First of all, let me express my gratitude for the wonderful hospitality of the Austrian colleagues, who received me openly and accompanied me through the two-week time as a host-judge at the Austrian Supreme Administrative Court. Ahead, I would like to thank President Prof. Dr. R. T. and the Vice President, Dr. in A. S., for their commitment and the creation of a program with rich information. After a guided tour through the wonderful historic building of the Austrian Supreme Administrative Court, the former Bohemian Court Chancellery of 1714 in the centre of Vienna, I was introduced to the functioning of the Administrative Court. In addition to numerous discussions with various judges, scientific staff and the head of the bureau of Documentation, I was able to participate in the deliberations of various chambers (“Senate”) of the Supreme Administrative Court. In addition to that, I had the opportunity to attend a session of the Austrian Constitutional Court. This was followed by a very interesting conversation with Justice Dr. R.M., Justice of the Austrian Constitutional Court, to whom I am also much obliged. Finally, a wonderful side show with playing quartets of W.A. Mozart and visiting a “Heuriger”-Tavern completed my stay. I would like to thank the ACA and my colleagues in Vienna for the exceedingly positive and interesting experiences as a host-judge at the Supreme Administrative Court in Vienna.

I. The Supreme Administrative Court

1. The Supreme Administrative Court’s position in the Austrian legal system

Besides the Court of Justice and the Constitutional Court, the Supreme Administrative Court is one of the three Austrian Supreme Courts of Law. Unlike in the Federal Republic of Germany, there is no supremacy between the Constitutional Court and the Supreme Administrative Court. Therefore no appeal is allowed against a judgment of the Supreme Administrative Court to the Constitutional Court. Nonetheless, constitutional law is also a
criterion of the administrative court within the framework of a permissible appeal ("Revi-
sion"), e.g. in the interpretation of statutes consistent with the constitution. In addition, the
European Convention on Human Rights enjoys the rank of constitutionality in Austria.

In contrast to the Courts of Law in Germany, which are divided into five jurisdictions with
five independent supreme courts on the federal level, the Austrian court-system is split into
the ordinary jurisdiction (for criminal and civil law) and the courts of public law (for constitu-
tional and administrative law). Until the reform of the administrative jurisdiction in 2012,
which entered into force on 1st January 2014, all the courts of the Republic of Austria were
federal courts. Since 2014, there are now in addition to the Federal Administrative Court, a
court of first instance, also nine regional administrative courts of first instance on the Län-
der-level (states).

2. Internal organization of the Administrative Court

The Supreme Administrative Court consists of the President, the Vice-President, thirteen
presiding judges and fifty-three judges; they all are professional judges. The Court usually
sits in chambers ("Senate") of five judges, while less complex cases and administrative
penal matters are handled by panels of three judges. One judge (the reporting judge) pre-
pares a draft ruling, which the chamber then deliberates and decides on in a meeting
which is not open to the public. Forty research assistants support the judges in the prepa-
reration of decisions. They are looking at the jurisprudence and literature, draw up prelimi-
nary drafts and take the minutes at the deliberations.

3. The judge’s appointment

The judges of the Austrian Supreme Administrative Court must have completed a degree
in law and at least ten years' professional experience. A quarter of the judges should come
from the countries. Candidates can apply to the Administrative Court for registered vacan-
cies and should present themselves to all judges face to face. The General Assembly of
the Administrative Court then adopts a tripartite proposal, to which the Federal Govern-
ment is bound, with the exception of the order of the candidates. The judges then are ap-
pointed by the Federal President. According to their professional background, the mem-
bers of the Administrative Court derive from administrative jurisdiction, ordinary jurisdic-
tion, the general administration, financial administration, lawyers and universities. They are
around the age of 40 at the appointment and retire at the age of 65.
II. Appeal of stages

1. The reform of the administrative jurisdiction in 2012

With the reform of the administrative jurisdiction in 2012, the former partly independent authorities, to which could be appealed, became now fully independent courts. In each federal state, an administrative court of First Instance was established; furthermore two administrative courts (Federal Administrative Court and Federal Finance Court) were established on the federal level. The former Court of asylum was transferred into the Federal Administrative Court.

After this basic change of system, an appeal to a higher authority against an administrative act can no longer be lodged. Against a decision issued by an authority (or because of a breach of the decision-making obligation), an appeal may only be lodged to the originating office, which - if the authority does not remedy it - is transferred to the lower Administrative Court. The administrative procedure then is transformed into an adversary trial with the petitioner and the authority as parties. The Administrative Courts, in principle, decide on the merits. They have the power and duty to be fully aware of the facts. To the Supreme Administrative Court an appeal may only be lodged in cases, in which the administrative court's decision depends on a legal question with fundamental importance.

2. The procedure at the lower Administrative Courts (Court of first instance)

A complaint shall be lodged at the issuing authority; it basically has a suspensive effect. If the authority does not want to set aside or modify its decision, the applicant may request the authority to submit the complaint to the Administrative Court (Court of first instance) for a decision. The authority then shall submit the request and the complaint to the administrative court together with the files of the proceedings. The administrative court is obliged to determine the facts ex officio. In principle it has to decide on the basis of a public hearing.

The Court's scope of the examination of the contested decision is limited by the matter. The "matter" of the appeal is only that issue, which has formed the content of the challenged administrative act. For the Court's decision is decisive the material and legal situation at the time of its judgment. Any changes in the relevant facts and the legal situation must therefore be taken into account. With the exception of administrative penal cases, there is no prohibition of a "reformatio in peius" in the court proceedings. A period of six months is in principle foreseen for the decision of an Administrative Court. Its infringement is sanctioned with the possibility of a request for a time-limit to the Supreme Administrative court.
In order to achieve the objective of procedural acceleration, the possibility of quashing the administrative decision and remitting the case to the authority is only given, if there are serious gaps in the authority’s investigation of the facts of the case. Apart from that the Administrative Court has to determine the facts ex officio and has to decide on the merits. The Administrative Court’s power and duty to decide on the merits is understood as a reformatory decision of the administrative act, with which the authority’s decision can be set aside or modified. Fundamentally different from the German procedural law, the administrative act itself is adopted by the Administrative Court. The court does not merely order the authority, e.g. to grant a building permit, but it issues the building permit itself. If the authority has discretion and the court finds an abuse of discretion, then the administrative court itself exercises the discretion.

3. The appeal (“Revision”) to the Supreme Administrative Court

3.1 Legal question of fundamental importance

An appeal, called “Revision”, to the Supreme Administrative Court is only admissible against a judgment by an Administrative Court, which depends on a legal question of fundamental importance. This is the case, if the judgment departs from relevant past decisions of the Supreme Administrative Court, or if there is no (or no consistent) case law on the particular issue in question. This legal filter for appeals shows that it is the task of the Supreme Administrative Court to formulate criteria for the interpretation of statute law. For the admissibility of an appeal the focus is not on the correctness of the legal application by subsumption in the individual case.

Cases are not accepted by the Supreme Administrative Court, if they fall into the jurisdiction of the Constitutional Court. Therefore, the Supreme Administrative Court is not competent if a plaintiff asserts exclusively the infringement of constitutionally guaranteed rights. In such a case, the petitioner must lodge a complaint against the judgment of the Administrative Court to the Constitutional Court. If the Constitutional Court rejects the appeal against the judgment of the Administrative Court, the petitioner can still lodge an appeal (“Revision”) to the Supreme Administrative Court.

3.2 Procedure of review

In its judgment the lower Administrative Court has inter alia to decide, whether an appeal (“Revision”) is admissible. If it allows an appeal, the Court has to present the legal question of fundamental importance in the motivation of its judgment, and the appeal is called
an ordinary appeal. If, however, the Administrative Court does not allow the appeal, the petitioner or the authority may lodge an extraordinary appeal to the Supreme Administrative Court. As a rule, petitions to the Supreme Administrative Court must be drafted and submitted by a lawyer (or alternatively, in fiscal matters, by a tax adviser or certified public accountant). The period for an appeal is six weeks.

Upon submission of the files by the lower court, the President of the Supreme Administrative Court allots the case to a reporting judge from the proper chamber, which is responsible for the matter after the court’s schedule of responsibilities. The reporting judge is as a single judge responsible for decisions on legal aid and the granting of the suspensive effect. He - if necessary with the help of a scientific staff - prepares a draft decision, which is circulating in the chamber (“Senat”). The colleagues provide the draft decision in the circulation procedure with remarks, which can contain from linguistic corrections to substantive counter-drafts. In the event of a substantial resistance to the suggested ruling or its content, the reporting judge may withdraw his draft and draw up a counter-draft.

Thereafter, the draft decision is deliberated by the Chamber (“Senat”) behind closed doors. In addition to the judges of the Senate, at least one research assistant is present as secretary taking the minutes. An oral hearing is very rare; in the traditional way in which it is carried out without a legal discussion, it seems to be useless.

3.3 Frame of review

The Supreme Administrative Court has to review the contested decision on the basis of the facts adopted by the administrative court, in so far as there is no unlawfulness on the competence of the administrative court or because of infringement of procedural rules. The presentation of facts not previously submitted is not allowed. The material and legal situation at the time of the decision of the administrative court is decisive for the finding of the Supreme Administrative Court on the appeal (“Revision”).

As not being a trail court, it is not the task of the Supreme Administrative Court to review the lower Administrative Court’s consideration of evidence. Only an inconsistent, inadequate or incomplete reasoning showing flawed logic or contradictions to human experience shall be set aside.

3.4 Decision of the Supreme Administrative Court

If the Supreme Administrative Court finds for the petitioner, it annuls the decision under review and sends the case back to the court below. In giving its new decision, the Adminis-
trative Court is bound to apply the interpretation of the Supreme Administrative Court. Otherwise the petition for review is dismissed as unfounded. Under certain circumstances, however, the Supreme Administrative Court itself may decide on the merits, possibly requiring the lower court to establish additional facts. Should a petition for review be found to be formally defective (e.g. if it was filed late or does not involve an issue of fundamental importance), it is dismissed by court order.

4. Resume

Regarding the reform of the administrative jurisdiction in 2012 from the point of view of a German observer, on the one hand the Austrian legislator has created independent administrative courts of first instance. But on the other hand he has not disengaged himself totally from the traditional conception of internal administrative review. With the duty of a strictly understood reformatory decision of the Administrative Courts "on the matter itself", relics of the traditional concept have survived, which do not really fit together with the idea of an administrative review detached from the executive. This applies, in particular, to the power of a reformatio in peius and the obligation to exercise administrative discretion. The Supreme Administrative Court has become an Appellate Court limited to the review of points of law, whose primary task is to ensure the unity of the jurisprudence against centrifugal forces. The Court fully fulfils this role and its findings enrich the international exchange of arguments in the discussion between the Supreme Administrative Courts of Europe.