In the case of Erkner and Hofauer*,

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* Note by the Registrar: The case is numbered 16/1986/114/162. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

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. R. Ryssdal, President,
Mr. G. Lagergren,
Mr. F. Gölcüklü,
Mr. F. Matscher,
Mr. B. Walsh,
Sir Vincent Evans,
Mr. C. Russo,

and also of Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar,

Having deliberated in private on 24 October 1986 and 24 March 1987,

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

PROCEDURE

1. The present case was referred to the Court by the European Commission of Human Rights ("the Commission") on 14 May 1986, within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 9616/81) against the Republic of Austria lodged with the Commission under Article 25 (art. 25) by Mr. Johann Erkner, Mrs. Theresia Erkner and, after Mr. Erkner's death, Mr. Josef Hofauer and Mrs. Theresia Hofauer, all Austrian nationals, in 1979 and 1984.

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 purpose of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 § 1 (art. 6-1) of the Convention and Article 1 of Protocol No. 1 (P1-1).

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

3. On 5 June 1986, the President of the Court referred the case to the Chamber constituted to consider the case of Ettl and Others (Rule 21 § 6). This 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 § 3 (b)). The other five members, chosen by lot on 25 October 1985, were Mr. D. Evrigenis, Mr. F. Gölcüklü, Mr. B. Walsh, Sir Vincent Evans and Mr. C. Russo (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently, Mr. Evrigenis died, and his place was taken

by Mr. G. Lagergren, substitute judge (Rules 22 § 1 and 24 § 1).

On 17 June 1986, the President of the Court gave the applicants' lawyer leave to use the German language (Rule 27 § 3).

4. Having assumed the office of President of the Chamber (Rule 21 § 5), Mr. Ryssdal consulted, through the Deputy Registrar, the Agent of the Austrian Government ("the Government"), the Commission's Delegate and the applicants' lawyer on the need for a written procedure (Rule 37 § 1). On 30 June 1986, he directed that the said Agent and lawyer should each have until 15 August 1986 to submit memorials, and that the Delegate should be entitled to file a memorial in reply within two months of the day on which the last filed of these memorials was forwarded to him by the Registrar.

The applicants' memorial reached the registry on 18 August. The Permanent Representative of Austria to the Council of Europe and the Secretary to the Commission informed the Registrar, on 21 August and 22 September respectively, that the Government and the Commission's Delegate did not intend to submit any observations in writing.

5. Having consulted - through the Deputy Registrar - the Government's Agent, the Commission's Delegate and the applicants' lawyer, the President of the Court directed on 25 September that the oral proceedings should commence on 20 October 1986 (Rule 38).

On 13 October, the Commission provided the Registrar with a number of documents he had asked for on the President's instructions.

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

There appeared before the Court:

- for the Government

Mr. H. Türk, Legal Adviser,
Ministry of Foreign Affairs, Agent,

Mr. D. Okresek, Federal Chancellery,

Mr. D. Hunger, Federal Ministry of Agriculture and
Forestry, Advisers;

- for the Commission

Mr. F. Ermacora, Delegate;

- for the applicants

Mr. E. Proksch, Rechtsanwalt, Counsel.

The Court heard addresses by the above, as well as their replies to its questions. The applicants produced documents during the hearing.

7. On 30 December 1986 and 27 January 1987, Mr. Proksch filed with the registry two documents, the first of which gave further particulars of one point in his clients' claim for just satisfaction. The Agent of the Government supplied a document on 7 January 1987.

AS TO THE FACTS

8. The applicants, Johann Erkner (deceased on 22 June 1983), his wife, Theresia Erkner, their son-in-law, Josef Hofauer, and their daughter, Theresia Hofauer, are Austrian farmers resident at Pöndorf, Upper Austria. They complain of consolidation proceedings

(Zusammenlegungsverfahren) taken in respect of their land since January 1969.

I. The circumstances of the case

1. The initial stages of consolidation

9. In a decision given on 27 February 1969, the Gmunden District Agricultural Authority (Agrarbezirksbehörde - "the District Authority") opened land-consolidation proceedings at Forstern-Pöndorf. Thirty-eight landowners were affected, and the operation covered 266 hectares; of these, 16 hectares were owned by Mr. and Mrs. Erkner, and about 3.5 hectares by Johann Erkner and his sister.

10. A land-valuation hearing was held on 21 April 1969. The twenty-six landowners present (the Erkners had been summoned, but did not attend) concluded an agreement, which was approved by the District Authority on the following day. The decision was served on the Erkner family on 27 May 1969; they did not appeal.

Between 2 and 16 July 1969, all the parties were given notice of the valuation schedule (Bewertungsplan). The applicants were also given notice of the remedies available but they did not appeal, and the schedule accordingly became final.

11. A further hearing was held on 8 August 1969. This was attended by the Erkners and their lawyer, who stated their wishes as regards reorganising the consolidation area inasmuch as it affected them.

12. By August 1970, the District Authority had drawn up a communal facilities plan and a draft consolidation plan. The compensatory parcels of land to be allotted to the landowners concerned had been marked out.

Mr. and Mrs. Erkner raised objections, which they maintained by and large in subsequent proceedings, including the proceedings for provisional transfer of land, which were concluded in 1975 (see paragraph 17 below), and the proceedings regarding the main reorganisation, which began in 1976 (see paragraph 19 below) and have not yet been concluded. They argued that the parcels of land offered them were less than their due, since they were being required to give up first-class farmland which faced south and was close to their farmhouse, in return for plots which were slightly larger in area but of poor - indeed very poor - quality, being wet, and also further from the farm.

2. The provisional transfer of parcels in compensation

13. On 10 August 1970, the District Authority ordered the provisional transfer of compensatory parcels on the basis of the draft consolidation plan. This decision was taken at the request of thirty-four of the landowners and opposed by the four others (including the Erkners), and it was based on section 97 of the 1911/1954 Upper Austrian Agricultural Land Planning Act (Flurverfassungs-Landesgesetz - see paragraph 40 below). It referred to the interests of the thirty-four - in particular the interest they had in rationalising their holdings and familiarising themselves with the new land situation. These interests outweighed the objections of those opposed to the scheme, who were at all events entitled to appeal against the consolidation measures. The difference in area between the land held by the majority (221 hectares) and the minority was sufficient security for any compensation which the latter might later be entitled to claim.

The decision was served on the Erkners on 4 April 1973, together with a note stating that by the terms of section 97(5) of the 1911/1954 Act

no appeal was possible (see paragraph 45 below). According to the Government, several previous attempts to serve the decision had failed.

14. The Erkners then appealed to the Administrative Court (Verwaltungsgerichtshof), claiming that this note was incorrect, since section 7 of the Federal Agricultural Authorities Act (Agrarbehördengesetz 1950 - see paragraphs 38, 45 and 48 below) had repealed section 97(5) of the 1911/1954 Act.

While essentially confirming that this was the case, the Administrative Court nonetheless dismissed the appeal on 21 September 1973, on the ground of non-exhaustion of remedies: the Erkner family should have appealed direct to the Provincial Land Reform Board (Landesagrarsenat - "the Provincial Board").

15. The applicants had in fact applied for leave to bring an appeal (Berufung) out of time, but the District Authority had declared this application inadmissible on 25 June 1973. That decision was upheld on 19 March 1974 by the Provincial Board, which held, notwithstanding the Administrative Court's decision, that any appeal was now ruled out by section 22(5) of the Provincial Act of 1972 (see paragraph 40 below).

16. The Erkners then appealed to the Constitutional Court (Verfassungsgerichtshof), claiming, inter alia, that their right to be heard by the lawful judge (gesetzlicher Richter) had been violated. On 11 December 1974, the Constitutional Court dismissed the appeal as unfounded but, at the applicants' request, referred the case to the Administrative Court for a decision whether any non-constitutional rights had been infringed.

17. In its second decision, of 23 June 1975, the Administrative Court confirmed its earlier opinion that a remedy existed and accordingly set aside the Provincial Board's decision to refuse to allow an appeal out of time. The Board dismissed the appeal on 25 November 1975 nonetheless, and the applicants did not appeal against that decision.

18. In spite of these proceedings, the provisional transfer of land had been effected in the meantime. The Erkners initially continued to cultivate the fields near their farm; but the police expelled them, and the corn they had sown was destroyed. The couple consistently refused to cultivate any of the compensatory parcels of land allotted to them.

3. The consolidation plans and related proceedings

(a) The first plan

19. On 7 May 1976, the District Authority adopted the consolidation plan, which ratified unchanged the situation brought into being by the draft plan of 1970 (see paragraph 12 above); the plan was published on 25 May.

20. Mr. and Mrs. Erkner appealed against this plan on 3 June, challenging it on essentially the same grounds as those on which which they had already objected to the provisional transfer. They relied on an expert opinion by a university specialist in agronomy, who concluded that the exchange of land had been to the applicants' clear disadvantage and put the value of the annual loss of yield at approximately 50,000 schillings.

The Provincial Board gave its decision on 26 April 1977. In so far as the Erkners had challenged the valuation of the land in question, it held the appeal to be inadmissible, since the valuation schedule had already become final. In so far as they had claimed financial

compensation, it ruled that it had no jurisdiction, since the District Authority had not determined the matter.

However, it allowed the appeal as regards the land awarded in compensation, finding that the applicants had lost about 14 hectares of good, south-facing land and had received in return a little under 23 hectares of land in the three least valuable categories, which faced north, was more overshadowed by forest and lay further from the farmhouse. This meant that they had not been properly compensated as provided for by statute, especially as the arrangement adopted would require a major change in their type of farming. The Provincial Board accordingly quashed the entire consolidation plan and remitted the case to the District Authority with a direction to reconsider the matter and adopt a new plan.

The decision was served on the applicants on 31 May 1977.

(b) The second plan

21. The District Authority failed to give a decision within the statutory six-month time-limit (section 73(1) of the General Administrative Procedure Act (Allgemeines Verwaltungsverfahrensgesetz) - see paragraph 55 below).

On 19 January 1979, the applicants applied to have jurisdiction transferred from the District Authority to the Provincial Board (section 73(2) of the same Act).

The Provincial Board granted this application and issued a new plan more advantageous to the Erkners on 18 December 1979. The Erkners, however, considered it unsatisfactory and incompatible with the applicable legislation, and on 22 January 1980 lodged an appeal with the Supreme Land Reform Board (Oberster Agrarsenat - "the Supreme Board").

22. The Supreme Board failed to give a decision within the statutory six-month period, and Mr. and Mrs. Erkner accordingly applied to the Administrative Court on 14 October 1980 to determine the matter itself under Article 132 of the Federal Constitution (Bundes-Verfassungsgesetz - see paragraph 55 below).

This application was not pursued, since the Supreme Board allowed the applicants' appeal on 3 December 1980 and remitted the case to the District Authority with a direction that it should adopt a new plan. It held that the allocation of a larger tract of north-facing land could not compensate for the loss of the good land facing south.

The decision was served on the applicants on 29 December.

(c) The third plan

23. Once again, the District Authority failed to give a decision within the statutory time-limit. Instead, it began to consider a drainage scheme for some of the lands allotted to the Erkners, who regarded this as unreasonable.

On 30 November 1981, they accordingly applied to the Provincial Board to determine the matter itself (section 73(2) of the General Administrative Procedure Act - see paragraph 55 below).

On 14 January 1982, the Provincial Board dismissed this application. It found that the District Authority had taken steps to prepare a new plan and was not therefore responsible for the delay. It also considered that planning a drainage scheme was acceptable at this stage in the proceedings.

24. On 3 February, the applicants appealed to the Supreme Board

against the Provincial Board's decision, which had been served on them on 21 January. The appeal was dismissed on 22 June.

On 15 July 1982, the District Authority adopted a new plan, which provided in particular for additional communal facilities that would drain some of the land allocated to the Erkners. This plan was published on 27 July.

25. On 23 August, the applicants appealed against the new plan to the Provincial Board, claiming that it still failed to provide compensation complying with the Supreme Board's decision of 3 December 1980 (see paragraph 22 above). They also challenged the accuracy of the legal description of the improvement scheme as a communal facility.

On 28 April 1983, the Provincial Board allowed the appeal. It ordered certain changes in the land allocations made to the Erkners and other parties but confirmed, and even widened, the drainage schemes planned by the District Authority, holding that the creation of additional communal facilities of this kind was lawful.

This decision was served on the parties on 9 June.

26. While recognising that progress had been made, the applicants considered that the requirements laid down by the Supreme Board on 3 December 1980 (see paragraph 22 above) had still not been entirely satisfied. On 20 June 1983, they accordingly lodged a further appeal - supported by an expert opinion - with the Supreme Board. They complained that the land offered in compensation still contained too many wet areas and had other disadvantages. They also challenged the Provincial Board's jurisdiction to order new communal facilities and sought a decision on their claim for financial compensation for the damage they had sustained since the provisional transfer of the compensatory parcels of land (see paragraph 20 above).

On 4 April 1984, the Supreme Board dismissed the appeal as unfounded, holding that the advantages of the consolidation scheme as a whole outweighed any disadvantages and no longer made any changes in production methods necessary; the allocation decided on by the Provincial Board accordingly satisfied legal requirements.

This decision was served on the applicants on 30 May.

4. The appeals to the Administrative Court

27. Following the death of Johann Erkner on 22 June 1983, his daughter and son-in-law, Theresia and Josef Hofauer, took over the whole of the farm, including the share of Johann Erkner's widow, Theresia.

28. On 10 July 1984, the three parties together lodged an appeal with the Administrative Court against the Supreme Board's decision. They argued that they had not received proper compensation in kind as provided for by statute, since there was still a deficit of south-facing land; that the allocation of land requiring additional communal drainage - at unspecified cost - was unreasonable; and that they had not been allotted land of special value (i.e. building land) close to their farm. They further claimed that their right to be heard had been infringed and that the problem of financial compensation remained unsettled.

In a decision given on 19 March 1985 and served on 7 May, the Administrative Court declared the appeal inadmissible in so far as it had been brought by Theresia Erkner, as she was no longer a party, and in respect of the failure to determine the question of financial compensation, on the ground of non-exhaustion of remedies. It allowed the appeal of the other two applicants as to the rest and accordingly

quashed the impugned decision. It ruled that, under the law in force, full details of communal facilities, including their cost, should be decided on when the consolidation plan was adopted, at the latest.

29. On 3 July 1985, pursuant to this decision, the Supreme Board set aside the consolidation plan drawn up by the Provincial Board, in so far as it laid down the compensation due to the Hofauer family. In its decision, which was served on the applicants on 16 July, the Supreme Board stated that the question of the communal facilities had to be settled first.

30. On 18 July 1985, Mr. and Mrs. Hofauer again appealed to the Administrative Court. They claimed that section 66 of the General Administrative Procedure Act had been contravened, since the Supreme Board had neither determined the merits itself (subsection 4) nor remitted the case to the Provincial Board for decision (subsection 2). The middle course of quashing the decision and simultaneously adjourning the proceedings was not provided for in the Act, which did not allow appeal proceedings to be resumed once a communal facilities plan had been finally adopted. If the Supreme Board determined their appeal after the event, they would no longer have any remedy for the other complaints, which the Administrative Court had not had occasion to consider on 19 March 1985.

The Administrative Court dismissed the appeal on 12 September 1985 and notified its decision to Mr. and Mrs. Hofauer on 8 November.

31. In the meantime, the Provincial Board had taken a fresh decision on 24 October 1985 (served on the applicants on 31 October), reconsidering Mr. and Mrs. Hofauer's appeal against the latest consolidation plan, i.e. the one of 15 July 1982 (see paragraph 24 above). In accordance with the Administrative Court's earlier judgment, of 19 March 1985 (section 63(1) of the Administrative Court Act - see paragraph 28 above), it quashed the plan on the ground that it did not comply with the procedural rules applying to any decision on communal facilities. It added, however, that there was no reason to abandon the scheme for draining the wet land allocated to the Hofauers, since the Administrative Court had not regarded the communal facilities required for this purpose as inherently unlawful. The District Authority should now therefore order the necessary communal measures and facilities and, once these had been completed, publish a new consolidation plan.

32. Earlier, on 27 August 1985, Mr. and Mrs. Hofauer had applied to the District Authority for part of their land to be exempted from consolidation. This application was dismissed on 21 April 1986, and an appeal lodged on 7 May was dismissed by the Provincial Board on 3 July. On 25 August 1986, Mr. and Mrs. Hofauer applied to the Constitutional Court, which has not given a decision to date (24 March 1987).

33. As the proceedings relating to the communal measures and facilities are still pending, no new consolidation plan has been adopted to date.

On 27 May 1986, however, the District Authority ordered Mr. and Mrs. Hofauer to allow a drainage system to be installed. An appeal against this decision, lodged with the Provincial Board on 13 June, was dismissed on 23 October 1986. On 23 December 1986, the applicants applied to the Constitutional Court, which has not given judgment to date.

5. The proceedings relating to the claim for financial compensation

34. In the meantime, the District Authority had contacted the applicants on the question of their claim for financial compensation for damage sustained since the provisional transfer of land - a matter

which had been raised in 1976, and then in 1978, 1982, 1984 and 1985. It wanted particulars of the amount of the claim, the persons or authorities against whom it was directed and its legal basis. On this last question, it pointed out that the statute applicable to the case - the Act of 1911/1954 - made no provision for financial compensation.

On 30 July 1985, the applicants' lawyer replied that his clients were claiming 50,000 schillings per annum since 1970, the year the provisional transfer was made, i.e. a total of 750,000 schillings, plus interest. He said that it was not his business to inform the Authority of the relevant law, but he nevertheless referred to the decision on the provisional transfer, which expressly mentioned the possibility of claiming compensation and alluded to the property of the majority group of landowners as security. The applicants' claim related to deprivation of property and could be founded, if no other provision applied, on Article 365 of the Civil Code. Unless compensation was paid, the deprivation of property would amount to unconstitutional despoliation and the whole operation would be vitiated by a fundamental procedural defect making it necessary to restore the original situation.

35. On 26 September 1985, the District Authority held that it had no jurisdiction to entertain the claim, which in any case appeared to have no basis in law.

On 11 November, the applicants appealed to the Provincial Board against this decision, which they claimed was wrong in law. The Act itself confirmed that the agricultural authorities had jurisdiction in the matter. No other judicial body was competent to deal with the question of an unlawful provisional transfer and compensation for ensuing damage. The District Authority's intention in referring in its decision of 10 August 1970 (see paragraph 13 above) to the existence of sufficient security had been to make it clear that the provisional transfer should not be detrimental to the applicants. Having decided on "forced expropriation" by means of the "forced exchange", the authority was bound to mitigate the damage and find a means of offering compensation (Ausgleich).

36. On 9 January 1986, the Provincial Board held that the appeal was inadmissible in respect of Mrs. Erkner, who was no longer a party to the proceedings (see paragraphs 27-28 above), and ill-founded in respect of Mr. and Mrs. Hofauer. Their claim had no basis in the relevant law: the authorities had no jurisdiction to entertain compensation claims unless such matters were necessarily (unbedingt) part of the land operations, which was not so in the instant case. It was not for the Board to determine whether or not the applicants could submit their claims to the ordinary courts.

On 19 March 1986, Mr. and Mrs. Hofauer made an application to the Constitutional Court, which has not given a decision to date (24 March 1987).

II. The relevant legislation

1. In general

37. Powers in respect of land reform in Austria are divided between the Federation and the Länder. Legislation establishing general principles is the responsibility of the Federation, while implementing legislation and law enforcement is the responsibility of the Länder (Article 12(1)(3) of the Federal Constitution). By Article 12(2) of the Federal Constitution, decisions at final instance and at Land level are taken by boards consisting of a "chairman, judges, civil servants and experts"; "the board which decides at final instance shall be set up within the appropriate Federal Ministry". "Provision shall be made in a Federal Act for the organisation, functions and procedure of the boards and for the principles for

organising the other authorities concerned with land reform". This Act must provide that the executive shall not be able to set aside or vary the boards' decisions; it cannot exclude appeals to the provincial board against decisions by the authority of first instance.

38. Within this constitutional framework the Federal Parliament has passed three Acts dealing with the following matters:

(i) the legal principles applicable to land reform (Federal Agricultural Land Planning (General Principles) Act (Flurverfassungs-Grundsatzgesetz 1951), as amended in 1977);

(ii) the organisation of the land reform boards and the principles for organising the authorities of first instance (Federal Agricultural Authorities Act (Agrarbehördengesetz 1950), as amended in 1974);

(iii) proceedings before agricultural authorities (Federal Agricultural Proceedings Act (Agrarverfahrensgesetz 1950), which refers to the General Administrative Procedure Act).

2. The consolidation of agricultural land

39. The basic rules applying to the consolidation of agricultural land are embodied in the Federal Agricultural Land Planning (General Principles) Act. The Länder have regulated the matters for which they are made responsible under the Federal legislation in provincial agricultural land planning Acts (Flurverfassungs-Landesgesetze).

40. In Upper Austria, consolidation is governed by the Agricultural Land Planning Act 1979 ("the Provincial 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 latter Act applied when the disputed proceedings began and will accordingly remain applicable until they are concluded.

41. The purpose of consolidation is to improve infrastructure and the pattern of agricultural holdings in a given area. It comprises communal measures and facilities and redistribution of land. The operation takes place in the following stages:

- the initial proceedings (section 64 et seq. of the 1911/1954 Act);

- ascertainment of the occupiers of the land in question and assessment of its value (sections 78-83);

- planning of communal measures and facilities (sections 84-92);

- provisional transfer of land, where appropriate (section 97);

- adoption of the consolidation plan (sections 92-110).

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

42. The initial proceedings, which are instituted officially, 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. 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.

43. Once the decision to open proceedings has become final, the agricultural authority ascertains who are the occupiers of the land

and assesses its value. Its decision (Besitzstandsausweis und Bewertungsplan) determines the value of the land in accordance with precise statutory criteria. 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.

44. 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 to provide suitable access to or permit effective cultivation of the compensatory parcels of land, or if they otherwise assist the consolidation scheme in the interests of the majority of the parties concerned. Alteration, relocation or removal of existing facilities may also be ordered. All these matters are embodied in a specific decision by the relevant authority (Plan der gemeinsamen Massnahmen und Anlagen), which must also settle the question of costs, usually shared by the landowners.

45. Under section 97 of the Provincial Act of 1911/1954, land may be provisionally transferred, even if some owners object, where:

- the compensatory parcels provided for in the draft consolidation plan have already been marked out;

- delay in implementing the said plan might seriously prejudice the owners requesting a transfer; and

- there is sufficient security that owners opposed to the transfer will be compensated for any disadvantages they may suffer.

By section 97(5), decisions by the competent authorities ordering provisional transfers are not appealable; but section 7 of the (later) Federal Agricultural Authorities Act provides that the final decision shall lie with the Provincial Land Reform Board, except in cases where an appeal lies to the Supreme Board (see paragraph 48 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: it reverts if the allocation is not confirmed in the final consolidation plan (Eigentum unter auflösender Bedingung).

46. At the end of the proceedings, the agricultural authority adopts the consolidation plan (Zusammenlegungsplan). Since 1977, this has had to be published within three years of the final decision to provisionally transfer parcels of land (section 7a(4) of the Federal Agricultural Proceedings Act). 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 Provincial 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" (section 91(1));

- "Any landowner whose land is included in the consolidation scheme ... shall be entitled to compensation corresponding to [its] value ... in the form of other land included in the [same] scheme" (section 27(1));

- "No one may, against his will, be allocated compensatory parcels

which he cannot cultivate without relocating his farmhouse or substantially changing the nature of his farm" (section 28(1)).

An implementing decree (Zusammenlegungsverordnung), likewise of 1911, further provides that:

- the ratio between value and area of the compensation parcels shall be the same as for the lands transferred or to be transferred (section 108);

- the proportions of orchard, field and meadow shall generally remain the same (section 109);

- as far as possible, the compensatory parcels shall be adjacent and so shaped as to facilitate cultivation, and their orientation shall be the same as that of the lands surrendered or to be surrendered (section 110);

- their length and width shall be in proportion (section 110);

- the average distance between them and the farmhouse shall not as a rule be greater than that between the farmhouse and the lands transferred or to be transferred (section 114).

47. Financial compensation may be paid for differences in value not exceeding 5% of the compensation due (sections 27(2) and 29(2) of the Provincial Act).

The provincial legislation does not provide for any financial compensation for damage which landowners who have successfully challenged the lawfulness of compensation received in land suffer before a final consolidation plan comes into force.

3. The agricultural authorities

48. 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).

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 has varied the decision in question and where the dispute concerns one of the issues listed in section 7(2) of the Federal Agricultural Authorities Act, such as the lawfulness of the compensation in the event of land consolidation; in such cases an appeal lies to the Supreme Board.

In Austrian law the land reform boards are classified as boards whose members include judges (Kollegialbehörden mit richterlichem Einschlag) and which constitute a kind of "specialised administrative tribunal".

49. The Provincial Board has eight members, all appointed by the Government of the Land (section 5(2) and (4) of the Federal Agricultural Authorities Act), viz.:

- one Land civil servant, who is legally qualified (rechtskundig), and acts as chairman;

- three judges;

- a legally qualified Land civil servant with experience in land reform, who acts as rapporteur;

- a senior Land civil servant (Landesbeamter des höheren Dienstes)

with experience in agronomic matters;

- a senior Land civil servant with experience in forestry matters; and

- an agricultural expert within the meaning of section 52 of the General Administrative Procedure Act.

50. The Supreme Board likewise has eight members (section 6(2) and (4) of the Federal Agricultural Authorities Act), viz.:

- one legally qualified senior civil servant from the Federal Ministry of Agriculture and Forestry, who acts as chairman;

- three members of the Supreme Court;

- a legally qualified senior civil servant from the Federal Ministry of Agriculture and Forestry with experience in land reform, who acts as rapporteur;

- a senior civil servant from the Federal Ministry of Agriculture and Forestry with experience in agronomic matters;

- a senior civil servant from the Federal Ministry of Agriculture and Forestry with experience in forestry matters; and

- an agricultural expert within the meaning of section 52 of the General Administrative Procedure Act.

The judicial members are appointed by the Federal Minister of Justice, and the others by the Federal Minister of Agriculture and Forestry.

51. Section 52 of the General Administrative Procedure Act, which is referred to in sections 5(2) and 6(2) of the Federal Agricultural Authorities Act, provides:

"1. If it becomes necessary to take expert evidence, the authority shall rely on the services of the official experts (Amtssachverständige) attached to it or put at its disposal.

2. However, by way of exception, the authority may also consult other suitable persons sworn as experts if no official experts are available or if it becomes necessary having regard to the particular circumstances of the case. ..."

52. Members of land reform boards are appointed for five years and may be re-appointed (section 9(1) of the Federal Agricultural Authorities Act). They cease to hold office before the expiry of their term if, inter alia, they no longer satisfy the conditions of appointment (section 9(2)). Any member may, at his own request, be relieved of his office on health grounds or for professional reasons which prevent him from properly discharging his duties (section 9(3)). If a judicial or civil-servant member is suspended from duty by decision of a disciplinary tribunal, he shall automatically also be suspended from duty as a member of a land reform board (section 9(4)).

53. The members of these boards discharge their duties independently and are not subject to any instructions (section 8 of the Federal Agricultural Authorities Act and Article 20(2) of the Federal Constitution). The executive can neither set aside nor vary their decisions (section 8 of the Federal Act and Article 12(2) of the Federal Constitution - see paragraph 37 above). The decisions can be challenged in the Administrative Court (section 8 of the Federal Act).

54. The pattern of organisation described above was the outcome of a legislative change in 1974 following a judgment of the Constitutional Court in the same year.

In the Constitutional Court's view, the land reform boards as constituted under the 1950 Act could not be regarded as being independent and impartial tribunals within the meaning of Article 6 § 1 (art. 6-1) of the Convention - their members included at that time a Minister from the Federal Government (in the case of the Supreme Board) or the relevant provincial government (in the case of the provincial boards), and the other members could be dismissed at any time by the relevant authorities (judgment of 19 March 1974, Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes, 1974, vol. 39, no. 7284, pp. 148-161).

The new legislation excluded from the boards anyone who was a member of either the Federal Government or a provincial government, introduced provisions governing the term of office and the dismissal of members and provided for appeal to the Administrative Court (sections 5(2), 6(2), 8 and 9 of the Federal Agricultural Authorities Act 1974).

4. Procedure before land reform boards

55. Procedure before the land reform boards is governed by the Federal Agricultural Proceedings Act (see paragraph 38 above), section 1 of which stipulates that the General Administrative Procedure Act shall apply - except for one section of no relevance in the instant case - subject to the variations and additional provisions made in the 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 Federal Act, the boards take their decisions after a private hearing. This is normally attended by the parties, who may consult the file (section 17 of the General Administrative Procedure Act). The parties may appear in person or be represented (section 9(3) of the Federal Act). The chairman may call witnesses and, in order to obtain information, civil servants who contributed to the decision at first instance and to the preparation of the decision (section 9(5)).

Hearings begin with a report by the rapporteur; the board then clarifies the subject-matter of the dispute by hearing evidence from the parties and the witnesses and by looking at the legal and economic situation in detail (eingehend) (section 10(2)). It proceeds on the basis of the facts found by the authority below, but can also order further investigations to be made by that authority or by one or more of its own members (section 10(1)). The parties must be able to acquaint themselves with the findings made as a result of the taking of evidence (Beweisaufnahme) and to submit their comments (section 45(3) of the General Administrative Procedure Act).

The boards deliberate and vote without the parties being present. After discussing the outcome of the hearing, the rapporteur submits conclusions (Antrag); anyone wishing to submit different conclusions (Gegen- und Abänderungsanträge) must give reasons for them (section 11(1) of the Federal Act). The chairman determines the order in which the conclusions are put to the vote (ibid.). The rapporteur votes first, followed by the judges and then the other members, including the chairman, who votes last and has a casting vote if the votes are divided equally (section 11(2)).

If an appeal is brought - within the prescribed two weeks (section 7(3)) - and is held to be admissible, the appropriate board will, if it considers the findings of fact so defective that a new hearing appears to be unavoidable, quash the disputed decision and remit the case to the authority below; otherwise it will determine the merits of the case itself (section 66(2) and (4) of the General Administrative Procedure Act). It may vary either the operative part

of the impugned decision or the reasons given for the decision (section 66(4)).

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, the parties 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, 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).

Reasons must be given for the boards' decisions, which must summarise clearly (klar und übersichtlich) the findings of the investigation, the assessment of the evidence, and the ruling - on the basis of that material - on the legal issues arising in the case (sections 58(2) and 60 of the General Administrative Procedure Act). Decisions are sent to the parties; a board may, however, choose to give its decision forthwith (section 13 of the Federal Act).

5. Appeals to the Constitutional Court and the Administrative Court

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

57. As an exception to the general rule laid down in Article 133(4) of the Federal Constitution, section 8 of the Federal Agricultural Authorities 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, which, if it rules that there has been no infringement of the right relied on in the application to it, will refer the case to the Administrative Court if the applicant so requests (Article 144(3) of the Federal Constitution).

Under Article 130 of the Federal Constitution, the Administrative Court hears determines applications alleging the unlawfulness of an administrative act (Bescheid) or coercion (Befehls- und Zwangsgewalt) against an individual or the breach by a competent authority of its duty to take a decision. It also hears appeals against decisions by boards whose members include judges - such as the land reform boards - where such jurisdiction is conferred on it by statute (see paragraphs 48 and 54 above).

If the Administrative Court does not dismiss the application as unfounded, it will quash the decision appealed against; it determines the merits itself only where the relevant authority has failed in its duty to give a decision (section 42(1) of the Administrative Court Act (Verwaltungsgerichtshofgesetz)).

When reviewing the lawfulness of an administrative act or of a decision by a board whose members include judges, the Court does so on the basis of the facts found by the authority concerned and solely in the light of the complaints made, unless the authority has acted ultra vires or procedural requirements have not been complied with (section 41 of the Administrative Court Act). In this connection the Act specifically provides that the Court shall quash the act appealed against - on grounds of procedural irregularity - where the facts the administrative authority held to have been established are contradicted in a vital respect by the file, or where they are

incomplete in such a respect or where there has been a failure to comply with rules which, if they had been correctly applied, might have resulted in a different decision (section 42(2)(3) of the aforementioned Act).

If, during the consideration of a case, grounds emerge which were previously unknown to the parties, the latter must be given an opportunity to be heard by the court, which must adjourn the proceedings if necessary (section 41(1) of the Act).

Procedure consists mainly in an exchange of pleadings (section 36), followed (except in certain cases specified in the Act) by a hearing inter partes, which will normally be held in public (sections 39 and 40).

PROCEEDINGS BEFORE THE COMMISSION

58. In their application of 3 April 1979 to the Commission (no. 9616/81), Johann and Theresia Erkner alleged, inter alia, an infringement of their right to a hearing within a reasonable time within the meaning of Article 6 § 1 (art. 6-1) of the Convention, and of their right of property, as guaranteed by Article 1 of Protocol No. 1 (P1-1). They also contended that they had not had a fair hearing and invoked Articles 8 and 14 (art. 8, art. 14) of the Convention, but subsequently they did not maintain their submissions on those points.

Following Johann Erkner's death on 22 June 1983, his farm passed to his daughter and son-in-law, Theresia and Josef Hofauer. Having become the sole owners, Josef and Theresia Hofauer expressed the wish, as the applicants' successors, that the proceedings should continue. On 8 March 1984, the Commission decided to grant their request. Theresia Erkner also wished to remain a party to the proceedings as an applicant.

59. The Commission declared the application admissible on 9 March 1984. In its report of 24 January 1986 (made under Article 31 of the Convention) (art. 31), it reached the conclusion that there had been a breach of Article 6 § 1 (art. 6-1) of the Convention (unanimously) and of Article 1 of the First Protocol (P1-1) (eleven votes to one).

The full text of the Commission's opinion and of the two separate opinions contained in the report is annexed to this judgment.

FINAL SUBMISSIONS TO THE COURT

60. At the hearing on 20 October 1986, the Court was asked

- by the Government "to hold that in the present case the provisions of Article 6 § 1 (art. 6-1) of the Convention as well as the provisions of Article 1 of Protocol No. 1 (P1-1) have not been violated and that therefore the facts underlying the dispute do not indicate any breach by the Republic of Austria of the Convention";

- by the Commission's Delegate to confirm the Commission's findings that there had been a breach of both Article 6 (art. 6) of the Convention and Article 1 of Protocol No. 1 (P1-1).

Counsel for the applicants referred to his memorial of 18 August 1986, in which he asked the Court, inter alia, to concur with the Commission and find that the Republic of Austria had been responsible for a human-rights violation.

AS TO THE LAW

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

61. The applicants claimed that their case had not been heard within a "reasonable time"; that the land reform boards were not independent and impartial tribunals; and that the Provincial Board sat in private in March 1986. They relied on Article 6 § 1 (art. 6-1) of the Convention, which provides:

"In the determination of his civil rights and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. ..."

The Government maintained that there had been no breach. For its part, the Commission considered that the length of the proceedings had exceeded a "reasonable time"; it did not give an opinion on the applicants' other submissions.

1. Applicability of Article 6 § 1 (art. 6-1)

62. The Forstern-Pöndorf agricultural consolidation plans concerned, inter alia, land belonging to the Erkner and Hofauer families, which was taken from them in exchange for land previously belonging to other owners. The applicants contested - and continue to contest - the lawfulness of the compensation obtained. Any decision - whether favourable or unfavourable - by the authorities dealing with the matter consequently affected, affects or will in the future affect their property rights. The outcome of the proceedings complained of is accordingly "decisive for private rights and obligations" (see the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 39, § 94, and the Sramek judgment of 22 October 1984, Series A no. 84, p. 17, § 34), so that Article 6 § 1 (art. 6-1) applies in the instant case; the Government, moreover, conceded this.

2. Compliance with Article 6 § 1 (art. 6-1)

(a) "Independent and impartial tribunal" - "public hearing"

63. Before the Court, the applicants cited the fact that the hearings before the Provincial Board in March 1986 were not held in public; they also contended that the land reform boards were not independent and impartial. As regards the latter contention, they relied on the organisational charts of the Federal Ministry of Agriculture and Forestry and the Office of the Provincial Government of Upper Austria to point to the existence of hierarchical links between the civil-servant members, the participation in the vote by civil servants responsible for preparing expert opinions, and the short term of office (five years).

These were new complaints. They were not raised as such before the Commission and were not based on the facts as found by the Commission within the framework fixed by its decision on admissibility. That being so, the Court has no jurisdiction to entertain them (see in particular, mutatis mutandis, the Bozano judgment of 18 December 1986, Series A no. 111, p. 27, § 62).

(b) "Reasonable time"

(i) Period to be considered

64. In civil proceedings, the "reasonable time" referred to in Article 6 § 1 (art. 6-1) normally begins to run from the moment the action was instituted before the "tribunal" (see, as the most recent authority, the Deumeland judgment of 29 May 1986, Series A no. 100, p. 26, § 77); it is conceivable, however, that in certain circumstances the time may begin to run earlier (see the Golder judgment of 21 February 1975, Series A no. 18, p. 15, § 32).

In the instant case, the applicants had recourse to the appropriate tribunals after 4 April 1973, when the decision of 10 August 1970 on a provisional transfer was served on them (see paragraphs 13-18 above). They had made their objections to the District Authority itself, however, as early as August 1970, although it has not been possible to establish the exact date (see paragraph 12 above). The Court concurs with the Commission in inferring that the dispute ("contestation") to be determined arose on or around 10 August 1970, which accordingly marks the beginning of the period to be taken into consideration (see, mutatis mutandis, the König judgment of 28 June 1978, Series A no. 27, p. 33, § 98).

65. As to the close of the period, the Government argued before the Commission that the determination of civil rights as mentioned in Article 6 § 1 (art. 6-1) does not necessarily imply a final judgment. They maintained that there had been an initial provisional determination of the parcels of land to be allotted to the applicants and then a series of decisions which steadily improved the applicants' position.

Like the Commission, the Court is not convinced by this argument. It has consistently held in relation to the application of Article 6 § 1 (art. 6-1) that the period whose reasonableness falls to be reviewed takes in the entirety of the proceedings in issue, including any appeals (see, inter alia, the above-mentioned Deumeland judgment, ibid.). That period accordingly extends right up to the decision which disposes of the dispute ("contestation") (see the Guincho judgment of 10 July 1984, Series A no. 81, p. 13, § 29).

In the instant case, the proceedings are still pending. Consequently, the length of time to be considered already exceeds sixteen and a half years (10 August 1970 - 24 March 1987).

(ii) Relevant criteria

66. The reasonableness of the length of proceedings is to be assessed according to the particular circumstances and having regard to the criteria stated in the case-law of the Court, especially the degree of complexity of the case, the applicants' behaviour and the conduct of the relevant authorities (see, inter alia, the Buchholz judgment of 6 May 1981, Series A no. 42, pp. 15-16, § 49, and the Zimmermann and Steiner judgment of 13 July 1983, Series A no. 66, p. 11, § 24).

67. Any land consolidation is by its nature a complex process. Usually - and quite legitimately - the proper valuation of parcels of land to be surrendered and to be received in exchange is at the forefront of the landowners' concerns. The difficulties inherent in such an assessment are often exacerbated by farmers' traditional attachment to their fields and meadows. Furthermore, the operation is designed to increase the profitability of holdings and develop the infrastructure of the area concerned; it therefore affects the interests not only of individuals but also of the community as a whole.

The consolidation in dispute concerned many people, including thirty-eight landowners, and covered 266 hectares (see paragraph 9 above). As soon as the initial measures were adopted, the applicants asserted that they were being required to exchange land of excellent quality for mediocre plots (see paragraph 12 above). This was essentially a question of fact, to be resolved by obtaining relevant information such as the area of the parcels of land and their use, yield capacity, geographical situation and so forth. After the successful appeals by the Erkners and the Hofauers, however, the appropriate authorities were under a duty to draw up a new plan. No doubt - as the Government conceded - they were not obliged to start completely afresh, but it was necessary for them first to give each of

the landowners concerned a hearing.

In these circumstances, the application of the law appears to have raised issues of fact of considerable complexity.

68. In the Government's submission, the applicants did their utmost to prevent or delay a decision on the merits, notably by taking advantage of every avenue of appeal available to them. In particular, the Government claimed that they were wrong to apply several times to a higher body, thereby interrupting the work of the lower authority.

The Court does not accept this submission.

It points out, in the first place, that it has consistently held that applicants cannot be blamed for making full use of the remedies available to them under domestic law (see, mutatis mutandis, the Eckle judgment of 15 July 1982, Series A no. 51, p. 36, § 82). In the instant case, as the Commission rightly pointed out, the remedies resorted to were mostly successful (see paragraphs 17, 20, 21, 22, 25, 28 and 31 above).

As for the applications seeking rulings from the higher authority instead of the one having jurisdiction at lower instance, the law allowed the applicants to make these once six months had elapsed (see paragraph 55 above). In each case, they in fact waited considerably longer - one year, seven months and nineteen days; eight months and twenty-two days; and eleven months and one day (see paragraphs 21, 22 and 23 above); and only one of their appeals failed - because the lower authority had taken a number of steps and, in the view of the higher authority, was not responsible for the delay (see paragraphs 23 and 24 above).

It nonetheless remains true that some of their subsequent actions, which are somewhat difficult to understand, must have contributed to prolonging the proceedings - namely their objection to the installation of a drainage system and their request to have part of their land exempted from consolidation (see paragraphs 25, 26, 32 and 33 above). At all events, the applicants' behaviour constitutes an objective fact which cannot be attributed to the respondent State and which must be taken into account for the purpose of determining whether or not the reasonable time referred to in Article 6 § 1 (art. 6-1) has been exceeded (see, mutatis mutandis, the above-mentioned Eckle judgment, ibid.).

69. As to the competent authorities, the Court notes that, in accordance with the law, they had initiated the consolidation process of their own motion and that they were responsible for the conduct of it (see paragraphs 42 and 55 above). Further and more particularly, they had decided as early as August 1970 on a provisional transfer of the land concerned (see paragraphs 13-18 above). They were accordingly under a special duty to act expeditiously. The Austrian legislature, moreover, itself recognises the existence of such an obligation: it has retained in relation to land-consolidation proceedings the general rule that a decision must be made within six months (see paragraph 55 above) and in 1977 enacted a provision whereby consolidation plans must be published at the latest three years after a final decision on provisional transfer (see paragraph 46 above).

Several of the periods of time in the instant case fail to comply with this obligation. Considering, first, the appeal proceedings against the provisional transfer: even if, as the Government suggested, the applicants bear some responsibility for the delay in serving the transfer decision on them (see paragraph 13 above), it is difficult to understand why this should have taken almost two years and eight months. The same is true, at least partly, of the subsequent appeal proceedings which ended on 25 November 1975 (see paragraphs 14-17

above): as the Commission rightly noted, these proceedings could have been concluded earlier if the agricultural authorities had accepted the Administrative Court's decision of 21 September 1973 confirming that a right of appeal existed. The authorities' refusal necessitated a second judgment by the Administrative Court, which was not delivered until 23 June 1975 - that is to say one year and nine months after the first decision.

On the other hand, the Court does not judge the appeal proceedings concerning the first two consolidation plans to have been of undue length - about twelve and eleven months respectively (3 June 1976 - 31 May 1977 and 22 January - 29 December 1980: see paragraphs 20-22 above); but the same cannot be said of the proceedings in the appeal against the third plan, which extended over almost two years and eleven months (23 August 1982 - 16 July 1985: see paragraphs 25-29 above). It may be that none of the various stages is inordinately long in itself, but their combined length is certainly excessive.

The most striking feature, however, is the time taken by the relevant authorities to adopt and publish a new plan after the setting aside of an earlier one: more than two years and six months for the second plan (31 May 1977 - 18 December 1979: see paragraphs 20-21 above); approximately one year and seven months for the third plan (29 December 1980 - 27 July 1982: see paragraphs 22 and 24 above); and more than one year and four months for the fourth plan, which is still awaited (31 October 1985 - 24 March 1987: see paragraph 31 above). Such lengthy periods are unacceptable.

70. In all, the proceedings complained of have already taken more than sixteen and a half years (see paragraph 65 above). Such a length of time is unreasonable in the circumstances of the case, having regard notably to the special duty to act expeditiously entailed by the provisional transfer of land. Doubtless the case was not of the easiest and the applicants themselves were responsible for some of the procrastination, but a number of delays are nonetheless attributable to the authorities dealing with the case. As a result of these delays, viewed together and cumulatively, the applicants' case was not heard within a reasonable time, as required by Article 6 § 1 (art. 6-1).

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

71. In the applicants' submission, the provisional transfer of their land in 1970 interfered with their right of property. They claimed that they had still not received the compensation in land to which they were entitled under the provincial legislation and that they had on this account suffered an "annual loss of yield" amounting to 50,000 schillings over the period 1971-1984 and to 30,000 schillings thereafter. They alleged a breach of Article 1 of Protocol No. 1 (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."

The Government challenged this contention, whereas the Commission accepted it in substance.

72. There has indisputably been an interference with the applicants' right of property as guaranteed in Article 1 of the Protocol (P1-1) (see the Marckx judgment of 13 June 1979, Series A no. 31,

p. 27, § 63): on 10 August 1970, their land was allocated to other landowners, who were parties to the consolidation scheme, or else used for communal measures or facilities, and they have not so far secured, by a final decision, the compensation in kind stipulated by the provincial legislation (see paragraphs 13, 18, 20, 22, 25, 28, 29, 31 and 33 above).

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

This provision "comprises three distinct rules". The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property; the second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions; and the third rule, stated in the second paragraph, recognises that States are entitled, amongst other things, to control the use of property in accordance with the public interest. The Court has to consider the applicability of the last two rules before determining whether the first one has been complied with. However, the three rules are not "distinct" in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in the light of the general principle enunciated in the first rule (see, as the most recent authority, the AGOSI judgment of 24 October 1986, Series A no. 108, p. 17, § 48).

74. The Court notes first of all that the Austrian authorities did not effect either a formal expropriation or a de facto expropriation (see the Sporrong and Lönnroth judgment of 23 September 1982, Series A no. 52, p. 24, §§ 62-63). The transfer carried out in August 1970 was a provisional one; only the entry into force of a consolidation plan will make it irrevocable (see paragraph 45 above). The applicants may therefore recover their land if the final plan does not confirm the distribution made at the earlier stage of the proceedings. Accordingly, it cannot be said that the applicants have been definitively "deprived of their possessions" within the meaning of the second sentence of the first paragraph of Article 1 (P1-1).

Nor was the provisional transfer essentially designed 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 45 above). The transfer must therefore be considered under the first sentence of the first paragraph of Article 1 (P1-1).

75. For the purposes of this provision, the Court must inquire whether a proper balance was struck between the demands of the community's general interest and the requirements of protecting the fundamental rights of the individual (see the above-mentioned Sporrong and Lönnroth judgment, p. 26, § 69).

76. It should first be recalled that more than sixteen years have already elapsed since the provisional transfer (10 August 1970 - 24 March 1987: see paragraph 13 above) without the applicants' having received, under a final consolidation plan, the compensation in land provided for by law.

According to the Government, the length of the proceedings is not a matter for consideration under Article 1 of Protocol No. 1 (P1-1) if the Court has already ruled it to have been in breach of Article 6 § 1 (art. 6-1) of the Convention. Such an argument is inconsistent with the Court's case-law, from which it is apparent that one and the same fact may fall foul of more than one provision of the Convention and Protocols (see, for example, the Airey judgment of 9 October 1979, Series A no. 32, p. 17, §§ 31-33). Moreover, the

complaint made under Article 6 § 1 (art. 6-1) can be distinguished from the complaint relating to Article 1 of the Protocol (P1-1). In the former case, the question was one of determining whether the length of the consolidation proceedings had exceeded a "reasonable time", whereas in the latter case their length - whether excessive or not - is material, together with other elements, in determining whether the disputed transfer was compatible with the guarantee of the right of property.

77. It should also be pointed out that the relevant provincial legislation did not permit any reconsideration of the provisional transfer, notwithstanding the applicants' successful appeals against the consolidation plans. Nor does it provide for the possibility of compensating the applicants financially for the loss they may have sustained on account of the forced exchange of their land for other, inferior land pursuant to the provisional transfer (see paragraphs 34-36 and 47 above).

78. The Court is not unmindful of the legislature's concern, however. In authorising a provisional transfer at an early stage of the consolidation process, its intention is to ensure that the land in question can be continuously and economically farmed in the interests of the landowners generally and of the community. Furthermore, although the applicants lost their land in consequence of the transfer decided on in 1970, they received other land in lieu, even if they are not satisfied with it. The applicable system, however, suffers from a degree of inflexibility: before the entry into force of a consolidation plan, it provides no means of altering the position of landowners or of compensating them for damage they may have sustained in the time up to the final award of the statutory compensation in land.

79. In the circumstances of the present case, therefore, the necessary balance between protection of the right of property and the requirements of the public interest was lacking: the applicants, who remain uncertain as to the final fate of their property, have been made to bear a disproportionate burden. There is no need at this stage to determine whether they have suffered actual prejudice (see the above-mentioned Sporrong and Lönnroth judgment, p. 28, § 73).

80. The Court accordingly finds that there has been a breach of Article 1 of Protocol No. 1 (P1-1).

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

81. The applicants are claiming compensation in the sum of 760,000 schillings for pecuniary damage in respect of the period from 1971 until 1986 and reimbursement of lawyers' fees, which they put at 582,099.10 schillings.

The Government and the Commission have not yet expressed a view on the matter, which is consequently not ready for decision. It must be reserved and the further procedure fixed, due regard being had to the possibility of an agreement between the respondent State and the applicants (Rule 53 §§ 1 and 4 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 6 § 1 (art. 6-1) of the Convention as regards observance of the "reasonable time" requirement;

2. Holds that it has no jurisdiction to entertain the other complaints made by the applicants under this provision;

3. Holds that there has been a breach of Article 1 of Protocol No. 1 (P1-1);

4. Holds that the question of the application of Article 50 (art. 50) of the Convention is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites the Government to submit to the Court, within the forthcoming two months, their written observations on the said question and, in particular, to notify the Court of any friendly settlement which they may reach with the applicants;

(c) reserves the further procedure and delegates to the President of the Chamber power to fix the same if need be.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 April 1987.

Signed: Rolv RYSSDAL
President

Signed: Marc-André EISSEN
Registrar