members of the Court and he/she usually sits on the bench.

Thirdly, some countries pointed out the role of the "public magistrate", who can be called various names, such as "parquet" (Senegal), "parquet general" (Benin), "commissaire du gouvernement" (Burkina Faso), "Judge-commissioner" (Thailand) or "rapporteur public" (France). The role of this public magistrate is to independently expose in public his opinion on the questions raised by the cases and the solutions they appeal. He is not part of the bench. Some of the reports point out that this system helps ensure accuracy of the decision of the court.

Belgium has an interesting institution called an "auditoriat" which appoints an "auditeur" who plays a central role in the processing of the matter to the audience stage. His powers are those of the magistrate-rapporteur (leading the case to the hearing with wide powers) and he proposes a solution to the court, but does not sit with the court to make the final decision. The auditeur in the Belgian system is described as an *amicus curiae* in the Belgian report.

Written or oral

In the civil law countries, the emphasis is predominantly on written presentation and procedural steps supplemented with a brief oral hearing. In many cases an oral hearing (audience) must be specifically requested otherwise it will not take place. Often an oral hearing is not requested. Many reports also point out that during the hearing, the parties may refer to their written submissions. They are not expected to repeat their content, but may concentrate their pleadings to the main issues.

In some civil law countries, oral hearings are used as part of the preliminary or interim proceedings for urgent orders for relief (Portugal, in relation to production of evidence). In Spain, since 1998, oral proceedings have been used in cases of minor importance. By using the oral procedure, it is possible to explore and consider more quickly the position of the parties and gain an early overall view of the case sufficient to consider the grant of urgent relief because there is an opportunity for the Tribunal to test the

parties as to the strength of their case at an early stage. In the Portuguese procedure, there is provision for an oral hearing with an immediate decision in matters, which call for the protection of rights and liberty. Often an early oral hearing will dispose of cases including those with no real prospects of success.

In common law jurisdictions on the other hand (New Zealand, United States, Canada, Australia, United Kingdom), the reports emphasise the oral hearing as the central process, but written submissions, written evidence in the form of affidavits, written statements of witnesses, and documentary material are being given increasing emphasis largely in the interest of shortening the hearing time. "Orality" traditionally has been and remains of great importance with the emphasis on vigorous exchange of views between judges and the parties or their lawyers. It is interesting to note that before the higher Federal Courts in the United States and in the Supreme Court of that country, the submissions are made in the form of an exchange of briefs, which contain extremely detailed presentations of argument and summaries of facts and which form the primary material before the Court and the decision. There is often a very limited time for oral presentation, often only 20 to 30 minutes even in cases of the greatest importance. In most common law jurisdictions, the parties are generally not so limited as to time. In the High Court of Australia, however, where there is an application for leave to appeal the parties are strictly limited on the oral hearing to 20 minutes each. The oral hearing gives an opportunity for the judges to clarify and test submissions and any difficulties which the Court may see in them, in order to see if the case is suitable to be heard by the High Court.

At the first instance level in common law countries there can be very lengthy oral hearings (sometimes up to 2 to 3 months) where it is necessary to decide complex issues of fact, involving expert witnesses and there are large numbers of documents. Also in common law countries, there is often lengthy and detailed cross-examination of important witnesses.

To a noticeable extent, the civil and common law jurisdictions are, however, becoming closer to each other by seeking to draw on the advantages of the other system. Although in common law countries the Court does not consider that it has power to call witnesses on its own initiative, there is a strong perception that the inquisitorial system is sometimes more effective in arriving at a true solution. On the other hand, many civil law countries are currently giving more room to oral procedures. In Colombia, for example, the ongoing updating of the administrative law code will implement oral trials with some written interventions. In France, a recent reform enables the litigants to

respond to the oral conclusions of the rapporteur-public, which was not possible before. As the Finnish report points out, both oral and written procedures are complementary since the purpose of an oral hearing is to obtain relevant evidence on matters where documentary evidence cannot be obtained or is insufficient to present the full picture.

Is the case determined by a single judge or a panel of judges?

In many countries, at first instance, the hearing is before a single judge. On appeal the Chamber is usually constituted by a panel of three judges and in some cases, five or more judges sit depending on the importance of the case. There are a number of exceptions. Generally, as the case rises in the Tribunal hierarchy, the reports indicate that more judges are involved. In a Tribunal of first and final instance, usually three to five judges constitute the panel. In the civil system important cases can be heard by a large panel consisting of all judges. In other countries, it is usual that the hearing, at first instance, is before a panel of three judges as in the case of Thailand. In one of the examples, given by Colombia, the Council of State sat with 23 Magistrates, nine of whom dissented. The Greek report also refers to majority and minority decisions of the Council of State.

In some countries, for example Sweden and Norway, there is provision for one or more lay judges, who may be experts, to sit with the administrative judges at first instance and in some cases experts also sit on appeal hearings. The purpose of this is to enable the Court to fully understand and decide on technical matters or other matters requiring specialised knowledge. This increases the credibility and soundness of the decision where expertise is required. Such matters include, for example, medical research expertise, expertise and practice in engineering, building matters, technology, scientific matters requiring advanced research in areas of say biology, chemistry, or issues in the field of economics, accounting and commercial practice. There is provision in some systems for the Tribunal to appoint experts as witnesses to give evidence and to assist the Court. In this case, they do not form part of the Court. If there is more than one judge the decision is made by majority.

In most civil law systems, there is no provision for publication of dissenting judgments. There is only one judgment of the Court. In common law systems, dissenting opinions are published and reported. The view is taken that it is for the judge to express his or her own reasons even if not in agreement. In this way it is said the law is kept open for flexible development. In almost all countries, the deliberations of the judges take place in private. In Switzerland, in the Federal Tribunal the procedural law requires

that the deliberation of the judges takes place in the presence of the parties. No other country referred to such a process.

In cases that require urgent measures, the reports show that there are specific provisions of varying degrees of complexity, for dealing with urgency. The president of the Chamber to decide the matter may appoint a single judge to hear any application for urgent measures, or for suspension of execution, or conservation of property or protection of fundamental rights, and provisional orders can be made by the single judge. In common law countries, there is a well-established procedure for seeking urgent relief. These matters are heard before a single judge who often gives a preliminary judgment on the generally limited information presented at the preliminary stage.

In common law and civil law jurisdictions, all the judges sitting on the panel assigned to the matter give the decision. In some exceptional cases, such as where a judge has died before giving judgment or is incapacitated, the decision could be made by the surviving judges.

2.2 What conditions must be fulfilled in order to confer the right to make a claim for review? Must the plaintiff show some form of personal interest? If so, is it defined in a broad or narrow manner? Please provide relevant case law.

In most countries, the application or request for review must satisfy five types of requirements.

First, it must give details of the complaint, the remedies sought and the basis for seeking the remedy. The request must set out the reasons for the complaint and the relief sought. In most cases the request has to be submitted in written form, but some countries also accept oral forms. In such cases, the clerk of the court makes a record of it.

Secondly, the request must be brought by a person or entity with legal capacity. "Legal capacity" usually means the person is able, in law, to perform a legal act, such as being of a certain age or being a legal person, entity, group, or parties who are accepted as representing an interest.

Thirdly, the request must be brought within the time limits for commencement of proceedings. Most reports refer to a time limit of two months or 60 days after the publication or notification of the act, but this delay can sometimes be much shorter

(14 days for an individual decision in Bulgaria), or much longer (in Kenya certiorari has to be done within 6 months of the date of the decision to be quashed).

In these three cases, the Court has a discretionary power to entertain the complaint even if there has been a failure to satisfy some prescribed rules or form or other requirements. In some cases there is express provision, for example, for the judge to extend the time limits or dispense with the procedural requirements.

Fourthly some of the reports mentioned the need for "exhaustion of remedies" as a condition for the request to be reviewed. In some countries, a person is not entitled to bring proceedings unless there has first been an exhaustion of remedies by taking all available steps within the administrative agency's internal procedures to obtain a favourable result before proceeding to a review before an Administrative Tribunal. Many agencies have provision for reconsideration on request by way of an internal review process. In Spain, the exhaustion of internal administrative review is a *sine qua non* for an appeal. The same condition applies in Indonesia, the Netherlands, Germany, and the Ivory Coast. This condition is referred to in the Slovakian report as "one of the basic principles of the administrative judiciary". In some countries, the same condition applies but only in some matters, such as taxes (France, Benin, Bulgaria), or social security (Bulgaria).

Fifthly, every report mentioned the need for the request to be brought by someone having an interest in the review of the decision. The need for locus standi.

Sometimes the statutory law will prescribe who can bring proceedings. For example, environmental legislation may expressly give a broad power to any person with an interest to bring a challenge even if not directly affected by the decision. In Colombia, the Ombudsman's office may be a party in support of a challenge and in some cases, persons may appear as *amicus curiae*. In Australia, in 1996, Catholic Bishops were allowed to appear as *amicus curiae* in a case concerning abortion, even though they were not entitled to intervene as a party because they did not have a sufficient interest to have locus standi as a party.

In most countries the question of locus standi is dealt with on a case by case basis. It is highly dependent on the particular circumstances of each case and it is not possible to state a universal principle. In a leading Australian case, *Australian Conservation Foundation v The Commonwealth*, decided in 1980, the High Court observed that a private citizen or corporation, with no special interest in the subject matter of the action

over and above that enjoyed by the public generally, did not have *locus standi* to seek an injunction to prevent the violation of a public right or enforce the performance of a public duty. The court decided that *locus standi* only existed when a person could show actual or anticipated injury or damage to property or proprietary rights to business or economic interests and perhaps some social and political interests. A concern or belief, however genuine, does not in itself constitute *locus standi* sufficient to entitle a Conservation Body to challenge a development. A belief, however strongly felt, that a law should be observed or that conduct of a particular kind should be prevented, does not give *locus standi*.

In both common law and civil law countries, there is often a reference in the procedures to a person who is "aggrieved" by the decision challenged. Such a person can include individuals or entities acting personally or acting in the interests of a collectivity or group or class, or an association acting in the interest of members. The term "aggrieved" is not a purely subjective concept in the sense that the person has a certain subjective "feeling" about a result, there must be some objectively identifiable adverse impact on a person's right or interest. In an annulment proceeding in some countries, the complainant must even show an effect on a subjective right (e.g. Belgium, Luxembourg). Most jurisdictions prohibit hypothetical actions or purely advisory actions. The required interest is sometimes described as being "direct and concrete" (China refers to the interest as being not abstract and having a direct effect). The Belgian report concisely sums up the required interest as being one that must be concrete, personal, direct and legitimate.

As one report points out, the purpose of the requirement of *locus standi* is to prevent persons interfering in the litigious process where such persons have no real concern but only a vague interest so that if they were allowed to intervene the intervention would impede the efficient administration of the Tribunal process and also delay the activity of the public organs.

That is the reason why it appears that in most countries a simple interest as a taxpayer or ratepayer, would not give status to challenge regulations or decrees made by administrative bodies on the sole basis that they pay taxes, as opposed to objecting to particular acts or decisions that affect them personally.

The dominant trend in the reports in both civil law and common law countries is strongly in favour of a wide and generous approach to the question of *locus standi* in the interest of transparency and access. One report points out (Tunisia), that it is

strongly in the general public interest that an unlawful administrative act should not be allowed to remain in force and that this consideration provides a basis for a broad acceptance of *locus standi.*

The interest in question can be personal, or as a member of a society, association or group with particular objectives to advance, which are negated by the decision or act challenged. For example, the objective of caring for the environment. Often environmental protection organizations are recognised and given *locus standi* to challenge land use projects, such as the construction of a dam or the harvesting of timber.

One example frequently given in both systems is in the area of town planning where a person objects to a building permit granted by a local authority to a neighbour which permits development causing detriment to the complainant, and where the protective conditions imposed by the authority are inadequate to prevent such detriment. One illustration given is in relation to the construction of a radio tower where a neighbour 60 metres away may have *locus standi* because of the impact of the tower visually on his property, whereas a neighbour say 500 metres distant who cannot see it, would not have *locus standi* to challenge the administrative act granting permission for erection of the tower because the impact is not sufficiently adverse. The question of *locus standi* is often one of fact and degree.

In Sweden, if a requirement exists that a person must be informed of the pending decision by the agency, then that person is considered to have sufficient *locus standi* to challenge.

In Italy it has been held that a student's parents had a qualified interest of their own, and also as representative of their child, to challenge the actions of a school authority when it affects the economic and moral interests of the family. In Cameroon, it has been decided that the Jehovah's Witnesses group could challenge a decision adversely affecting their organization, even though it was not yet registered in Cameroon. Other examples indicate that the interest can be purely moral or in some cases, minimal.

A union was able to challenge a deficiency in a regulation concerning salaries in Portugal.

In Turkey, persons claiming as tenants of premises, which had been ordered to be restored as an historical site, were held to have no interest to challenge the decision to

restore, because they had previously been ordered by another Turkish Court to evacuate the premises and had thereby lost their status as tenants, which would otherwise have given them *locus standi*. In Algeria, an association of parents of school children was able to seek an annulment of a building permit that allowed construction of a large wall adjoining the school, which would block the sun with loss of light and warmth, which would adversely affect the students.

In Greece, *locus standi* of residents to challenge construction of an elevated electricity line was not destroyed because they had bought property and built their homes after having been notified of the proposed development. In a challenge for "excess of power" in Greece, the right to challenge is described as being a *quasi* "*actio popularis*".

In France, a journalist who covered judicial matters, was held to have sufficient interest by reason of his professional activities when he challenged a general decree limiting publication of material concerning judicial debates.

Cyprus gives an example of a decision by its Supreme Court that a decision of a municipality to create a new post related to the general restructuring for the provision of municipal services, and therefore did not affect any legitimate interest of the applicant. The Cyprus report also refers to a matter where an applicant was held to have no legitimate interest to complain against the refusal by the Registrar of Motor Vehicles to issue a licence for the use of a motor vehicle registered in the name of and belonging to his wife. That case involved a particular provision in the Cyprus Constitution but it would be interesting to see how it would be decided in other jurisdictions with respect to *locus standi*.

In most cases in the reports, it is possible for a third party to intervene in the proceedings, although not a party to the decision which gives rise to the challenge, where that third party has a real interest in fact or in law, or will suffer an adverse effect. It is also possible for a third party to appeal. There is generally an "adverse effect" on the person if they may benefit if the challenge is successful, or if they would be disadvantaged if the challenge was unsuccessful.

Class actions or an *actio popularis* can be brought in some jurisdictions to protect the legality of civil and political rights.

2.3 Does the plaintiff have direct access to the Court, or is he/she obliged to submit his/her demand through a counsel/attorney?

Most nations allow direct access by complainants without a requirement for a lawyer/attorney. In many instances, an initial application for review must be made by or with the certification of a qualified lawyer but a lawyer is not required to conduct the whole case through to final decision. Some countries allow a complainant to appear without representation in the lower Courts but insist on an advocate in the higher Courts, such as the Council of State.

Only a few countries insist on an advocate at every stage of the proceeding and before every court (Greece, Italy, Lebanon, Portugal, and Spain). And even in such cases exceptions often exist concerning small matters (Greece or Slovakia for example).

In some countries (France), only members of a specialised bar are permitted to appear before the highest Courts such as the Council of State.

The reports indicate that judges tend to make due allowance for, and adopt a liberal approach to, cases presented by individuals or entities without representation, particularly when considering submissions.

2.4 Electronic technology: Can a legal demand be submitted to an administrative Court using electronic technologies?

Most countries do not presently use electronic technologies extensively for case management. Most are moving towards a comprehensive electronic filing and document lodgement system in the near future, but no country has yet a fully developed electronic system dealing with all stages of the procedure. It is inevitable that technology will be increasingly used given the revolution in communication. Portugal is at an advanced stage in the lower courts using electronic resources and video conferencing. There is a common electronic procedural platform with the individual courts.

In a number of cases, there are provisions in the procedural rules for electronic filing and verification of signatures and of seals on official documents issued by the Court. Email appears to be used in a few cases. One significant matter to emerge from the reports is that most countries recognise the need for an advantage to be obtained from using electronic technology. Some countries are moving strongly in that direction; Australia, Canada, France, the United States and the United Kingdom to name a few.

Most of them are already conducting experimentations in this matter or already allow the litigants to consult some of the information on their case using the Internet.

2.5 Is there some form of public or private legal aid system aimed at providing assistance to a person who cannot afford an attorney?

In a few cases, there is no legal aid available for administrative cases. This is so in Cyprus, Colombia, and in a sense in Austria, where it is very limited before the inferior courts. In almost all other countries, some form of public legal aid is available. It is often the essential element to ensure access to justice by the citizen aggrieved by an act of the Executive. It is generally subject to a means test as to income and property. In many cases, lawyers' associations provide voluntary assistance. In Australia lawyers often assist on a *pro bono* basis.

The nature and extent of legal aid is variable. In some cases, it will provide an advocate while in other cases it will provide comprehensive assistance at all stages of the proceeding, including the hearing. Most legal aid systems require the applicant to show some real prospect of success as well as proving a lack of means. The reports generally see the legal aid system as greatly assisting the Courts or Tribunals by shortening proceedings enabling issues to be more efficiently resolved. Experience shows that this is so.

2.6 When a claim is made to a Court, is the right of the relevant public authority to implement the decision stayed or suspended until the Court has determined the case?

Most reports indicate that the mere presentation of a review application will not suspend the effect of the challenged act. As one report points out (the Netherlands), this is intended to safeguard legal certainty and to ensure the proper functioning of the public administration.

Germany and Austria (before the inferior courts) are notable exceptions, as well as Finland and Bulgaria, for appeals on individual decisions only.

In some exceptional cases in other countries, there are limited instances where there will be an automatic suspensory effect. In France for example, where there is an administrative order for deportation, there will be an automatic suspension of the order for 48 hours to enable the deportee to make an application and challenge the decision. In some tax cases, a party can apply to the Department for suspension of payment and if

refused, there can be recourse to an administrative judge. In Turkey, the review application suspends the recovery of tax.

Nevertheless, in most cases, applications can be made to the Court by way of a preliminary hearing for suspension or other measure designed to preserve the *status_quo ante,* pending the final determination. This can remove or reduce the impact of irreparable non-compensable damage, which was caused by the implementation of a decision which may later be annulled as a result of the challenge, and thereby be considered as never having any existence or effect.

The circumstances which justify suspension or modification vary widely but include the extent and nature of likely prejudice, whether it can be adjusted or compensated in money or an award of damages, or by some other condition, direction or order.

Several countries have referred to a detailed procedure for urgent applications in this context using a process of "référé suspension", in various forms, depending on the circumstances whereby a single judge can make suspensory orders to "preserve" the position or prevent prejudice.

2.7 Can the Court deliver an injunction ordering the executive or a public authority to produce a document to which the other party could not previously have access (please provide relevant case law)?

The general rule is that each party must place before the Court the documents and evidence to establish its case. This arises from natural justice principles where a party is entitled to know the essential content of documents to be used against him or her and be given a chance to respond.

In some areas, such as freedom of information legislation, there are provisions which prevent some Administrative Courts and Tribunals from having access to ministerial and cabinet documents based on a certificate from the Minister for Justice. Such a certificate is binding on the Courts and Tribunals.

In a few cases the Court is only entitled to receive the papers that the administrative body produces to it.

In most cases, there is an extensive power of the judge to direct parties and third parties to produce documents. As Finland underlines it, "the court must on its own initiative obtain evidence in so far as the impartiality and fairness of the procedure and the nature of the case so requires". In some cases, the Court may appoint an "expert" to consider

whether any other documents need to be produced. In other cases the judge rapporteur or auditeur will ensure that the documents and other information are produced. In Switzerland, a distinction is drawn between documents relating to internal acts and acts necessary to the decisions. There is no procedure similar to discovery in the common law system.

In some countries, the civil servant responsible for not producing the evidence required by the court may be prosecuted and eventually fined (Colombia, Greece, and Bulgaria). In most cases, where the administrative body does not produce the evidence, the Tribunal may conclude that the complainant's case is established in respect of the facts and circumstances, which the documents were intended to prove. In a few instances, this will mean the complete determination of the case. In other cases where documents are not produced, the Court will treat the failure to produce by a party as a default, and judgment may be given on that basis.

In Australia, if a party does not call for evidence from a witness who one would have expected to have been called to give evidence, the court may use that fact against that party when forming conclusions as to factual matters.

In Turkey, if documents are not produced to the complainant, the defence cannot rely on information in those documents. A similar principle is applied in common law countries. In Turkey, a decision was set aside because the judge did not do enough research as to available documents.

Most Courts will give great weight to the fact that usually it is the administration or agency that will know which documents are relevant and will have exclusive control of them. Therefore the Court will take a liberal attitude in relation to an application by a complainant for production of documents and proofs from the administration. Some jurisdictions such as the United States provide that witnesses can be extensively examined orally as to the existence and location of relevant documents in their possession and their responses can be tested by extensive cross-examination. This is referred to as oral discovery in common law countries. The requirement for discovery is a continuing one, so that if a new document is located or made before the hearing, the agency is required to produce it. In other words it is a continuing obligation.

2.8 Are there emergency or interim measures? Are they simply aimed at delivering preliminary injunctions (such as temporary restraining order) or at taking provisional measures, or can they also resolve a fundamental question?

The general approach is that applications can be made at any time to a judge to take urgent measures to suspend the execution of an administrative act or decision or the operation of a rule wholly or in part, until the Tribunal makes its decision on a preliminary basis.

In several civil law countries, there has developed a system of "référés", whereby a single judge nominated by the president of a chamber may appoint a person to give an urgent hearing for the purpose of considering the suspension of execution in order to protect individual liberty, conserve property or entitlements, or to enable a speedy resolution in relation to the payment of a financial claim to a creditor where there is no real defence to a debt claim.

Generally, the order made by the référé can be appealed to a higher level Court where it will be considered by three judges. In cases involving individual liberty for example, there may be provision for hearing of such applications within a very short timeframe. In France, it is noted that there has developed what is described as "a real culture of urgency" over the past eight years, directed to prevent irreversible or non-compensable prejudice arising from implementation of an administrative act, which may later be annulled. (This concept of "culture" is often of central importance in setting or changing rules and practice).

It is generally necessary to show an urgent situation and need for relief and a reasonable apprehension of damage or loss.

In common law systems, the Courts have an extremely broad power to make interlocutory suspensory orders. They are generally made on the basis that there is some real prospect of success in the grounds for complaint, and that the "balance of convenience" between the respective prejudices to either party falls in favour of granting the temporary relief.

In common law countries, it is possible to seek interlocutory injunctions and orders for the preservation of documents and evidence. Where the case is extremely urgent, such as the imminent demolition of a building, or expulsion of a non-resident who has filed a refugee status application, an application for relief can be made *ex-parte* on an injunction obtained in a matter of hours. However, these injunctions are only in force for a short

time until a further order is made and an opportunity is given to the respondent to present its case as to why the preliminary *ex-parte* injunction should be set aside.

Suspensory measures expire once the matter has been heard and a decision made on a final basis. They are temporary in nature in the sense that they are only binding until determination by the Court or Tribunal or until further order. They are directed to preserve the *status quo ante*.

These suspensory measures and urgent applications can and do often result in the early final determination of the whole hearing. This is because often where there is an exposure to examination by a judge at an early interlocutory hearing of the grounds of the case, an appraisal can be made by the parties as to whether the case has reasonable prospects of success. Another alternative in urgent cases is to accelerate the final hearing within a very short period so that significant prejudice from execution of the challenged order can be prevented or minimised.

3. Powers of the Administrative Law Judge

3.1 What is the hierarchy of legal standards (Constitution, International Law Statutes) that the Court can take into account when carrying out review?

The "hierarchy" defines the precedence of rules, which the judge will have to apply when carrying out administrative review and will depend on the source from which the law is derived. In the case of conflict, the norms which are higher in the "hierarchy", take precedence over the norms at a lower level.

In most cases, the hierarchy of norms was reported to be as follows:

The Constitution

In some countries, there is no written constitution. This is the position in the United Kingdom and New Zealand where effectively the Court's jurisprudence has set out a number of relevant principles. In the absence of a written constitution, statutes passed by Parliament comprise the controlling regime at the higher level. In the case of international treaties in such countries, they may prevail over the domestic law by force of legislation giving effect to them.

The Constitution in most countries supersedes other regimes except where international treaties and arrangement are expressed to take precedence, in which case the countries will follow those treaties. In Belgium and the Netherlands for example, the national reports indicate that the international treaties supersede the Constitution.

Constitutional Principles

In some civil law countries, there is a set of principles and values, which are recognised and applied by the Courts, which are embodied in the Constitution or derived from it, and which are protective of basic values in the particular society, such as rights to self-expression, liberty of the person, equality of treatment, and human dignity. In some countries, such as France, there is the principle of "*laïcité*". The reports refer to "fundamental values embodied in the Constitution", "complementary constitutional customary rules", or to "principles of constitutional value". There are basic underlying principles such as the continuity of the public service, for example, which are relevant although not expressed in legislation.

In common law countries, such values can be protected by the Court's power to grant orders in the nature of prerogative writs, such as *habeas corpus* (liberty), *certiorari* and prohibition by which a Court can annul a decision or act which breaches the law on a challenge being made. There are also unwritten powers to challenge a person's authority to hold public office (*quo warranto*). The greatest of these writs is *habeas corpus* and the extensive jurisprudence relating to this has recently been developed in the United States' Federal Courts relating to the imprisonment of US citizens and overseas nationals in Guantanamo Bay.

International law

In many countries ("*dualiste*"), the international law needs to be specifically adopted by parliament where it is embodied in the form of international treaties (for example: Canada, China, Finland, Germany, Norway, and the United Kingdom). In others (Switzerland, France, Poland), international law does not need to be adopted ("*moniste*"). In Thailand, an administrative act which does not comply with international treaties and agreements, cannot be reviewed in Courts or Tribunals. In other cases, treaties do not need to be adopted because they apply automatically on entry into the Treaty. In the majority of cases, international law will override other statutes in the country once it is in force, but in a few countries this may depend on the nature or the date of the Treaty. In Turkey for example, some international treaties are mentioned by the Constitution and therefore have a constitutional value. Treaties related to human rights supersede the statute law but not the Constitution, whilst other treaties are at the same level as statute law. In Austria, international law does not as such take precedence over State laws or Federal Laws, only (after adoption) under the principle of lex posterior derogat legi priori. Vice versa a later enacted State law or Federal law will take precedence over a treaty adopted earlier.

In the European Union countries the position of European Union law towards internal law raises interesting topics. In such countries, EU legal norms usually have precedence over national norms in conflict with them, regardless of whether the EU norm is contained in a Treaty, an instance of secondary legislation, a general principle of law or a judgment of the European Court. In the case of Cyprus, for example, European Union law prevails over the national law as the consequence of an amendment to the Constitution so that national Courts will refuse to apply legislation that contravenes European Union law. In case of conflict, a national judge will make a finding of annulment or invalidation of a particular act or decision stemming from a national law which is contrary to a European Community law in force in Cyprus. The case of Cyprus is particularly interesting because a constitutional amendment in 2006 provides that no provision of the Constitution can invalidate (i) laws enacted, (ii) acts done, or (iii) measures taken by the Republic of Cyprus, which are necessitated by obligations arising from membership of the European Union. To this extent, the European Union law overrides the express Constitutional provisions.

The position is not clear in relation to customary international law, which is not in formal written treaties. In some countries, the general rules of international law take precedence over statute and create rights and duties for the inhabitants (Germany, Greece). In other countries they are subservient to the statute law (France) except where European Union law applies.

Statutory law – legislation

This refers to acts of parliament and legislative acts passed by parliament.

Regulatory law – delegated legislation

This includes rules, regulations, ordinances and decrees, which have the force of law made pursuant to a statute.

Bylaws and other provisions made under delegated legislation pursuant to regulatory law.

General principles of law

These include judge-made law, which permeates and guides the interpretation of the domestic law. Thailand gives an example of setting aside a regulation because it violated a general principle of law, which required Thai legal texts to be in the Thai language so that they can be clearly understood. The judge-made law provides a background of principle rights and responsibilities which are not covered by statutory

order, legislation or rules but which can be modified by legislated provisions when such an intention is clearly expressed.

These general principles of law, which can also be referred to as the jurisprudence developed by the Courts, provide a basic body of principles which impact on the interpretation of the statutory and regulatory law, by reference to fundamental human rights and values. They are applied when no legislation applies and in such cases are referred to by the court to provide a legal basis to determine the case. For example, a law will be construed generally in such a way as to not interfere with individual liberty or unjustly expropriate property, unless the law expressly provides otherwise.

In a Federation (such as Australia) or in a Confederation (such as Switzerland or Canada), there will be statutes passed by a national Parliament and also by state, provincial, regional or cantonal governments. In these cases, the Constitution may provide for the priority of one set of laws over the other or prescribe exclusive areas in which laws can only be made by the Federal parliament. In Australia, for example, if two laws are enacted, one by the Federal parliament and one by the State parliament, and there is an inconsistency, the Constitution provides that the federal law will prevail to the extent of the inconsistency. Therefore, a Tribunal in the case of conflict would have to apply the Federal statute rather than the State statute covering the same field.

3.2 When the Executive or a Public Authority gives its interpretation of a statute, can the lawfulness of such interpretation be challenged in Court? If so, according to which standards and criteria? Is the country bound by policy decisions of the Executive or a Public Authority?

Yes. In almost all cases the reports indicate, without significant reservation, that the Courts are not bound by interpretations of the administration in relation to statutes. This is not surprising in view of the principle that the basic role of the Courts is to interpret and clarify the application of the law and (at least in theory), not to make new law.

In some cases, in particular areas of litigation having regard to the nature of the subject matter, the Courts will pay deference to the interpretation adopted by the executive, administrator or agency. For example, in some cases concerning highly technical matters, specialised departments or agencies regularly dealing with complex subject matters, may have a special expertise and insight which should be taken into account. Some understanding of the Executive approach to interpretations taken is important to ensure the consistent and clear application of the administration. In most

countries, the reports indicate that the departments and agencies adopt general circulars and guidelines as to the interpretation of statutes, in the interests of uniform administration. However, this does not mean that those circulars and guidelines as to interpretation will in any way bind the Courts when reviewing administrative acts.

The function of interpretation and application of the law in a binding way has, historically and almost universally, been the function of the Courts to the exclusion of the Legislature and the Executive. This does not mean that the Courts will not pay attention to the views of the Executive or the Legislature when they come to interpret the law, however. For example, in most countries regard is had to the *travaux préparatoires* as a means of interpretation. This is so in the case of common law countries and also civil law countries. The Court will look to the purpose of the Act as expressed in speeches in Parliament or in Explanatory Memoranda issued to the members of Parliament when the law is being considered for enactment. These documents state the purpose and intent of the legislature. However, in the last resort, it is always the Courts whose interpretation is binding.

Generally, the lawfulness of a standard or requirement can be challenged by deciding whether the law as interpreted by the Executive conflicts with a law standard or norm, which is at a higher level in the hierarchy (*ultra vires*). As the Cyprus report points out, administrative interpretations are tested by reference to European Community law and constitutional principles and by reference to standard practices of legal interpretation as to the object and purpose of the law, having regard to the language and the context and its common meaning. The Court will also have regard to interpretations in earlier decisions and the circumstances that led to the making of the law in question.

Mere general circulars which in no way affect any person's specific interest cannot generally be challenged in so far as they go to interpretation. The only exceptions are Germany, Austria and Switzerland, in which, as the German report points out, the executive's interpretation of legal statutes, commonly found in internal directives and guidelines, is subject to an unrestrained judicial review. But in most cases, general circulars can be challenged only where the interpretation of the law has a particular effect on persons or projects or course of action. In some cases where circulars of interpretation are applied as if they were binding, they may be challenged. A statement by a Minister or high officer of the Executive as to interpretation will never bind the Court.

In so far as the interpretation of the Constitution is in the form of a policy, such policy will not bind the Court. Policies are generally regarded as guidelines or indications and not as binding. In some cases, in common law countries, where a general policy is applied without reference to the particular circumstances in the specific case, the act or decision will be set aside.

3.3 If the Executive gives its interpretation of treaty law, is the Court bound by such interpretation?

In most cases, the Court is not bound by an interpretation given by the Executive. Most Courts will apply the principles of interpretation in the *Vienna Convention on the Law of Treaties*, 1969 Articles 31 and 32.

However, in a few cases, the Court will give deference to the interpretation adopted by the Executive because treaties involve relationships between nations and there may be special considerations or nuances of foreign policy and a need for consistency in international dealings which may persuade a Court to follow an interpretation which the Department of Foreign Affairs for example, has applied over a long period, provided such an interpretation is reasonably open.

In some cases, Courts will take into account the representations of the authority as to possible approaches, but they will not be bound by these.

In Australian Courts where an interpretation may have an impact on the administration under a Minister's responsibility, the Minister may be permitted to intervene to give his or her interpretation and the reasons which support it on a confidential basis.

In the case of France, the report states that for many years there was a varying approach to this question, but having regard to a decision of the European Court of Human Rights, it changed its practice in relation to the interpretation of international treaties in 1950 and since then, the administrative judge has assumed entire responsibility for interpreting treaties, although the judges will take into account the views of the Executive.

3.4 In so far as discretionary measures are concerned, which type of review does the Court exercise? Provide, if possible relevant case law to show how the Court verifies reasonableness of a decision of the Executive or a Public Authority.

This question raises three matters as to the way all countries review administrative decisions and regulations:

- Purpose and definition of judicial review;
- Definition of reasonableness/proportionality; and

- Practice of reasonableness/proportionality

First, it is interesting to see that there is a similar approach in every country on the purpose and definition of judicial review.

In common law countries, the Courts will apply standards of judicial review in approaching the exercise of an administrative discretion. These principles of review include manifest error on the face of the decision; error of fact or law, discrimination, *ultra vires*, failure to consider relevant matters, consideration of irrelevant matters, failure to take matters into account, bias, failure to hear both sides and unfair procedure, bad faith and gross unreasonableness, lack of reasoning, and/or significant error of fact or law.

The approach that is taken to review of discretion in Australia, with similar approaches in other common law countries, is conveniently summarised in a statement of the High Court in a leading case concerning the length of a prison sentence entitled *House v The King* (1936) 55 CLR 499, as follows:

> *... It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate Court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate Court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the Court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred. ...*

All the reports from civil law countries also mention that the purpose of a judicial review is to control whether a decision has been taken by the competent authority, within its power, after a fair and appropriate procedure - usually involving the reasoning of the decision - that is to say whether the decision is based on relevant facts and considerations, and whether the discretionary power has been properly exercised.

Secondly, it is also interesting to see that there is a broadly similar approach as to the definition of reasonableness/proportionality.

All reports from civil law and common law countries point out that discretionary power of the administrative bodies has to be controlled by the use of the concept of reasonableness or related concepts – though not necessarily identical – such as "erreur manifeste d'appreciation" or proportionality. Most of the reports point out that the purpose of this control is to balance the discretionary power of administrative bodies and the need for rule of law.

The reports in civil law and common law countries also point out that the extent of discretionary power left to the administrative bodies is related to the precision of the statute law. As Portugal and many reports emphasise, the range of permissible actions of the administrator will depend on whether the legislation conferring the power has left open a range of permissible alternatives to be selected in exercise of the administrator's discretion. But even though this margin of discretion is excluded from intense judicial control, the administrative decision will still have to present a solution which could reasonably be reached.

In certain cases, the specific criteria which confine the discretion, are set out in some detail in the legislative provisions, either expressly enumerated or such that they can be implied or ascertained by a careful reading of the whole statute. In other cases, however, the discretion is wide and unfettered, and not confined by reference to specified criteria, and in these cases, the Court will take a wider approach to review of the validity of the administrative decision, allowing it a greater margin before finding error.

Thirdly, it is also interesting to see that there is a similar approach in the practice of reasonableness or proportionality, which involves a progressive strengthening (intensité) of the review exercised by the courts or tribunals over administrative decisions.

In common law countries, the "reasonableness" criterion is applied by asking whether the decision is so unreasonable that no reasonable person or body of persons could have made such a decision. This is a concept referred to as "Wednesbury unreasonableness" by reference to a famous case involving a public body called the Wednesbury Corporation. In considering this question, Courts will, in practice, have regard to whether the result is "grossly disproportionate". To some extent this corresponds to "*erreur manifeste d'appréciation*" referred to in the French report, which is an error which is obvious to a reasonable person. The French report refers to an example that relates to the imposition of sanctions concerning public officials. In that case, the judge will closely examine whether there should be any sanction (*proportionalité*) but will control on a more liberal basis the level of the sanction (error *manifeste d'appréciation*). In the former case,

the judge will consider the antecedents of the agent and his general conduct in the service.

But beyond this control of manifest errors, many reports mention the fact that a more intense level of review is also carried out.

In the United Kingdom, proportionality has now been adopted as an independent ground of review and is seen by English Courts as applying a greater intensity of review in the sense that the Court will look more closely into the factual aspects of the decision than is the case with "gross unreasonableness".

In some common law countries, unreasonableness is only one of a number of tests to review the exercise of discretion. It is not a conclusive test. For example, a Court may ask whether a condition imposed on a building permit is so clearly onerous or unnecessary as to indicate there must have been some error in the application of the legal principles to the particular circumstances. In reaching such a conclusion in financial matters, some Courts have regard to cost/benefit considerations. Where a decision is made to undertake a particular project and the cost/benefit is manifestly disproportionate, it may be set aside, or where there is the imposition of a sanction which is grossly disproportionate to the breach. The existence of practical alternatives can be taken into account. The Korean report refers to "a balancing of interests check". Thailand, in relation to the concept of bad faith, gives an example of a fishing restriction which was held to be valid because it was proportional to the public benefit of protecting the breeding of fish and preserving fish supplies for the future. South Africa also refers to the criterion of "rationality" and New Zealand underlines that in particular cases where human rights are engaged, the court have suggested that a more intense level of review may be needed and the courts have approached the concept of a variable approach to unreasonableness.

In most civil law countries, the judge will consider proportionality between the reasons and the outcome of the decision as a test of validity. France refers to two examples.

The first concerns measures relating to the administration of the police and here the general principle applied is that liberty is the rule and interference the exception. The Tribunal will look at the proportionality between the action by the police, and the necessity which calls for action. This examination can give rise to questions of conflict between individual liberty and the need for public order. The judge will look closely at the relationship to see if the administrative act is reasonable and proportionate. The

administration can limit the exercise of a liberty in the interest of public order but only if strictly necessary. In the case of deportation, the judge will consider whether the harm inflicted by a deportation measure, balanced by the right to lead a private family life, is disproportionate.

A second way the reports consider proportionality is to look at cost benefit comparisons in relation to entities such as public utilities and their expenditure. This approach applies in areas of expropriation of property when the necessity in the public interest to acquire property must be weighed against the interest of the landholder. This cost/benefit analysis approach is referred to in the report of Greece.

The question to be asked is whether the advantages of the operation and its inconvenient effects in all respects lead to a balance in favour or against the act. This balancing approach has been adopted in areas concerning urban planning approval of projects and the setting aside of areas as protective or buffer zones.

Another matter which is referred to in these areas is whether there are other practical alternatives to a proposed development, for example, the erection of a factory in a residential area.

Discriminatory treatment without justification can also be a ground to review an administrative decision or act. For example, imposing stricter requirements on one applicant than were imposed on another applicant without any particular reason, could be a ground for attacking a decision (see Thailand p72).

3.5 Is the Court simply empowered to quash (to declare null and void) the decision or to dismiss the legal demand? Instead of quashing the decision, is it within the authority of the Court to amend or modify the decision? Can the Court substitute an entirely new and different decision? Can the Court reconsider the merits of the decision?

In countries where the Courts or Tribunals exercise judicial review (that is, an examination of the legality of the administrative act or decision), there is generally no power to change the decision on its substantive merits. The Tribunal or Court will give its reasons, set aside the decision and remit the matter to the administrative authority for determination in accordance with the principles set out by the reviewing Court.

In the common law systems where judicial review is applied, in rare cases where there can only be one outcome once the law is declared, the reviewing Court or Tribunal may

interfere and itself make the final determination in order to avoid further unnecessary expense and delay, rather than remit it for further decision.

In some countries where there is judicial review by the Courts, there is also a parallel system of Administrative Tribunals, which can give a final decision on the merits of the administrative act, as in Australia. The Tribunal decisions generally cannot be reviewed on merits by a Court on judicial review but can only be examined as to their legality. In Australia however, the Tribunal, on administrative review, is entitled to reconsider, in the light of new evidence, the actual merits of a decision made by the Minister or administrative agency whose decision is challenged. The Tribunal also has the power to send the matter back for decision by the administrative agency, but the primary function of the Administrative Appeals Tribunal in Australia, for example, is to make the "correct and preferable decision", which should have been made by the Minister or agency, having regard to both fact and law. In the reports that have been furnished there was no other Tribunal that conducts a complete right to review of the decision of the administration entirely on the merits.

In the reports of most other systems, the position is that if the decision is annulled for illegality and set aside, the matter will be sent back for further consideration by the agency carrying out the act or making the decision. Some jurisdictions (Cyprus for example), take the view that for the Court to reconsider the merits of an administrative decision would violate the strict separation of powers provided for by the Constitution. This is because administrative decision-making on merit is seen as the function of the Executive branch of government and not of the Courts. This perceived Constitutional problem does not arise where the Tribunals and Courts themselves are part of the Executive branch of government.

In civil law countries, the administrative Courts are often independent entities within the Executive, but not subservient to it, and therefore there is no problem with respect to the separation of powers.

Some countries indicate that the court has the power to substitute its own decision for the one taken by the administrative authority (Bulgaria, Finland, Sweden, Lithuania, and Switzerland).

In many other countries, the court has the power to modify an administrative decision only in certain matters, such as sanctions for example.

The French report gives some examples of a power to modify an administrative decision when dealing with limited specific matters such as environmental and certain tax matters. A distinction is drawn between cases where annulment is sought and those where there is full jurisdiction. The power in France to decide the merits exists in cases that are not purely annulment cases; that is, cases described as *plein contentieux,* which may be close to the notion of "appeal" in common law countries. In annulment cases, there is also the possibility of a partial annulment provided that the invalid part can be severed (is detachable) from the remaining part of the administrative act or decision. The judges have greater power in these cases and can modify the attacked decision and substitute the new decision for that of the administration. There are also certain specialised areas, which include election and financial disputes, environment disputes, building disputes, and demolition disputes where modified orders can be made. This power exists also in relation to disputes involving administrative authorities, which are independent, in areas of audio-visual media and financial contracts for example.

3.6 When the Court quashes a decision taken by a public authority, does this take effect retroactively, when the original decision was made, or simply when the Court rules? Does the judge have power to fix the time from which the annulment operates? On what principles is a date chosen?

In the majority of countries where an annulment takes place, it operates retroactively; that is to say as from the date on which the challenged decision was originally made. The effect of the order is to restore the situation which existed prior to the making of the decision (status quo ante) which has been annulled. This retroactive operation of a decision is a logical conclusion from the fact that if a decision is annulled then it never had any existence. In those countries where the application for review suspends the challenged decision or act, the problem does not arise (Finland, Germany, Austria, Bulgaria).

However, in practice, the retroactive operation of a decision can give rise to considerable hardship, for example in cases where rights have been acquired by parties arising from the administrative decision or act in the period between its making the decision or act and the decision of the Court declaring it to be null and ineffective.

In Switzerland, however, the annulment only operates from the time when the Tribunal decision is made so that the judge does not modify the annulment so that it operates retroactively, but there are certain exceptions. The matter is left to the legislature to rectify the problems.

The problems that can arise from such a prospect are illustrated by examples in the reports where building permits have been granted and the construction of the building has commenced on the faith of the original decision. These acts may become illegal as a consequence of a retroactive application of an annulment decision.

Accordingly, most national reports state that the Courts have power to adjust the operation of the decision to relieve persons adversely affected from severe prejudice caused by invalidating the intervening acts based on the challenged act or decision, and that can include the award of compensation or damages.

In France for example, the problems were recognised in a decision in 2004 and as a consequence, the Court is permitted to deal more broadly with the problem of retroactive consequences and adverse prejudices when these are clearly excessive. This power has been widely used in France.

In making a decision to modify the retroactive effect, the Court will consider the extent of the illegality to see whether it is minimal, and whether there is room for a challenge to any disproportion between the breach and the prejudice likely to be suffered by a party or other persons if a retroactive effect is given to the Court order. In common law countries, a similar exercise is carried out in relation to the discretionary grant of injunctions when relative prejudice to parties is weighed. This is often referred to as weighing the "balance of convenience".

In Greece, there is no power to limit the time from which the Tribunal or Court decision operates.

By having a discretion to vary the dates on which the order is made to take effect or by making other compensatory orders, the prejudice can be prevented or lessened.

3.7 What means are available to a judge to compel the administration to enforce a decision which the Executive does not wish to carry out?

In some countries, there are no means of enforcement given to the administrative Court in the event of failure or refusal (Finland, Cameroon, Cyprus, Ivory Coast, New Zealand and Sweden). However, the practical situation is that in very few cases is there a failure to comply with the Court orders. In Australia for example, the Administrative Appeals Tribunal does not have any direct means of enforcing its decision. However, an approach can be made to the Federal Court (a judicial Court) by a dissatisfied party to enforce the decision and it has broad powers to enforce its decision by way of contempt

proceedings. In those countries where there is judicial review by the ordinary Court, they can use all the enforcement measures of those Courts.

Statistically, the French report indicates that the number of complaints based on a failure to implement decisions by administrative agencies is extremely small. For example, in 2008 out of 10,250 matters registered, there were only 120 demands for assistance in the execution of the matter before the Council of State. There were 549 before the Administrative Courts of Appeal based on 27,800 registered matters, and before the Administrative Tribunals themselves, only 1,245 complaints, where 176,000 matters had been registered. These figures relate only to complaints. That does not mean they were all justified.

In most countries, the Tribunal or Administrative Court will not itself and of its own initiative follow-up the execution of the decision and it is not charged with, nor will it assume, any surveillance role to ensure that its orders are carried out. There must be a complaint or non-compliance brought before the Court by an aggrieved person.

If a person is dissatisfied with a failure or refusal to carry out an order, an approach can usually be made to the Court or Tribunal for an order requesting that the administration comply. If there is a refusal, the Court may in some cases call up the heads of agencies to explain the position (as in Thailand). The Court may order compliance within a specified timeframe. Indonesia uses publicity in mass media announcements on the defendant's failure to comply, but these are expensive and not very effective. The Court recognises a need for effective enforcement.

Where heads of agencies are called up before the Tribunal on a complaint as to non-execution, the matter can sometimes be resolved in a non-litigious manner by way of mediation. If this fails then the Courts, in some cases, have the power to impose a daily penalty on the agency.

In a few cases the Tribunal, on a complaint being made, can itself appoint a commissioner to carry out the execution of the order (Italy and Luxembourg for example). This is perhaps the most effective and direct way of ensuring that the orders are complied with. In Spain, since 1998, the Court has specific power to control the execution by the administration of its orders. The Portuguese judge in some circumstances replaces the administration and issues a sentence that produces the effects the illegally committed act should have produced. In both countries, there are extensive powers of enforcement.

In some countries, there is the possibility of suing for damages or compensation in the civil Courts if the administration has failed to implement the Tribunal's decision. Indonesia has a very elaborate regime to enforce its decisions. In Algeria, if a functionary does not comply or misbehaves in relation to the performance of an order by a Tribunal or Court, in an extreme case, the functionary may be imprisoned for six months to three years together with liability to pay payment of a large penalty.

In Bulgaria and a number of other countries where there is a payment to be made, it can be enforced by a bailiff or Court officer. In the event of disobedience, an appeal can be taken to the Court against failure to take steps within seven days from the agency being informed of the decision.

On the other hand, in Sweden, the Court cannot take enforcement action, but in some cases involving municipalities, a fine or special charge can be imposed by the County Court.

Conclusion

The above general survey shows in many respects the similarities in approaches taken by different national courts in resolving what are essentially the same practical problems in the process of delimiting the areas of dispute, and proceeding to a speedy and just determination of the issues raised. The purpose of this report is to stimulate dialogue and raise questions for later discussion and elaboration. With in depth consideration of particular national case studies during the committee sessions, we will gain a unique appreciation of the chosen subject matters. We will then have the opportunity to draw substantial conclusions from the material before us at the culmination of the 10th Congress of the IASAJ.

Hon Brian Tamberlin QC
Deputy President
Australian Administrative Appeals Tribunal

With the invaluable assistance of Mr Timothée Paris of the Conseil d'Etat, France