COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF WIESINGER v. AUSTRIA

(Application no. 11796/85)

JUDGMENT

STRASBOURG

30 October 1991

In the case of Wiesinger v. Austria*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention** for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court***, as a Chamber composed of the following judges:

Mr J. CREMONA, *President*,
Mr Thór VILHJÁLMSSON,
Mr F. MATSCHER,
Mr L.-E. PETTITI,
Sir Vincent EVANS,
Mr A. SPIELMANN,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr A.N. LOIZOU,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 April and 24 September 1991,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 11 July 1990, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11796/85) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by two Austrian nationals, Mr Konrad and Mrs Klara Wiesinger, on 12 August 1985.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether the facts of the case disclosed a breach by

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* The case is numbered 38/1990/229/295. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

** As amended by Article 11 of Protocol No. 8 (P8-11), which came into force on 1 January 1990.

*** The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

the respondent State of its obligations under Article 6 para. 1 (art. 6-1) of the Convention and Article 1 of Protocol No. 1 (P1-1), alone and in conjunction with Article 14 (art. 14+ P1-1) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings and designated the lawyer who would represent them (Rule 30).

3. The Chamber to be constituted included ex officio Mr F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 August 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr J. Cremona, Mr Thór Vilhjálmsson, Mr L.-E. Pettiti, Mr N. Valticos, Mr I. Foighel, Mr R. Pekkanen and Mr A.N. Loizou (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Sir Vincent Evans, substitute judge, replaced Mr Valticos who was unable to take part in the further consideration of the case (Rule 24 para. 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 para. 5) and, through the Deputy Registrar, consulted the Agent of the Austrian Government ("the Government"), the Delegate of the Commission and the lawyer for the applicants on the need for a written procedure (Rule 37 para. 1). In accordance with his orders and instructions, the Registrar received the Government's memorial on 24 January 1991 and the claims of Mr and Mrs Wiesinger under Article 50 (art. 50) of the Convention on 7 February and 22 March 1991; the applicants' claims were drawn up in German with the President's leave (Rule 27 para. 3). On 16 April the Secretary to the Commission submitted several documents which had been asked for by the Registrar on the instructions of the President.

5. Having consulted, through the Deputy Registrar, those who would be appearing before the Court, the President had directed on 9 October 1990 that the oral proceedings should open on 22 April 1991 (Rule 38).

6. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government
  Mr W. OKRESEK, Federal Chancellery, Agent,
  Mr F. HAUG, Ministry of Foreign Affairs,
  Mr J. JÖSTL, President
  of the Supreme Agricultural Reform Board, *Advisers*;
- for the Commission
  Mr H.G. SCHERMERS, *Delegate*;
- for the applicants
  Mr P. WIESAUER, Rechtsanwalt, *Counsel*.

The Court heard addresses by Mr Okresek and Mr Haug for the Government, by Mr Schermers for the Commission and by Mr Wiesauer for the applicants, as well as their replies to the questions put by the Court.

7. For the final deliberations, Mr Cremona, Vice-President of the Court, replaced as President Mr Ryssdal, who was unable to take part in the further consideration of the case; Mr A. Spielmann, who was present at the hearing as a substitute judge, became a full member of the Chamber (Rules 21 para. 5, 22 para. 1 and 24 para. 1).

AS TO THE FACTS

8. Mr Konrad Wiesinger and his wife Klara are Austrian farmers residing at Hartkirchen, Upper Austria. They complain of consolidation measures (Zusammenlegungsverfahren) taken in respect of their land since July 1975.

I. THE CIRCUMSTANCES OF THE CASE

A. The consolidation measures

9. On 22 July 1975 the Linz District Agricultural Authority (Agrarbezirksbehörde, "the District Authority") opened the Hacking land consolidation proceedings, pursuant to section 29 of the Upper Austrian Agricultural Land Planning Act 1972 (Flurverfassungs-Landesgesetz, "the 1972 Act"). The measures concerned at least 67 landownersand covered approximately 172 hectares, including the applicants' property at Hartkirchen.

On 15 July 1976 Mr and Mrs Wiesinger made a "declaration of wishes" (Wunschaufnahme), expressing their wish to receive parcels situated near their farmhouse. On 13 August 1976 the District Authority adopted the land valuation schedule, against which the Wiesingers did not appeal.

10. On 13 October 1978 the District Authority ordered the provisional transfer of compensatory plots (Grundabfindungen) on the basis of a draft consolidation scheme (Neueinteilungsplan), pursuant to section 22 of the 1972 Act (see paragraph 36 below). The applicants had agreed to this plan, which provided them with a parcel of 23,219 square metres near their farm, and did not contest the transfer decision. While they lost the ownership of land formerly belonging to them (including the five plots mentioned in paragraph 12 below), which passed to the association of landowners (see paragraph 33 below), they acquired the provisional ownership of certain plots subject to a condition subsequent, namely that they would be

dispossessed of them under the final consolidation scheme, if it did not confirm the allocation thereof to the applicants (section 22 of the 1972 Act).

B. The amendment of the area zoning plan for Hartkirchen

11. On 1 September 1978 the municipal council of Hartkirchen had adopted an area zoning plan (Flächenwidmungsplan; see paragraphs 42-43 below), which was approved on 10 October by the government of the Land. The Wiesingers' property, which was covered by the consolidation scheme, retained its designation as agricultural land, although certain adjoining plots had been redesignated as building land in 1976 and 1978.

12. At the request of the new (provisional) owners, the municipal council amended the area zoning plan on 16 November 1979. It classified as building land five plots covering a surface of 25,206 square metres which had previously belonged to the applicants. On 16 April 1980 the Land government approved the decision, which became final on 6 May.

Subsequently the five plots were divided into parcels and sold to several persons who were granted building permits in respect of them.

C. The proceedings instituted by the applicants following the amendment of the area zoning plan

13. On 10 August 1982 Mr and Mrs Wiesinger asked the District Authority to return to them the five plots by withdrawing them from the consolidation scheme. In their view the plots in question were now to be regarded as land of special value which under the relevant legislation was in principle to be left to the previous owners. In the alternative, they asked to be allocated building land or to be accorded financial compensation (Geldwertentschädigung). They also sought compensation (Schadensersatz) on account of loss of interest (Zinsverlust) arising from the fact that they had not themselves been able to sell the five plots after the amendment of the area zoning plan; they estimated this amount at 1,600,000 schillings on the basis of a price of 400 schillings per square metre at an interest rate of 10%.

14. The District Authority replied by a letter of 17 January 1983. It referred to the Upper Austrian Agricultural Land Planning Act 1979 ("the 1979 Act"), which had replaced the 1972 Act, and drew their attention to the fact that claims for compensation had to be submitted within six months of the date on which the consolidation scheme became final (section 20(6); see paragraph 37 below). It therefore requested the applicants to await the publication of the scheme which was scheduled for July.

15. The Wiesingers took the view that the District Authority had failed to resolve within the statutory time-limit of six months the questions which they had raised with it and, on 23 August 1983, filed with the Provincial

Land Reform Board (Landesagrarsenat, "the Provincial Board") an application for a ruling on the matter (section 73 of the General Administrative Procedure Act, Allgemeines Verwaltungsverfahrensgesetz; see paragraph 41 below).

The Provincial Board gave its decision on 17 November. It dismissed the request for the five plots to be withdrawn from the consolidation scheme. It considered that, in order to attain its objective, the scheme had to include the land in question and the fact that the plots were now building land made no difference in this respect. It found that the District Authority's refusal to rule on the applicants' other claims was justified since the merits of such claims could not be determined until the consolidation scheme had become final. The Provincial Board ordered the District Authority not to approve or authorise any further division into parcels of the land in question or to allow any further conversion into building land or any further issue of building permits.

16. The Wiesingers appealed to the Supreme Land Reform Board (Oberster Agrarsenat, "the Supreme Board"), which declared their appeal inadmissible on 1 February 1984. Its decision was upheld on 27 June by the Constitutional Court (Verfassungsgerichtshof) and on 25 September 1984 by the Administrative Court (Verwaltungsgerichtshof).

17. Previously, on 10 January 1984, the applicants had contested the Provincial Board's decision of 17 November 1983 (see paragraph 15 above) directly in the Administrative Court, which gave its decision on 20 March 1984. It upheld the impugned decision in so far as the Provincial Board had refused to return the five plots to the applicants, but at the same time declared the appeal well-founded on the other points. As the District Authority had not ruled within the statutory period of six months on the alternative claims filed by the applicants, the Provincial Board ought to have decided them itself.

18. In new proceedings before it, the Provincial Board gave its decision on 18 October 1984. In its view it was not possible under the 1979 Act to afford compensation for the alleged damage. The Act provided that the owners of plots of special value covered by a consolidation scheme should in principle be compensated by the allocation of land of the same type. As regards the building land claimed by the Wiesingers, the Board noted that the provisional transfer of the plots precluded altering their allocation for the time being. However, the provisional transfer did not prejudge the consolidation scheme which would determine definitively the question of land of special value. Furthermore, the building plots were referred to only in the area zoning plan for Hartkirchen and there was therefore an inseparable link between that plan and the question of statutory compensation for land of special value. Accordingly, the area zoning, which was the responsibility of the municipal authorities and not the agricultural authorities, was a precondition. The municipal council of Hartkirchen had

announced that it proposed to convert into building land certain of the compensatory plots allocated to the applicants, but their area and location had not yet been fixed. The Provincial Board concluded that it could not rule on the merits of the question until an appeal had been filed concerning the consolidation scheme, once the latter had been adopted and published.

19. Mr and Mrs Wiesinger then appealed to the Constitutional Court, which on 24 June 1985 refused to entertain their appeal as the case did not raise any specific questions of constitutional law. It remitted the case to the Administrative Court, in accordance with the applicants' alternative plea.

20. The Administrative Court dismissed the appeal on 19 November 1985. It noted in the first place that the applicants had themselves obtained the plots which they had wished and whose designation as agricultural land had not been changed. They had thus suffered no temporary disadvantage for which they could claim financial compensation. It was true that the area zoning plan had reclassified a part of their former land after its provisional transfer. However, the consolidation scheme, which was to fix the statutory compensation, would have to take into account any changes in the value of the land occurring in the course of the proceedings, for example following a new area zoning plan as in this instance. Consequently, the contested decision was not unlawful.

D. The proceedings instituted by the applicants to accelerate the implementation of the consolidation measures

21. Relying on section 7a(4) of the Federal Agricultural Proceedings Act 1950 (Agrarverfahrensgesetz, "the 1950 Federal Act"), according to which the consolidation scheme is to be published not later than three years after the final decision on the provisional transfer of plots, the Wiesingers asked the Provincial Board on 17 January 1984 to take jurisdiction over the case in accordance with section 73 of the General Administrative Procedure Act (see paragraphs 37 and 41 below).

On 7 June the Board refused. It considered that it was empowered to adopt the consolidation scheme only if the failure to comply with the statutory time-limit of three years was exclusively the fault of the District Authority. This was not the case.

Since the provisional transfer the District Authority had made every effort to draw up the consolidation scheme. Its work had been delayed on account, in particular, of the proposed route for a new major road and its link roads across the area in question, which made it necessary to revise the position of 43 owners. Furthermore, a substantial part of the file had had to remain for several months with the Provincial Board in connection with appeal proceedings instituted by a landowner; likewise, the Wiesingers' application of 23 August 1983 had required the file to be sent to the Provincial Board, then to the Supreme Board and to the Administrative

Court, and had therefore prevented a decision from being taken during this period. The District Authority could have adopted and published the consolidation scheme in 1983 if further consideration, inquiries and interviews had not been necessary following the alteration to the Hartkirchen area zoning plan. With a view to expediting the final adoption of the area zoning plan, it had held discussions with the municipal council as early as 8 September 1983, and then with the authorities with competence in the field of land development on 25 January, 22 February, 5 March and 10 April 1984.

As the area zoning plan had still not been settled, it had not been possible to adopt the consolidation scheme, because the District Authority could not yet determine whether the allocation of land provided the applicants with sufficient compensation, thereby satisfying the statutory criteria. It was, moreover, contrary to the principles of efficient administration to finalise the consolidation scheme before the adoption of the area zoning plan. The conduct of the District Authority had thus been justified. Under section 38 of the General Administrative Procedure Act, it was possible to stay (aussetzen) proceedings pending a definitive decision on a preliminary question which was the subject of other proceedings. In this case the area zoning constituted a preliminary question for the consolidation proceedings.

22. The applicants appealed to the Supreme Board, which dismissed their appeal on 6 March 1985.

It began by upholding the Provincial Board's decision that the latter had competence to adopt a consolidation scheme solely where the failure to comply with the statutory time-limit of three years was exclusively the fault of the District Authority. According to the established case-law of the Administrative Court, there was no such fault where the delay resulted from the conduct of one of the parties or from an insurmountable obstacle. In the present case it had not been suggested that the applicants' conduct had been in any way reprehensible, nor could the failure to comply with the statutory three-year time-limit be blamed on the District Authority. Throughout the consolidation proceedings, it had to take account of the area zoning plans and any amendments thereto. It was therefore impossible, and indeed contrary to the principles of efficient administration, to adopt a consolidation scheme where no final land-development plan or area zoning plan existed, and where negotiations for the adoption of such plan were in progress. Even before the Wiesingers' appeal had been filed, the competent authority had conducted further inspections of the land and had had contacts with the Hartkirchen municipal council, which was considering the possibility of converting some of the plots allocated to them into building land. In those circumstances, there was no justification for adopting a consolidation scheme which would probably have been defective as from its adoption, if the municipal authority subsequently fixed an amended area zoning plan. The finalisation of such a plan in fact constituted a

precondition for the adoption of the consolidation scheme. For all these reasons, the District Authority had been right to stay the proceedings pending the final decision of the municipal council and was not responsible for the delay in the consolidation proceedings.

23. Mr and Mrs Wiesinger contested this decision before the Constitutional Court, which, on 23 November 1985, refused to entertain their appeal on the same grounds as those set out in its judgment of 24 June (see paragraph 19 above). It remitted the case to the Administrative Court in accordance with the applicants' alternative plea.

The Administrative Court dismissed the applicants' appeal on 8 April 1986. It found, inter alia, that the Provincial Board's refusal to assume jurisdiction had been justified, since the failure to comply with the statutory time-limit was not exclusively attributable to the District Authority. Furthermore, the applicants' claims concerning the nature and extent of the compensatory plots related to the question of the statutory compensation, which would be dealt with by the consolidation scheme.

E. The consolidation scheme

24. On 16 July 1986 the District Authority published the consolidation scheme (see paragraph 37 below); it returned to the Wiesingers 9,680 square metres of their former land and allocated to them plots covering an area of 19,909 square metres classified as a zone capable of being redesignated as building land (Bauerwartungsland). It pointed out that the applicants had already received monetary compensation, in 1974, for certain plots that they had had to give up in connection with the construction of the new major road. It dismissed their claim for compensation for the increased value of their former land following its reclassification, because that had been taken into consideration when the compensatory plots were allocated definitively. Finally, the District Authority found that the applicants had not suffered any temporary damage and were not entitled to any financial reparation.

25. The applicants contested the scheme before the Provincial Board. They argued that the land which they had ultimately received was of a lower value than their former land; they had, they claimed, sustained a loss of more than 4,000,000 schillings.

26. The different agricultural authorities attempted first to secure a friendly settlement of the dispute: the District Authority, between 20 October 1986 and 8 July 1987, during which period twelve meetings were held, and the Provincial Board, between 28 September 1987 and 28 August 1989, at eignteen meetings with the parties concerned, the local authorities, the highways department and the land designation supervisory authority. In the course of these meetings the Provincial Board invited the municipal authorities in question to redesignate a particular plot which they were proposing to allocate to the applicants as building land.

However, the authorities' efforts were in vain.

27. After the attempts to reach a friendly settlement had failed, the Provincial Board held a hearing on 28 September 1989.

On 24 January 1990 it allowed in part the Wiesingers' appeal. It awarded to them a part of their former land, now reclassified, and other plots converted or to be converted into industrial sites. On the other hand, it dismissed once again their claim for financial compensation.

28. The applicants appealed against this decision to the Supreme Board, which dismissed their appeal on 5 December 1990.

After having examined in detail the Wiesingers' objections, the Supreme Board concluded that they had received compensatory plots of a value equivalent to that of their former land, as was required under the 1979 Act. Accordingly, the impugned decision did not infringe their statutory rights. Furthermore, according to the Supreme Board, if the new situation of agriculture in the area was compared to the old one, it could be said that the consolidation scheme had been a success and had achieved its goals.

In the meantime the applicants had appealed to the Constitutional Court, which has not yet ruled.

F. Other steps taken by the applicants

29. Prior to the adoption of the consolidation scheme, the Wiesingers applied to the civil courts for an order directing the cessation of the construction work which had begun on their former land.

On 16 October 1985 the Wels Regional Court (Kreisgericht) found that it lacked jurisdiction. Its decision was overturned on 21 February 1986 by the Linz Court of Appeal (Oberlandesgericht), but on 19 June 1986 the Supreme Court (Oberster Gerichtshof) confirmed that the civil courts were not competent to decide the matter. The Supreme Court declined, on account of the exclusive powers vested in the District Authority under Austrian law (section 102(2) of the 1979 Act; see paragraph 33 below), to follow its previous case-law, although it concerned similar facts.

30. The applicants also requested authorisation to construct two animal feed silos on their compensatory plots near their farm. However, the authorities refused on the ground that they were only provisionally owners of the land in question.

II. THE RELEVANT LEGISLATION

A. Agricultural legislation

1. The consolidation of agricultural land

31. The basic rules applying to the consolidation of agricultural land are embodied in the Federal Agricultural Land Planning (General Principles) Act (Flurverfassungs-Grundsatzgesetz 1951), as amended in 1977. The Länder have regulated the matters for which they are made responsible under the Federal Legislation in provincial agricultural land planning Acts (Flurverfassungs-Landesgesetze).

In Upper Austria, consolidation is governed by the Agricultural Land Planning Act 1979 ("the 1979 Act"). This replaced an Act of 1972, which had itself replaced an Act of 1911 that had been brought into force again in 1954. The proceedings in the present case were instituted under the 1972 Act, on the basis of which the provisional transfer was ordered. However, the subsequent proceedings were governed by the 1979 Act.

32. The purpose of consolidation is to improve the infrastructure and the pattern of agricultural holdings in a given area (section 1(1) of the 1979 Act). It comprises communal measures and facilities and redistribution of land. The operation takes place in the following stages:

- the initial proceedings;
- ascertainment of the occupiers of the land in question and assessment of its value;
- planning of communal measures and facilities;
- provisional transfer of land, where appropriate;
- adoption of the consolidation plan.

None of these stages may begin until the previous stage has been terminated with a final decision.

33. The initial proceedings, which are instituted of the authorities' own motion, serve to determine the consolidation area, which, in addition to farmland and forest, may include land voluntarily offered for consolidation and land required for communal facilities (sections 2 and 3). Land which is not needed for the purposes of consolidation may subsequently be withdrawn from the area (section 4(2)). The owners form an association (Zusammenlegungsgemeinschaft), which is a corporate body governed by public law.

The institution of proceedings means that land use is restricted until the proceedings are concluded; any change in use must be approved by the appropriate agricultural authority. This authority has exclusive jurisdiction, inter alia, over disputes concerning ownership and tenure of land in the consolidation area (section 102).

34. Once the decision to open proceedings has become final, the agricultural authority ascertains who are the occupiers of the land and assesses its value (sections 11 and 12). Its decision (Besitzstandsausweis und Bewertungsplan) determines the value of the land in accordance with precise statutory criteria (section 13). Each of the landowners involved may challenge the valuation not only of his own land but also of the land of the others. Once the agricultural authority's decision has become final, however, it is binding on all of them.

35. Communal measures (e.g. soil improvement, alterations to terrain or landscape) and communal facilities (e.g. private roads, bridges, ditches, drainage and irrigation) are ordered, where they are needed, in a specific decision by the relevant authority (Plan der gemeinsamen Massnahmen und Anlagen), which must also settle the question of costs, these usually being shared by the landowners.

36. Under section 22, in both the 1972 and the 1979 Act, land may be provisionally transferred before the adoption of the consolidation scheme, even if some owners object.

Decisions by the competent authorities ordering provisional transfers are not appealable; but section 7 of the Federal Agricultural Authorities Act 1950 (Agrarbehördengesetz, as amended in 1974, "the 1950/1974 Federal Act") provides that the final decision shall lie with the Provincial Board, except in cases where an appeal lies to the Supreme Board (see paragraph 39 below).

The main purpose of provisional transfer is to ensure that the consolidation area is rationally cultivated during the interim period. The land transferred becomes the property of the transferees subject to a condition subsequent: ownership of it reverts to the original owner if the allocation is not confirmed in the final consolidation plan (Eigentum unter auflösender Bedingung, section 22(2)). This provisional, conditional ownership is, as a rule, not entered in the land register, since it is subject to a resolutive condition and it is possible that the parties concerned may be allotted other parcels once the proceedings are completed. The District Authority has to authorise any entry in the land register (sections 94 et seq.).

37. At the end of the proceedings, the agricultural authority adopts the consolidation scheme (Zusammenlegungsplan, section 21). Since 1977 this has to be published within three years of the final decision provisionally to transfer parcels of land (section 7a(4) of the 1950 Federal Act), failing which the person concerned may request the higher authority to assume jurisdiction. The adoption of the plan is an administrative act which is supported by maps and other technical data, and whose main function is to determine the compensation due to the landowners who are parties to the proceedings. The 1979 Act includes the following regulations on this matter:

- when compensatory parcels are being determined, regard shall be had to the wishes of the parties directly concerned in so far as this can be done without infringing statutory provisions or interfering with important public interests served by the consolidation scheme;

- any landowner whose land is included in the consolidation scheme shall be entitled to compensation in the form of other land of equal value included in the same scheme or, if that is not possible, to be reallocated his previous parcels, including building land (section 19);

- changes in the value of land which come about in the course of the proceedings, including those occurring after the provisional transfer, must be taken into account in the final allocation under the consolidation scheme (section 14(1));

- claims for compensation have to be submitted within six months from the date on which the consolidation scheme becomes final (section 20(6)).

38. The provincial legislation does not provide for any financial compensation for damage suffered, before a final consolidation plan comes into force, by landowners who successfully challenge the lawfulness of compensation received in the form of land.

2. The agricultural authorities

39. The first-instance authority in Upper Austria is the District Agricultural Authority, which is a purely administrative body. The higher authorities are the Provincial Board, established at the Office of the Provincial Government (Amt der Landesregierung), and the Supreme Board, set up within the Federal Ministry of Agriculture and Forestry (Bundesministerium für Land- und Forstwirtschaft). These boards include judges and constitute a kind of "specialised administrative tribunal".

40. Decisions (Bescheide) of the District Authority can be challenged by way of appeal (Berufung) to the Provincial Board, whose decision is final except where it varies the decision in question and where the dispute concerns one of the issues listed in section 7(2) of the 1950/1974 Federal Act, such as the lawfulness of the compensation in the event of land consolidation; in such cases an appeal lies to the Supreme Board.

The executive can neither set aside nor vary the decisions of these three bodies, but they can be challenged in the Administrative Court (section 8 of of the 1950/1974 Federal Act and Article 12 para. 2 of the Federal Constitution).

41. Procedure before the land reform boards is governed by the 1950 Federal Act, section 1 of which stipulates that the General Administrative Procedure Act - except for one section of no relevance in the instant case - shall apply, subject to the variations and additional provisions made in the 1950 Federal Act.

The boards are responsible for the conduct of the proceedings (section 39 of the General Administrative Procedure Act). By section 9(1) and (2) of the 1950 Federal Act, the boards take their decisions after a private hearing.

Boards must determine cases without undue delay (ohne unnötigen Aufschub) and in any event not later than six months after an application has been made to them (section 73(1)). If the board's decision (Erkenntnis) is not notified to the parties concerned within that time, they may apply to the higher authority, which will thereupon acquire jurisdiction to determine the merits (section 73(2)). If the latter authority fails to give a decision within the statutory time-limit, jurisdiction passes - on an application by the interested party - to the Administrative Court (Article 132 of the Federal Constitution and section 27 of the Administrative Court Act).

B. Area zoning planning

42. In the present case, area zoning planning is governed by the Upper Austrian Land Planning Act (Raumordnungsgesetz).

In Austrian law area zoning plans and any amendments thereto are regarded as decrees (Verordnungen), even if they only concern one individual's property. Accordingly, the proceedings in which they are issued are not normal administrative proceedings and the persons affected are not parties to them.

However, the competent local authorities (Gemeinden) must take into consideration planning proceedings of neighbouring local authorities and other public law corporations, as well as regionally significant measures of other planning organisations (section 15(10)), including the planning projects of the agricultural authorities.

43. The lawfulness of decrees can be challenged before the Constitutional Court under Article 139 of the Federal Constitution. However, case-law has established that area zoning plans cannot be directly challenged in proceedings under Article 139 by the individuals affected if it is possible to institute administrative proceedings.

This is the case, in particular, where the area zoning plan is the basis for the granting or withholding of building permits. The persons affected are expected to assert their rights in administrative proceedings concerning the building permit, in which they can allege that the underlying area zoning plan has no legal basis or is contrary to the applicable legislation. Ultimately this question can be brought before the Constitutional Court by a constitutional complaint under Article 144 of the Federal Constitution or by a request made by the Administrative Court under Article 89 para. 2 and Article 139 of the Federal Constitution.

C. Appeals to the Constitutional Court and the Administrative Court

44. The decisions of land reform boards can be challenged in the Constitutional Court. The latter will determine whether there has been any infringement of the applicant's rights under the Constitution and whether the boards have applied a decree (Verordnung) that is unauthorised by statute law, an unconstitutional statute or an international treaty that is unlawful (rechtswidrig) under Austrian law (Article 144 of the Federal Constitution).

45. As an exception to the general rule laid down in Article 133 para. 4 of the Federal Constitution, section 8 of the 1950/1974 Federal Act provides for an appeal to the Administrative Court against the decisions of land reform boards. Application may be made to the Administrative Court before or after an application to the Constitutional Court. The latter will, if it rules that there has been no infringement of the right relied on in the application to it and if the applicant so requests, refer the case to the Administrative Court (Article 144 para. 3 of the Federal Constitution).

Under Article 130 of the Federal Constitution, the Administrative Court determines applications alleging the unlawfulness of an administrative act (Bescheid) or a breach by a competent authority of its duty to take a decision. It also hears appeals against decisions of boards whose members include judges - such as the land reform boards (see paragraph 39 above) - where such jurisdiction is conferred on it by statute.

PROCEEDINGS BEFORE THE COMMISSION

46. In their application (no. 11796/85) lodged with the Commission on 12 August 1985, Mr and Mrs Wiesinger alleged a violation of their right to have their case examined within a reasonable time by an independent and impartial tribunal within the meaning of Article 6 para. 1 (art. 6-1) of the Convention, and of their right to the peaceful enjoyment of their possessions as protected under Article 1 of Protocol No. 1 (P1-1); they claimed in addition that they had received less favourable treatment than the new owners of their former land and complained of a breach of Article 14 (art. 14) of the Convention.

47. The Commission declared the application admissible on 10 July 1989, except as regards the complaint concerning the independence and impartiality of the agricultural authorities. In its report of 6 June 1990 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 6 para. 1 (art. 6-1) of the Convention and Article 1 of Protocol No. 1 (P1-1), and that it was not necessary to consider whether there had been a breach of Article 14 (art. 14) of the Convention.

The full text of the Commission's opinion is reproduced as an annex to this judgment*.

FINAL SUBMISSIONS TO THE COURT

48. At the hearing on 22 April 1991, the Government invited the Court to declare that "there has been a violation neither of Article 6 (art. 6) of the Convention nor of Article 1 of Protocol No. 1 (P1-1), read alone or in conjunction with Article 14 of the Convention (art. 14+P1-1)".

The applicants asked the Court to find that there had been a violation of Article 6 para. 1 (art. 6-1) of the Convention, as well as of Article 1 of Protocol No. 1 (P1-1), and submitted a claim for just satisfaction under Article 50 (art. 50) of the Convention.

AS TO THE LAW

I. ALLEGED BREACH OF ARTICLE 6 para. 1 (art. 6-1) OF THE CONVENTION

49. Mr and Mrs Wiesinger claimed that, in the consolidation proceedings to which they were parties, their civil rights and obligations had not been determined within a "reasonable time", as required by Article 6 para. 1 (art. 6-1) of the Convention. As far as is relevant, this provision reads:

> "In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by (a) ... tribunal ... "

This allegation was accepted by the Commission, but contested by the Government.

50. The consolidation scheme in issue affected the applicants' property rights, and was thus decisive for their private rights and obligations (see, the Erkner and Hofauer judgment of 23 April 1987, Series A no. 117, p. 60, para. 62, and the Poiss judgment of the same date, ibid., p. 102, para. 48); this was not, in fact, disputed by those appearing before the Court.

Article 6 para. 1 (art. 6-1) is therefore applicable to the proceedings concerning the adoption of the scheme.

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* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 213 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

A. The period to be taken into consideration

51. The consolidation proceedings started on 22 July 1975 and the provisional transfer of the parcels covered by the scheme, all of which were at the time designated as agricultural land, was ordered on 13 October 1978 (see paragraphs 9 and 10 above).

The Court agrees, however, with the Commission and the Government that no "dispute" ("contestation") arose in this case until 10 August 1982. Previously the applicants had accepted the provisional transfer (see paragraph 10 above). It was only on that date that they, having learnt that their former parcels had been redesignated as building land, sought from the District Authority, amongst other things, their exclusion from the scheme and their return to them or, alternatively, the attribution of plots of equivalent value or the payment of monetary compensation (see paragraph 13 above, and the above-mentioned Erkner and Hofauer judgment, p. 61, para. 64).

52. As to the end of the period, the Government argued that the Austrian authorities had in fact dealt with several separate sets of proceedings, all of which were completed within a reasonable time.

The Court is unable to accept this argument. It considers, like the Commission, that the various interim proceedings were inter-related, in that they all bore on questions that were preliminary to the main contentious issue, namely the compensation to which the applicants were entitled after the redesignation of their former land (see paragraph 37 above).

The applicants' request of 10 August 1982 was rejected by the Administrative Court on 19 November 1985 because the definitive allocation of the land had not yet been decided (see paragraph 20 above). The object of the second set of proceedings instituted by the applicants was precisely to secure the prompt adoption of the final consolidation plan (see paragraph 21 above). Again, their objections and appeals subsequent to publication of the plan on 16 July 1986 were likewise directed at the determination of the compensation issue (see paragraphs 24-28 above).

In these circumstances, the consolidation proceedings in question have to be considered as a whole. They have not yet given rise to a decision which disposes of the "dispute" (see, inter alia, the above-mentioned Erkner and Hofauer judgment, p. 62, para. 65), since the applicants' appeal to the Constitutional Court is still pending (see paragraph 28 above).

53. The proceedings have thus lasted, until now, more than nine years (10 August 1982 - 24 September 1991).

B. Reasonableness of the length of the proceedings

54. The reasonableness of the length of proceedings is to be assessed in each case according to the particular circumstances and having regard to the

criteria laid down in the Court's case-law (see, inter alia, the above-mentioned Erkner and Hofauer judgment, p. 62, para. 66). In addition, only delays attributable to the State may justify a finding of a failure to comply with the "reasonable time" requirement (see, inter alia, the Zimmermann and Steiner judgment of 13 July 1983, Series A no. 66, p. 11, para. 24).

1. Complexity of the case

55. The Court recalls its approach to this issue in this type of case, as stated in paragraph 67 of the Erkner and Hofauer judgment (ibid., p. 62). It recognises, as did all the participants in the Strasbourg proceedings, that land consolidation is by its nature a complex process, affecting the interests of both individuals and the community as a whole.

Here, the consolidation scheme concerned a large number of landowners and covered an area of approximately 172 hectares (see paragraph 9 above). An additional factor of complexity was the recent construction in the area of a network of link roads to a main road, which caused the position of a number of landowners to be revised (see paragraph 21 above).

The proceedings appear, however, to have developed relatively smoothly until the municipal authorities, on 16 November 1979, redesignated the applicants' former plots as building land and they reacted to this measure (see paragraphs 12 and 13 above). The agricultural authorities were then faced with a difficult problem: according to section 14(1) of the 1979 Act, changes in the value of land occurring in the course of consolidation proceedings had always to be taken into account if they had a bearing on the amount of compensation due (see paragraph 37 above). Since the redesignated plots were worth more than the agricultural land which the applicants had received in exchange, the case became much more complex. This state of affairs was, however, the consequence of the Austrian authorities' actions and cannot be held against the applicants.

2. Conduct of the applicants

56. In the Commission's view, Mr and Mrs Wiesinger could not be blamed for having used, after their situation had been changed by the redesignation of their former plots, almost all the legal remedies available to them. The Government conceded this point, but maintained that, by filing so many objections and appeals, the applicants unnecessarily prolonged the proceedings.

57. The Court, while in principle concurring with the Commission's opinion, recalls that the applicants' behaviour constitutes an objective fact which cannot be attributed to the respondent State and which must be taken into account in determining whether or not the reasonable time referred to in Article 6 para. 1 (art. 6-1) has been exceeded (see the above-mentioned Erkner and Hofauer judgment, Series A no. 117, p. 63, para. 68). It notes,

however, like the Commission, that the remedies which the applicants pursued in the interim proceedings did not delay the determination of the main issue, namely the question of the compensation to which they were entitled. In fact, their first action was rejected, with final effect, by the Administrative Court on 19 November 1985 on the ground that the consolidation plan, which had not yet been adopted, would have to take account of the enhancement in value of the plots in question (see paragraph 20 above). Their second action, seeking to accelerate the adoption of the scheme, concluded with the Administrative Court's decision of 8 April 1986, holding that the applicants' complaints concerned the question of statutory compensation, which would be dealt with by the scheme (see paragraph 23 above). It was only later, on 16 July 1986, that the consolidation scheme itself was published (see paragraph 24 above).

58. Although the definitive scheme improved the applicants' situation by returning to them some of their former plots, they nevertheless objected to it on the ground that the land that they had lost was still more valuable than the land they had finally received by way of compensation (see paragraph 25 above). They maintained this position throughout the proceedings, including the friendly settlement negotiations with the agricultural authorities, and did finally secure a further improvement of their situation (see paragraph 27 above). It cannot, therefore, be said, as the Government contended, that the remedies pursued by the applicants were useless.

No substantial delay can thus be attributed to the applicants.

3. Conduct of the Austrian authorities

59. According to the Government, the Austrian authorities concerned had at no stage been inactive but had, on the contrary, continuously endeavoured to bring the proceedings to an end within a reasonable time. The failure by the District Authority to complete the consolidation scheme within three years from the provisional transfer, as provided for by Austrian law (see paragraph 37 above), could not, the Government maintained, prejudice the issue of the reasonableness of the length of proceedings under Article 6 para. 1 (art. 6-1) of the Convention.

60. The Court accepts the Government's contention that failure to abide by the time-limit prescribed by Austrian law does not in itself contravene Article 6 para. 1 (art. 6-1) of the Convention. In determining whether there was a breach of that provision, it will have regard to its previous decisions in similar cases (see, inter alia, the above-mentioned Erkner and Hofauer judgment, ibid., p. 63, para. 69, and the above-mentioned Poiss judgment, ibid., p. 105, paras. 58-59).

61. First of all, the competent agricultural authorities initiated the consolidation process of their own motion in 1975 and were, accordingly, responsible for its conduct. After the provisional transfer had been ordered on 13 October 1978 (see paragraph 10 above), they were under a special

duty - by reason of the substantial legal effects of this measure - to act with diligence, this obligation being, moreover, recognised by the Austrian legislation (see paragraphs 37 and 41 above).

62. In the Court's opinion, the main feature of the present case, which had a considerable influence on the progress of the proceedings, is the amendment of the relevant area zoning plan by the Hartkirchen municipal council on 16 November 1979. This measure, which gave rise to the "dispute" on 10 August 1982, upset the balance which had been struck between the different landowners at the time of the provisional transfer and which had then had their general approval. Since the enhancement in value of the applicants' former plots had, under Austrian law, to be taken into account in determining which compensatory parcels should be allotted to them in the consolidation scheme (see paragraph 37 above), the agricultural authorities had to re-examine the land allocations contemplated in the draft plan (see paragraphs 10 and 24 above). Moreover, the grant of building permits to the provisional owners by the municipal council aggravated the situation.

The above-mentioned developments led the municipal council to propose a further amendment to the area zoning plan in order to convert some of the compensatory plots allocated to the applicants into building land (see paragraph 18 above). According to the agricultural authorities and in particular the Supreme Board (decision of 6 March 1985), the adoption of the area zoning plan constituted a precondition for the final approval of the consolidation scheme, because otherwise the latter would have been defective from its adoption if it proved to be inconsistent with the amended plan (see paragraphs 21 and 22 above).

The difficulties in this case thus stemmed from a lack of coordination between the municipal and the agricultural authorities, in finalising, respectively, the plan and the scheme. Furthermore, the competent authorities had not provided for remedies which would have ensured that the proceedings were concluded within a reasonable time.

63. Finally, after the approval of the consolidation scheme on 16 July 1986, it took the agricultural authorities more than four years to determine the applicants' appeals. The Government stressed that intensive efforts were made during this period to reach a friendly settlement with the applicants and the other parties concerned, first before the District Authority (20 October 1986 - 8 July 1987) and then before the Provincial Board (28 September 1987 - 28 August 1989).

Without denying the utility of negotiations in this kind of case, the Court considers that their duration on this occasion (almost three years) exceeded what was reasonable, especially as regards the period after the Provincial Board had noted the failure of the discussions before the District Authority.

C. Conclusion

64. The Court accordingly concludes, having particular regard to the difficulties occasioned by the lack of coordination between the various authorities concerned, that the applicants' case has not been determined within a reasonable time.

There has thus been a violation of Article 6 para. 1 (art. 6-1) of the Convention.

II. ALLEGED BREACH OF ARTICLE 1 OF PROTOCOL NO. 1 (P1-1)

A. Scope of the case as regards Article 1 of Protocol No. 1 (P1-1)

65. Before the Commission, Mr and Mrs Wiesinger alleged, firstly, that they had been victims of an unlawful expropriation of their land without adequate compensation and, secondly, that they had suffered an unjustified interference with their property rights pending the adoption of the final consolidation scheme. They relied on Article 1 of Protocol No. 1 (art. P1-1) which provides:

> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

66. In its decision of 10 July 1989 on the admissibility of the application (see the Commission's report, p. 33, para. 3 in fine), the Commission found that domestic remedies had not been exhausted as regards the applicants' first complaint. It held, on the other hand, that their second complaint could not be rejected as being manifestly ill-founded.

67. Since the Court's jurisdiction is delimited by the Commission's decision on admissibility (see, amongst many authorities, the Powell and Rayner judgment of 21 February 1990, Series A no. 172, p. 13, para. 29), the Court is not empowered to entertain the applicants' first complaint. In fact, under Austrian law, compensation is not fixed until after the consolidation scheme has become final, a stage which has not yet been reached in this case.

Accordingly, the Court will confine itself to examining the second complaint.

B. Compliance with Article 1 of Protocol No. 1 (P1-1)

68. The applicants claimed that there had been an unjustified interference with their right of property by reason of the situation created by the provisional transfer ordered on 13 October 1978, especially when it became apparent that, following the redesignation of their former agricultural land as building plots in 1980, they had not received sufficient compensatory parcels (see paragraphs 10 and 12 above). They had not yet been able to alter this situation or to obtain financial compensation.

69. According to the Government, on the other hand, the increase in value of the relevant parcels, which occurred rather long after they were voluntarily surrendered by the applicants, in no way affected their right to the peaceful enjoyment of their possessions. In the Government's opinion, there is no interference with this right if, as in this case, the previous owner's land allocation is not modified in the course of the proceedings following the redesignation of his former land. Even if there were such an interference, it would nevertheless be justified, since a fair balance would have been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. In this case, the interests relating to the reorganisation of the agricultural pattern, underlying the land consolidation proceedings, certainly warranted a certain amount of interference with an individual's right of ownership.

70. The Court concurs with the Commission that there was an interference with the applicants' right of property.

It is true that they - unlike the applicants in the Erkner and Hofauer case and the Poiss case cited above (Series A no. 117, p. 45, para. 13, and p. 89, para. 8) - expressly agreed to the draft scheme, did not object to the provisional transfer, accepted the plots, situated near their farm, which had been provisionally allocated to them, and started cultivating them (see paragraphs 9 and 10 above). This was, however, on the assumption that all the plots concerned would remain agricultural land. The redesignation of their former land by the local authorities in 1980 (see paragraph 12 above) upset the initial balance and added a new factor to the existing situation.

This was because section 14 of the 1979 Act required the agricultural authorities to take any change in value of the kind here in question into account when adopting the final consolidation scheme (see paragraph 37 above). The land allocations contained in the draft scheme and accepted by the parties concerned were therefore no longer definitive and had to be adapted to the new circumstances, as the applicants had requested. In this connection it is to be noted that the revised consolidation scheme contemplates that a part of the applicants' former land will be returned to them (see paragraphs 24 and 27 above), although no final decision has yet been reached in this respect.

It follows that, as from the redesignation of the land in 1980, the situation is comparable to that in the Austrian cases previously cited. The applicants have not so far obtained, by a final decision, the compensation in kind stipulated by the provincial legislation (see the above-mentioned Erkner and Hofauer judgment, p. 65, para. 72).

71. It remains to be determined whether this interference contravenes Article 1 of Protocol No. 1 (P1-1).

As regards the structure of this provision and the relationship between its component parts, the Court refers to its long- established case-law (see, as the most recent authority, the Fredin judgment of 18 February 1991, Series A no. 192, p. 14, para. 41).

72. In its view, the applicants have not been "deprived of their possessions", within the meaning of the second sentence of the first paragraph of Article 1 (P1-1). The transfer effected in October 1978 is only provisional, and the applicants may still recover at least part of their land (see paragraphs 24 and 27 above) when the consolidation scheme enters into force.

Again, the provisional transfer was essentially designed not to restrict or control the "use" of the land (second paragraph of Article 1) (P1-1), but to achieve an early restructuring of the consolidation area with a view to improved, rational farming by the "provisional owners" (see paragraph 36 above). The transfer must therefore be considered under the first sentence of the first paragraph of Article 1 (P1-1) (see, with regard to the same matter, the above-mentioned Erkner and Hofauer judgment, Series A no. 117, pp. 65-66, para. 74).

73. For the purposes of this provision, the Court must inquire whether a proper balance has been struck between the demands of the community's general interest and the requirements of protecting the fundamental rights of the individual (ibid., p. 66, para. 75).

In this respect a temporary disadvantage sustained by an individual, by reason of a measure taken in accordance with domestic law, may in principle be justified in the general interest, if it is not disproportionate to the aim sought to be achieved by that measure.

74. According to the relevant legislation (see paragraph 32 above), the purpose of consolidation is to improve the infrastructure and the pattern of agricultural holdings, by redistributing the land and providing communal facilities. It serves the interest of both the landowners concerned and the community as a whole by increasing the rentability of holdings and rationalising cultivation.

The applicants did not deny that the initial steps taken to enforce the consolidation scheme were in the general interest. In fact, they voluntarily surrendered their plots (see paragraph 10 above) and received in exchange the plots which, according to the Administrative Court (see paragraph 20

above), they wanted. As from 1978 they started cultivating these plots as they wished.

Furthermore, it appears that the draft scheme also received almost general approval on the part of the landowners concerned.

75. The applicants, however, claimed that, because of the subsequent designation of their former land as building plots, the agricultural consolidation proceedings lost their initial legitimate purpose.

76. In this respect, the Court notes firstly that the consolidation scheme covered approximately 172 hectares owned by at least 67 persons, of which only about 2.5 - belonging to the applicants - were the object of any dispute (see paragraphs 9 and 12 above).

Secondly, in its decision of 17 November 1983 (which was upheld by the Constitutional and Administrative Courts), the Provincial Board considered that, in order to attain its objective, the scheme had to include the plots in question, notwithstanding their redesignation as building land (see paragraphs 15 and 16 above). In a subsequent decision of 18 November 1984, the same Board noted that the provisional transfer of the plots precluded altering their allocation for the time being, without prejudice to the final distribution of the land under the scheme (see paragraph 18 above).

The Court considers that these decisions, taken in accordance with Austrian law, cannot be regarded as inadequate and disproportionate. The main purpose of a provisional transfer, namely to ensure that the consolidation area is continuously and rationally cultivated during the interim period (see paragraph 36 above), would be upset if repeated changes were allowed. The Court recognises that in determining what measures were necessary in the general interest, the Austrian agricultural authorities, being in direct contact with the local situation, enjoyed a margin of appreciation (see, mutatis mutandis, amongst other authorities, the above-mentioned Fredin judgment, Series A no. 192, p. 17, para. 51), provided that the requisite fair balance was struck (see paragraph 73 above).

77. The Commission considered that, although the maintenance of the situation complained of might have been justified for a limited time, here the period was excessive.

The Court observes that, as in the Erkner and Hofauer case and in the Poiss case, the interference complained of by the applicants has continued over a long period. However, the Court's ruling on the alleged breach of Article 6 para. 1 (art. 6-1) of the Convention in this case (see paragraph 64 above) is not conclusive as to the issue under the Protocol. The latter issue concerns the substance of the right of property and cannot be determined solely in the light of the duration of the situation; other elements are also relevant (see, mutatis mutandis, the above-mentioned Erkner and Hofauer judgment, Series A no. 117, p. 66, para. 76).

78. In particular, it must be recalled once again that Mr and Mrs Wiesinger agreed to the provisional transfer, and accepted and exploited the compensatory parcels (see paragraph 70 above).

The situation changed after the amendment to the area zoning plan in 1980 and the grant of building permits. The applicants, however, did not manifest their disagreement until 10 August 1982. After their appeal of 23 August 1983, the Provincial Board ordered the District Authority, on 17 November 1983, not to authorise any further conversion into building land or any further issue of building permits (see paragraph 15 above). Having regard to the provincial legislation (see paragraph 76 above) and to the date of the applicants' appeal, the Provincial Board can be said to have reacted promptly with regard to this specific matter.

Furthermore, as from 16 July 1986, the District Authority reallocated to the Wiesingers in the consolidation scheme 9,680 square metres of their former land and the Provincial Board, after the failure of friendly settlement negotiations, again improved their position in January 1990 (see paragraphs 24 and 27 above). It is therefore still possible that some of the applicants' former land may be returned to them when the scheme is definitively approved.

In all these respects, the situation in issue here is at variance with that pertaining in the previous Austrian cases.

79. Having regard to all the circumstances of the case, the Court considers that the interference with the applicants' right of property cannot be held to be disproportionate to the demands of the general interest involved in the consolidation proceedings.

Accordingly, no violation of Article 1 of Protocol No. 1 (P1-1) has been established.

III. ALLEGED BREACH OF ARTICLE 14 OF THE CONVENTION, TAKEN IN CONJUNCTION WITH ARTICLE 1 OF PROTOCOL NO. 1 (art. 14+P1-1)

80. The applicants also alleged before the Commission that they had been the victims of discrimination contrary to Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1), in that they had been treated less favourably than the provisional owners of their former land.

However, they did not pursue the matter as a separate issue before the Court and it sees no reason to examine it.

IV. APPLICATION OF ARTICLE 50 (art. 50) OF THE CONVENTION

81. Article 50 (art. 50) of the Convention provides:

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

Mr and Mrs Wiesinger sought compensation for pecuniary and non-pecuniary damage, together with reimbursement of their costs and expenses, both in Austria and before the Convention institutions.

A. Pecuniary damage

82. The applicants firstly claimed 2,104,700.66 Austrian schillings in respect of arrears of interest on a loan which they had obtained from the Hartkirchen Savings Bank in order to carry out urgent improvements to their property. Since they had not been able to have their former plots withdrawn from the consolidation scheme and sold, it had not been possible for them to repay the loan and the corresponding interest.

However, as the Government rightly pointed out, these debts were not incurred in connection with the consolidation proceedings, but in order to undertake repairs to their farm and stables. There is accordingly no causal link between the violation of Article 6 para. 1 (art. 6-1) found by the Court and the alleged damage.

83. The applicants further sought 6,600,000 schillings by way of compensation for the difference in value between the agricultural land they had received and the building land they had surrendered.

The Court notes, however, that the question of compensation for the increase in value of the applicants' former land is outside the scope of the case, as declared admissible by the Commission (see paragraphs 65-67 above). No award can thus be made in this connection.

B. Non-pecuniary damage

84. The applicants alleged that Mr Wiesinger's health had been affected for some years because of the consolidation proceedings in issue. He claimed 240,000 schillings as damages in respect of the ensuing diminished capacity for work from 1986 to 1990, and 600,000 schillings for the next ten years until his retirement.

In the Government's submission, however, the existence of a causal link between the damage to Mr Wiesinger's health and the consolidation proceedings had not been established.

85. The Court does not exclude the possibility that the excessive length of those proceedings caused Mr Wiesinger some stress and anxiety.

As this type of prejudice is not susceptible of precise quantification, the Court, making an assessment on an equitable basis, as required by Article 50 (art. 50), awards Mr Wiesinger 200,000 schillings under this head.

C. Costs and expenses

86. The applicants sought the reimbursement of their costs and expenses in Austria, totalling 1,336,030.36 schillings. This sum comprises 1,252,802.10 schillings for their counsel's fees before the agricultural authorities and the Constitutional and Administrative Courts, 56,909.52 schillings for the proceedings seeking an injunction to stop construction work on their former land, 20,571.24 schillings for the costs that they were ordered to pay to the respondents in those proceedings and 5,747.50 schillings for the costs incurred in extra-judicial proceedings.

For their costs before the Convention institutions they claimed the sum of 445,056 schillings.

87. The Government offered a lump sum of 100,000 schillings for the costs concerning the domestic proceedings since, they maintained, a very large number of the applicants' objections and appeals had been dismissed on procedural grounds. They also agreed to reimburse the amount of 130,000 schillings for the costs incurred in Strasbourg.

The Delegate of the Commission invited the Court to find a fair intermediate solution.

88. According to the Court's case-law, in order to be the subject of an award costs and expenses must have been actually incurred, necessarily incurred and reasonable as to quantum.

The Court notes, with respect to the costs in Austria, that the applicants' request of 10 August 1982 (see paragraph 13 above) must be considered as a preliminary step to the main proceedings. Likewise, the application to the Provincial Board on 17 January 1984 had the specific purpose of accelerating the adoption of the consolidation scheme (see paragraphs 21 and 57 above). Furthermore, it cannot be excluded that the excessive length of the main proceedings, and in particular of the negotiations for a friendly settlement (see paragraphs 62 and 63 above), increased the costs incurred therefore.

As to the costs incurred in Strasbourg, the applicants had the benefit of legal aid before the Commission and the Court, but neither the Government nor the Commission disputed that they had incurred additional costs.

The amounts claimed are, however, too high, when related to the particular breach found.

89. Having regard to these circumstances, the Court, on an equitable basis, awards 300,000 schillings for the costs and expenses in Austria and 200,000 schillings for those before the Commission and the Court.

FOR THESE REASONS, THE COURT

1. Holds unanimously that there has been a violation of Article 6 para. 1 (art. 6-1) of the Convention;

2. Holds by eight votes to one that there has been no violation of Article 1 of Protocol No. 1 (P1-1);

3. Holds unanimously that it is not necessary to examine the complaint under Article 14 of the Convention, taken in conjunction with Article 1 of Protocol No. 1 (art. 14+P1-1);

4. Holds unanimously that the Republic of Austria is to pay, within three months, 200,000 (two hundred thousand) Austrian schillings to Mr Wiesinger for non-pecuniary damage and 500,000 (five hundred thousand) schillings to both applicants for costs and expenses;

5. Dismisses unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 October 1991.

John CREMONA
President

Marc-André EISSEN
Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the separate opinion of Mr Cremona is annexed to this judgment.

J. C.
M.-A. E.

PARTLY DISSENTING OPINION OF JUDGE CREMONA

Whilst I am in agreement with the judgment on the Article 6 para. 1 (art. 6-1) issue, I regret that I am unable to agree with the conclusion reached by the majority of my colleagues on the issue under Article 1 of Protocol No. 1 (P1-1). In finding, like the unanimous Commission, a violation also under this head, I consider it sufficient, for the sake of brevity, to say that in general I adopt in this regard the reasoning of the Commission in its report.

In particular, inasmuch as this case has been distinguished by the majority from that of Erkner and Hofauer I would simply add this. In this connection the judgment stresses that the applicants in the present case, unlike those in the other case, had agreed to the provisional transfer and accepted the compensatory plots (paragraph 77). Inasmuch as the implication is that only later did they change their minds, I think it is much fairer to say that what really happened is that they had their minds changed for them by something quite remarkable.

Land which in their hands as owners was simply agricultural was in the course of the consolidation proceedings redesignated by the local authorities, in the hands of the provisional owners to whom it had been allotted and at their request, as building land. In fact the applicants saw these provisional owners sell various plots of this land at a very handsome profit (the grant of building permits made the situation practically irreversible) without their being able to see this imbalance put right. Incidentally, it is also to be noted that when the applicants for their part requested authorisation to construct two animal feed silos on their compensatory plots the authorities refused on the ground that they were provisionally owners of the land in question (paragraph 29).

Admittedly the reallocation to the applicants of part of their former land and the hypothetical possibility that some more may possibly be returned to them when the consolidation scheme is eventually definitely approved (paragraph 77) may to some extent alleviate the position, but to my mind do not cure it.

The fact remains that there was an unjustified interference with the applicants' property which has already lasted eleven and a half years without their having been able to obtain redress. Like the unanimous Commission, I therefore consider that the applicants have thereby suffered more than a temporary disadvantage which parties to consolidation proceedings can reasonably be expected to sustain, that there was no appropriate balance between the measures taken in the public interest and the protection of the applicants' right of property and that they had to bear a disproportionate burden incompatible with their right to the peaceful enjoyment of their possessions.