EUROPEAN CONVENTION ON HUMAN RIGHTS

ANDORFER TONWERKE CASE

Strasbourg

1983

APPLICATION 7987/77

ANDORFER TONWERKE

against

AUSTRIA

This publication contains the report of the European Commission of Human Rights drawn up in accordance with Article 31 of the Convention for the Protection of Human Rights and Fundamental Freedoms, relating to the application No. 7987/77 lodged with the Commission by the Andorfer Tonwerke against the Austria.

The report was transmitted to the Committee of Ministers on 8 March 1982.

As the case was not referred to the European Court of Human Rights, it was for the Committee of Ministers to decide, under the provisions of Article 32 paragraph 1 of the Convention, "whether there has been a violation of the Convention".

The decision of the Committee of Ministers was taken by Resolution DH (83) 9 of 23 June 1983, the text of which is reproduced on page 63 of the present publication.

The Committee of Ministers also authorised publication of the Commission's report on this case.

I. REPORT OF THE COMMISSION.

TABLE OF CONTENTS

I. INTRODUCTION

1. The following is an outline of the case as it has been submitted by the parties to the European Commission of Human Rights.

The substance of the applicant company's complaints

2. The applicant company owned a clay pit at Andorf. Adjoining land containing a clay deposit which the company considered as being essential for the continuation of its production of tiles was expropriated for road construction purposes. The company claimed compensation for the loss of this clay deposit and the resultant loss of profit, but this was refused by the relevant administrative decision.

The company then turned to the courts to determine the compensation. After lengthy proceedings the courts, too, adjudicated the compensation only on the basis of the agricultural value of the land, rejecting the company's further claims essentially on the ground that the company had not in fact had the intention of exploiting the clay deposit in the near future. The relevant non-contentious proceedings remained pending before the court of first instance, the District Court of Raab, from December 1969 until October 1977. The subsequent appeal proceedings before the Regional Court of Ried lasted until January 1978 and the further appeal proceedings before the Supreme Court until June 1978.

The company had in the meantime discontinued its production of tiles and sold its production plants in 1972. The company was liquidated and its manager, Mr Walter Hannak, appointed as liquidator. He claims that the breakdown of his firm was directly caused by the expropriation. The courts, however, have held that the liquidation of the firm was due to other reasons.

3. In its application to the Commission, the company claimed that the withholding of compensation for the clay deposit contained in the expropriated land and for the loss of profit allegedly caused by the expropriation constituted an unjustified interference with its right to the peaceful enjoyment of its possessions (Art. 1 of the Protocol). It further claimed that it had been discriminated against in this respect (Art. 14 of the Convention read in conjunction with Art. 1 of the Protocol). The Commission, however, rejected these complaints as inadmissible.

The Commission also declared inadmissible some of the company's procedural complaints, namely that it had not enjoyed a fair hearing (Art. 6(1) of the Convention) and that no effective remedy to a national authority had been available to it to ensure a fair hearing (Art. 13).

These complaints are therefore no longer at issue at this stage of the Commission's proceedings.

4. The Commission, however, declared admissible and retained for a

consideration of the merits the applicant company's further complaint under Art. 6(1) of the Convention regarding the length of procedure and the related complaint under Art. 13 of the Conventon that there was no effective remedy to a national authority in this respect. These complaints constitute the subject matter of the present Report.

Proceedings before the Commission

5. The application was introduced by Mr Hannak, acting on behalf of the applicant company, on 12 May 1977. It was registered on 2 August 1977.

6. On 5 March 1979 the Commission decided to give notice of the application to the respondent Government for observations on admissibility. The Government were invited to submit these observations, which should inter alia deal with the question of the length of procedure, before 4 May 1979. This time limit was subsequently extended at the Government's request until 1 July 1979. The Government submitted their observations on 21 June 1979, and the applicant company was invited to submit observations in reply before 17 August 1979. It did so on 19 July 1979.

7. On 13 December 1979, after having considered the parties' written observations, the Commission decided to declare the application in part admissible (cf. paras. 3 and 4 above). The parties were then invited to submit written observations on the merits of the admissible complaints and to comment on the possibility of securing a friendly settlement of the matter (Art. 28 of the Convention).

8. Since both parties showed a readiness to enter into friendly settlement negotiations, the proceedings on the merits were not pursued until it became clear that an agreement acceptable to both sides could not be reached at this stage.

9. On 16 October 1980 the Commission decided to resume the consideration of the merits and to invite the parties to submit written observations on the substance of the case before 1 December 1980. The applicant company submitted such observations on 11 November and the Government on 26 November 1980.

10. On 18 December 1980 the Commission decided to hold an oral hearing with the parties on the merits of the application, and this hearing took place on 13 May 1981. Mr Hannak in his capacity as legal successor of the applicant company was granted free legal aid by a decision which the Commission took on the day preceding the hearing. At the hearing, the applicant company was represented by Dr Erich Novacek, a lawyer of the Upper Austrian Chamber of Commerce, Mr Walter Hannak sen., being the former manager and present liquidator of the company, and the company's minority partner, Mr Walter Hannak jun. The Government were represented by their Agent, Ambassador Dr Kurt Herndl of the Federal Ministry of Foreign Affairs, who was assisted by two advisers, Dr. Wolf Okresek of the Federal Chancellery and Dr. Gerd Felsenstein of the Federal Ministry of Justice.

11. After the hearing the Commission again placed itself at the disposal of the parties with a view to securing a friendly settlement. However, in the light of the parties' reaction, the Commission now finds that there is no basis on which such a settlement can be effected.

The present Report

12. The present report has been drawn up by the Commission in pursuance of Art. 31 of the Convention and after deliberations and votes in plenary session, the following members being present:

MM. C.A. NORGAARD, President
J.A. FROWEIN, Second Vice-President
F. ERMACORA
J.E.S. FAWCETT
E. BUSUTTIL
T. OPSAHL
G. JÖRUNDSSON
G. TENEKIDES
B. KIERNAN
M. MELCHIOR
J.A. CARRILLO

13. The text of the Report was adopted by the Commission on 8 March 1982 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2) of the Convention.

14. A friendly settlement of the case not having been reached, the purpose of the Commission in the present Report, as provided in para. (1) of Art. 31, is accordingly (1) to establish the facts; and (2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

15. A schedule setting out the history of the proceedings before the Commission and the Commission's decision on the admissibility are attached hereto as Appendices I and II.

16. The full text of the oral and written pleadings of the partis together with further documents handed in as exhibits are held in the archives of the Commission and are available to the Committee of Ministers if required.

II. ESTABLISHMENT OF THE FACTS

17. The facts relating to the present case are generally not in dispute between the parties.

The applicant company

18. The applicant company which has its seat at Andorf, Upper Austria, was originally founded in 1891 and existed as a limited partnership company since 1963. After a decline in its production of tiles since 1964 and a complete stop of this production in 1969 the company eventually sold its production plant to another firm in the year 1972. The company was then liquidated and its principal shareholder and manager, Mr Walter Hannak sen., appointed as liquidator. It is in this capacity that he has continued to represent the company in the domestic lawsuits, and eventually in the present proceedings under the Convention. Before the Commission he has been assisted by Dr. Erich Novacek, a lawyer of the Upper Austrian Chamber of Commerce.

The developments leading up to the expropriation proceedings

19. The applicant company owned and exploited a clay pit at Andorf. An adjoining piece of land, also owned by the company, was for the time being used for agricultural and forestry purposes. It was considered to contain a clay deposit of high quality suitable to provide at some future date a basis for the company's specialised production of tiles. For the first time in 1964 the company learnt that the Province of Upper Austria planned to use this land for the construction of a new road. Already at the planning stage the company filed objections stating that its production was dependent on the possession of this particular piece of land since no qualitatively comparable clay deposits existed on its other premises. It therefore requested that the road be planned in a different way. However, the Province maintained its planning decisions despite these objections. The construction, property acquisition and expropriation proceedings for the road were opened in November 1964 on this basis.

20. In December 1964 a minority partner of the company, pretending to act on behalf of the company, concluded a contract with the provincial road administration on the sale of the above land (lots No. 470/1 and 471 of the communal section of Haitzing) to the Province for a purchase price of 25,000.-AS. On 26 January 1965 the Provincial Government ordered the construction of the road across the land. However, on 26 February 1965 the applicant company informed the Provincial Government that in its opinion there existed no valid agreement regarding property acquisition, nor a lawful decision on expropriation. The above sales contract had been concluded without the knowledge and consent of the company's manager and was therefore void. The validity of this contract was subsequently challenged by a court action brought by the applicant company against the Province of Upper Austria and the Regional Court of Linz eventually confirmed by a decision of 4 April 1968 that no valid agreement had been established.

21. Following this court decision the applicant company's lawyer wrote to

the Provincial Government on 19 July 1968 requesting the institution of expropriation proceedings in which the company could specify its compensation claim. On 28 October 1979 the provincial road administration made a formal application for the expropriation. The Provincial Government thereupon decided to institute expropriation proceedings to regularise the situation.

The administrative expropriation proceedings

22. The administrative expropriation proceedings which ensued were based on the Provincial Road Administration Act (Amtliche Linzer Zeitung No. 1/1947) which refers to the Railway Expropriation Act (now BGBl. No. 71/1954) insofar as the applicable procedure is concerned. This Act provides that the decision to expropriate shall be taken by an administrative act which must include the fixing of the compensation payable to the expropriated party. If the party is dissatisfied with the compensation fixed in this way it may apply to the courts. The administrative decision insofar as it concerns the compensation will then be set aside and it becomes the exclusive task of the courts to determine the compensation in non-contentious proceedings (under the Non-Contenious Proceedings Act 1854) without being bound in any way by the previous administrative decision.

23. The administrative authority competent to decide on the expropriation in this case was the Provincial Government and the interests of the Province as the expropriating party were represented by the provincial road administration which is a branch of the Provincial Government's administration.

24. The applicant company being the expropriated party did not contest the necessity of the expropriation as such since the construction work on the road had in the meantime already been completed. But it was in disagreement with the road administration as to the amount of compensation due to it. In this respect it claimed, in addition to the agricultural value of the land, compensation for the loss of the clay deposit contained in this land, and for the diminished value of certain investments which it had made with a view to its future exploitation. Although the clay had not been actually exploited, the road administration accepted that the compensation must, in principle, be determined not by reference to the use of the land at the time of expropriation, but having regard to the possibility, already existing at that time, of using it for another purpose. The disagreement between the parties at this stage seems to have been only on the assessment of the value which the clay deposit in question would have represented for the applicant company.

25. Accordingly, the Provincial Government asked an expert for brickworks to determine the value of the clay deposit. In the opinion which this expert submitted on 12 February 1969 he estimated the total damage resulting from the loss of the land containing the clay deposit at some 83,000.-AS. He did not consider that compensation should be paid for certain mechanical investments which, according to the applicant company, had become useless after the expropriation.

26. This expert opinion was discussed at a hearing before the Provincial Government on 20 February 1969. On this occasion, the municipal authorities of Andorf, being a party in the expropriation proceedings, raised the new argument that a public way ran across the property in question making impossible the exploitation of the entire clay deposit. The applicant company objected that the rights in this way were extinguished due to prescription. The Provincial Government, however, asked the expert to supplement his opinion taking into account the existence of this public way. The expert subsequently reduced his evaluation of the damage to 58,000.- AS.

27. In March 1969 the applicant company applied to the competent district authority at Schärding for permission to work the clay near the new road beyond the limits of its existing clay pit. The district authority, however, decided on 22 May 1969 to adjourn the matter until the legal questions concerning the disputed existence of the above public way had been clarified.

28. The Provincial Government took the expropriation decision on 2 October 1969. In this decision, it fixed the compensation at only 11,205.-AS, representing the agricultural value of the lot. The company's claims for separate compensation in respect of the clay deposit were dismissed on the ground that the above-mentioned public way cut off the expropriated part of the lot from the land worked by the company which did not possess, had never possessed, and could not expect to obtain permission to work the clay beyond that way. The Provincial Government therefore considered that the company's production of tiles had not been affected in any way by the expropriation, and that the production had in fact been stopped for other reasons.

The court proceedings taken by the municipality of Andorf against the applicant company

29. The question of the public way running across the property in question which had been of decisive importance in the above administrative proceedings was subsequently taken to the courts by the municipality of Andorf. By an action which it filed with the District Court of Raab against the applicant company, the municipality sought to assert its rights in this public way. However, this action was eventually withdrawn on 26 November 1971 and by a ruling of 31 January 1972 the District Court acknowledged that the character of a public way was lost by prescription acquisitive. On 5 December 1972 the way property was ascribed to the applicant company with the consent of the Linz Court of Appeal.

The non-contentious court proceedings before the District Court of Raab on the determination of the expropriation compensation

30. The applicant company which was dissatisifed with the amount of compensation fixed by the Provincial Government had in the meantime decided to make use of the court procedure provided by the Railway Expropriaton Act (cf. para. 22 above). On 2 December 1969, it applied to the competent District Court at Raab for the judicial determination of this compensation. It now raised a claim in the amount of 20 million, later 30 million AS. This claim was based on the loss of

profit resulting from the discontinuation of its production which it alleged was exclusively due to the construction of the new road. It argued that the provisional stop of its production of tiles in 1964 had become necessary because the competent authorities had not been prepared to indicate security measures which would have allowed to continue the exploitation of clay without endangering the new road. Eventually it had turned out that the workable clay deposit had been reduced from 65,000m3 to 15.000m3 thus forcing the company to discontinue the production permanently as it appeared no longer economically viable. The company's claim was supported by a private expert opinion prepared by a professor of the University of Mining Science in Leoben.

The composition of the court

31. The District Court of Raab which had to deal with this application is a court with only one judge. The judge appointed to this post between 1 January 1969 and 1 July 1975 was frequently ill during prolonged periods and therefore had to be replaced by other judges. Three different judges were assigned this task during periods in 1971 (two days weekly), 1973, and 1974-1975 (again for only two days a week). A new judge was appointed on 1 January 1976, and yet another one on 1 July 1977. There were therefore altogether five judges who dealt with the case at various stages. It appears that some procedural acts had to be repeated for this reason. The Federal Ministry of Justice later admitted in a letter to the applicant company that the repeated changes of the judge may have contributed to the delay in the proceedings, but it considered that those changes were due to the organisational structure of small district courts with only one judge and therefore unavoidable.

The taking of evidence

32. Considerable time was needed by the court to obtain expert advice from various quarters. The court first appointed two experts for expropriation compensations, then a geological expert, and finally an expert on production methods.

33. The decision to appoint two experts for expropriation compensation resident in Vienna and Villach respectively was made on 30 April 1970. A hearing was held in their presence on 6 November 1970 including an inspection of the applicant company's plant. It was on this occasion that the parties agreed on the consultation of a geological expert (see para. 34 below). After that expert had given his opinion the court fixed a hearing on 22 November 1974 which, however, had to be postponed to 23 January 1975 inter alia for the reason that the above two experts were prevented from appearing on the earlier date. They were also present at the next court hearing on 12 March 1976. So far they had not been asked to reply to any specific questions, and they now stated (apparently for the first time) that they were only qualified to submit an opinion on the agricultural and forestry aspects of the matter but not on cost accounting in a tile

manufacturing plant such as the applicant company's with a view to establishing the financial loss suffered by that company. It seems to have been for this reason that the court found it necessary to appoint yet another expert to deal with the company's production methods (see para. 35 below). As regards the above two experts, the court took a decision on 10 April 1976 by which it invited them to submit their expert opinion - limited to the agricultural and forestry value of the expropriated land - by the end of the same month. They did so on 26 April 1976. According to them, the agricultural and forestry value was 16,079,70 AS.

34. As mentioned above the parties agreed at the court hearing on 6 November 1970 that a geological expert should be appointed to assess the value of the clay deposit contained in the expropriated land on the basis of soil tests obtained by experimental drillings. After receipt of the general plan of the site including longitudinal and cross-sections, drawn up by a land surveillor of Ried, this expert was appointed on 8 January 1971. He inspected the site in the presence of the parties on 20 December 1971 and, following some delay caused by a dispute over who should bear the considerable costs of the drillings (see paras. 37-39 below), he eventually submitted his report on 18 June 1973. As this expert was then abroad and could not be reached, and because of subsequent difficulties to find a date aggreable to all three experts so far appointed, the court did not discuss this expert opinion before 23 January 1975. At the court hearing on this date, the applicant company's private expert (para. 30 above) expressed a number of reservations as to the correctness of the geological expert's opinion, and the court therefore ordered him to prepare a supplementary report. He submitted a very voluminous supplementary report on 6 November 1975. It was discussed at the next court hearing on 12 March 1976. As a number of questions still remained open, the court asked the expert on 23 June 1976 to submit a further supplementary report. He submitted his replies to the additional questions on 28 July 1976.
The District Court subsequently received an application by the applicant company to obtain still further clarifications from this expert. It appears that a supplementary report of the geological expert arrived at the District court in late August 1977.

35. The appointment of a further expert who would deal with the applicant company's production methods was suggested by the applicant company after the court hearing on 12 March 1976. The court had initially planned to deal with the production methods at a hearing on 24 and 25 May 1976, but later decided to cancel this hearing. By a decision of 23 June 1976 it appointed a certain expert despite the applicant company's objections to the effect that this person did not seem to be sufficiently qualified and was moreover a relative of the expert previously consulted by the Provincial Government. The Provincial Government was apparently not consulted prior to the appointment of this expert. His appointment was brought to the knowledge of the Provincial Government only after he had submitted his report, dated 2 July 1976, to the court. The Provincial Government then challenged the decision to call on the expert, because they had not previously been consulted, and also because they considered that

his appointment had not been necessary in view of the earlier results of the proceedings. The questions put to the expert had in the Provincial Government's opinion already been clarified by 1972. On 21 September 1976 the Regional Court of Ried rejected this appeal as inadmissible, stating that no separate remedy was given against a decision of a court to take certain evidence. The question whether the failure to consult a party prior to the appointment of an expert violated that party's procedural rights could only be raised in an appeal against the court's judgment on the main issue. This decision was confirmed by the Supreme Court on 13 January 1977.

36. Apart from the above expert evidence the court had regard to a number of other pieces of evidence, including in particular certain documentary evidence, information received from the District Authority of Schärding on 29 April 1976 concerning the applicant company's chances of obtaining an authorisation for a modification of its production installations, and finally a detailed account of the "History of the Andorfer Tonwerke" submitted by the applicant company itself.

Cost proceedings

37. The question of the costs occasioned by the consultation of the above experts gave rise to a further dispute between the parties. The Railway Expropriation Act provides in its section 44 that the costs of determining the compensation have to be borne by the railway enterprise (i.e. the expropriating party) unless they have been caused by an unjustified intervention of the expropriated party. Basing itself on this provision, the District Court, when appointing the geological expert ordered the Province of Upper Austria to pay an advance contribution of 30,000.-AS to the costs. The Provincial Government appealed from this decision claiming that the applicant company's request for a geological expert opinion had been unjustified. The appeal was however rejected by the Regional Court of Ried on 1 March 1971.

38. On 27 July 1972 the District Court ordered the Province to pay certain further costs, including costs for experimental drillings amounting to some 131,000.-AS. The Provincial Government appealed again, arguing that the question whether the company's intervention was justified could only be determined when the outcome of the lawsuit was known, and that the law did not provide for any advance payment of these costs. This appeal was partially upheld by the Regional Court which decided on 5 September 1972 that the costs must provisionally be borne by the office of the clerk of court.

39. However, after having advanced the costs, the clerk's office then issued payment orders to both parties on 6 November 1972 in order to recover these costs from them. Both parties filed objections against these payment orders. The applicant company claimed that it was not at all obliged to pay these costs; and the Provincial Government relied again on the allegedly unjustified attitude of the company and

the non-existence of a duty to pay advance contributions. The clerk's decision being of an administrative nature, it was the President of the Regional Court who had to decide on these objections. By a ruling of 16 January 1973 he found that the company's objections were justified while those of the Provincial Government had to be rejected. The Provincial Government was still dissatisfied and appealed to the Administrative Court. This court found on 19 October 1973 that the costs in question had to be borne by the Province, not only provisionally but finally. The question whether or not the intervention of the expropriated party was unjustified did not depend on the outcome of the lawsuit, but on the objective circumstances when making its application. In the present case there was no indication that the applicant company's intervention had been unjustified.

40. The Provincial Government continued to file appeals against various cost decisions even after this decision of the Administrative Court. Apart from appeals against the costs occasioned by the other three experts (cf. para. 41) it also appealed against the District Court's decision of 14 October 1976 to impose on the Province the costs for the geological expert's supplementary report (AS 38.000.-). This appeal was rejected by the Regional Court on 23 November 1976.

41. When after submitting their report in April 1976 the agricultural and forestry experts claimed their costs of some 21,000.- and 19,000.-AS respectively, the applicant company filed an objection stating that an opinion on the agricultural value could also have been obtained by experts residing in the court district itself, and that the travel expenses and long delays caused by these experts were therefore unjustified. The Provincial Government likewise observed in a note of 18 May 1976 that it considered the consultation of these experts as unnecessary. It further argued that it had not itself requested the hearing of these experts, and that the request for their appointment was implied in the applicant company's original application to the court to fix the compensation. On 24 June 1976 the District Court nevertheless fixed the costs for these experts in the full amount claimed by them. The Provincial Government's subsequent appeal against the actual imposition of these costs was rejected by the Regional Court of Ried on 21 September 1976, its attempt to appeal further to the Supreme Court failed since the Regional Court found by a decision of 2 November 1976 that such appeal was inadmissible. The only result of these appeals was that the Province's (further) advance contribution to the costs was reduced from AS 80.000.- to 40.000.-. The Province's appeal against the costs occasioned by the expert for tile production methods was likewise dismissed.

The District Court's decision

42. Without holding a further hearing after 12 March 1976, the District Court of Raab took its decision on the compensation due to the applicant company on 6 October 1977. It awarded a compensation of only 16,079.70 AS, being the agricultural and forestry value of the land. The company's further claim of 29.983,920.30 AS was dismissed

as being unfounded.

43. In the reasons for this decision the court found that the expropriated lots were partly used as agricultural land, partly as forest. They contained clay which was particularly suitable for the production of tiles. The total surface was 9000 m2, and the workable surface had been reduced to 6800 m2 by the construction of the road. There remained 30,400 m3 of clay which could be worked even after the construction of the road, and 17,800 m3 (worth AS 67,640.-) were lost. Before 1935, the company had worked the clay deposit in the direction of the new road, but after that date the clay pit had only been worked in a vertical direction. The clay available after the road construction would have allowed the continued production of tiles for ten years on the basis of 1,5 million tiles per year, and for seven and a half years on the basis of 2 million tiles per year. The clay lost by the road construction could have been stocked and used up later. In this way, the production could have been prolonged to a period of 12 years. Since 1965, the economic situation of the company had deteriorated continuously. Eventually, it had to sell the production plants in 1972. Before 1969, the company never had seriously tried to obtain permission to work the clay in the relevant area. It was only in March 1969 that it applied for such permission to the competent district authority. When doing so, it expressly referred to the connection with the expropriation proceedings. In the course of these proceedings the company was told that it had to fulfil certain conditions before it could obtain the permission. As it did not fulfil these conditions, no decision was made. The company did not apply for a decision of the higher authority under S.73 of the Code of General Administrative Procedure.

44. The Court considered that the company's claim for compensation was based on the loss of profit which it could have made if the entire clay deposit had still been available to it. This profit could only have been achieved on a long term basis, during a period extending considerably beyond the date of the expropriation. Since the company sold its production plants in 1972, it could not have used up the clay deposit remaining after the construction of the road by the time of the sale. Moreover, it would have been possible to excavate the entire clay deposit before the construction of the road and to put it on stock. In this way the company would have had the possibility of reducing the damage (as was its legal duty) and of using up the clay entirely. The fact that the company had not applied for permission to work the clay before 1969 proved that it had not previously had the real intention of using the clay deposit in issue for its production. This application apparently had only been made with the intention of increasing the basis of its compensation claim. The company therefore was not entitled to any compensation in regard to the clay deposit lost by the expropriation. The compensation therefore had to be determined exclusively on the basis of the agricultural and forestry value.

The appeal proceedings

45. The applicant company appealed from the above decision of the District Court, but the Regional court of Ried rejected the appeal on

24 January 1978.

46. The Regional Court considered that in the assessment of the value of a piece of land its future use for a particular purpose could only be taken into account if that use was not only legally possible but also probable in the near future. The facts in the present case showed that the negative development of the applicant company's production of tiles was not due to the construction of the road, but to economic difficulties of a general character. In addition to the findings of the District Court, it appeared that already in 1964 the applicant company had not had the intention of extending the excavation of the clay in the direction of the new road. If a real possibility of using the clay deposit lost by the construction of the road had not existed, there was no basis on which to claim compensation for the loss of the clay in question. It was true that at the time of the expropriation it could not be excluded that at some date in the future this clay might be needed again; however, already at that date it was foreseeable that it would not be possible in the near future to draw profit from this clay deposit. This was confirmed in 1972 when the company sold its plant without selling at the same time the lots affected by the expropriation. This showed that the clay deposits contained in these lots were not of any particular interest for the buyer, and that their exclusion from the sales contract had not influenced the price. The Court concluded that the company had not suffered any loss of profit by the expropriation, and accordingly was not entitled to claim any compensation under this title. The District Court therefore had rightly determined the compensation only on the basis of the agricultural and forestry value of the expropriated land.

47. The applicant company appealed further to the Supreme Court, which, however, rejected this appeal as inadmissible on 1 June 1978. The Supreme Court found that it was only competent to receive an appeal directed against the decision of the appellate court confirming the decision of the first court if it contained a manifest violation of the law. The applicant company had based its appeal on the argument that the refusal of compensation in respect of the clay deposit manifestly violated S.4(1) of the Railway Expropriation Act which provides for a compensation in respect of all damage caused to the property of the expropriated party. The Supreme Court, however, found that this legal provision was not so clear as to exclude any doubts as to the intentions of the legislator. The interpretation given of this provision by the Regional Court, namely that compensation in respect of mineral wealth contained in expropriated land must only be paid if its exploitation was not only possible, but probable in the near future, did not manifestly violate the law.

III. SUBMISSIONS OF THE PARTIES

A. Submissions of the applicant company

48. The applicant company has *inter alia* complained of the length of the proceedings in the present case which it considers to be contrary to Art. 6(1) of the Convention, and of the absence of an effective remedy to a national authority by which it could have achieved a speeding up of these proceedings (Art. 13 of the Convention).

As to the alleged violation of Art. 6(1) of the Convention

49. The company observes that the expropriation of its land in fact took place in 1965/1966 when the new road was constructed. The administrative expropriation decision, however, was not taken before October 1969 and the proceedings for the judicial determination of the expropriaton compensation lasted from 2 December 1969 until 6 October 1977, i.e. almost eight years in first instance. The appeal proceedings were not terminated before 1 June 1978, thus bringing the total length of the proceedings to more than eight and a half years. The company submits that the Federal Chancellery admitted in a letter of 6 February 1978 that "in view of the proceedings pending since 1969 it is difficult to speak of a 'reasonable time'" (dass "angesichts des seit 1969 anhängigen Verfahrens ...von einer 'angemessenen Frist' schwerlich gesprochen werden" kann)

50. In the company's view this unreasonable length of the proceedings cannot be justified by objective circumstances. The company noted the Federal Ministry of Justice's explanation that the repeated changes of the judge were due to the organisational structure of small district courts, but in its view the delay in its case and the fact that so many judges had to deal with it, was more particularly caused by a completely wrong approach of the court to the taking of evidence. The Non-contentious Proceedings Act requires the court to decide as speedily as possible and to order the taking of evidence, especially of expert evidence, only where this is necessary and relevant to its decision (Section 2 (2) No. 5 of the Act). The company is still convinced that the court's eventual decision to limit its compensation to the agricultural value of the expropriated land was wrong, but basing itself on the rationale of this decision - the refusal of further compensation on the ground that the companay did not have the intention of working the clay contained in this land and therefore sold its production plant - it observes that all the relevant data for taking such a decision were available to the court already at the end of the year 1972, and this was in fact admitted by the respondent Government who had argued that the relevant facts of a case may only crystallise in the course of the proceedings. In the present case these facts had crystallised by 1972, and it was therefore wholly pointless for the court to continue in the taking of evidence on the value of the clay and on the damage caused to the company by its loss after it must have become clear that a compensation for these items was excluded under the applicable legal principles. In its decision of 25 January 1978 the Regional Court of Ried in fact recognised that it would not have been necessary to take any evidence in this respect.

51. The company submits that its claim and its applications for the taking of evidence in support of this claim were not in themselves unreasonable. This is shown by the various court decisions on the costs of the expert evidence where it was found that the company's intervention had not been unjustified having regard to Section 44 of the Railway Expropriation Act. The company here refers in particular to the Administrative Court's decision. It further observes that the tax authorities, too, were of the opinion that its claim represented a considerable value since it was ordered to pay taxes in the amount of 2 million AS in view of these claims - a tax obligation from which it had considerable difficulties in freeing itself : the tax claim was in fact only withdrawn in the year 1976. However, all this cannot change the fact that according to the legal principles eventually applied, it was not necessary to take the evidence in question. The Government's argument that the evidence was also taken in the interest of the company cannot convince. It was the company's right to ask for the taking of this evidence, but it was for the court to decide whether or not the evidence requested was relevant having regard to the applicable legal principles. It is therefore only the court and not the applicant company which must be blamed for the wrong decision to take this evidence, and for the resultant unnecessary delay in the proceedings.

52. The court was particularly negligent when appointing the first two experts. The subject with which they were expected to deal was not defined when they were appointed. The court apparently thought that they were competent to deal with the question of the profitability of the company's tile production, but it was only discovered after six years, by the fourth judge dealing with the case, that in fact they were only competent to deal with the agricultural and forestry value. Much delay would have been avoided if this had been known earlier. The court could also have found experts in the court district itself to deal with the agricultural value, and they would probably have been less occupied and would have worked quicker than the above two experts. The appointment of a fourth expert on the company's production methods only in 1976 could also have been avoided.

53. As regards this last expert, the company denied that it made unnecessary difficulties regarding his appointment. It is not true that the company's manager considered himself as the only Austrian expert on tile production, he only did not know of any other expert and there were certain objections against the person proposed by the court because he had given up his own tile production many years ago and was moreover a relative of another expert previously occupied in the case. As regards the other three experts, the company did not raise any objections against the persons appointed.

54. Another factor which contributed to the length of the proceedings was the Province's behaviour regarding the costs of the expert evidence. The applicant company considers that the Republic of Austria is also responsible for this behaviour of the Province. The Province repeatedly opposed the cost decisions of the courts and remained each time unsuccessful. It even took the case to the Administrative Court although that court had clarified the legal position regarding the

costs of expropriation proceedings in an earlier case decided in 1970. There was therefore in principle no need in 1973 to seize the Administrative Court again with this question. The applicant company further submits in this connection that its lawyer raised the question of the delays caused by the cost proceedings with the judge of the District Court in October 1974. The judge informed the lawyer that the Province had not paid the advance contribution to the costs as requested, and he asked the lawyer whether he expected him now to take enforcement measures against the Province. The lawyer stated that the legal position was clear, enforcement measures could be taken against the Province in the same way as against any other party to civil proceedings.

55. The applicant company has in addition referred to the delay caused by the proceedings concerning the alleged existence of a public way cutting off the expropriated land from the existing clay pit. The municipal authorities of Andorf tried to assert their property rights relating to this way, although these property rights had in fact been lost by prescription. The court's finding to this effect was not made before 1972 when it was already too late for the applicant company which had in the meantime sold its plant.

56. Some argument was also devoted to the conduct of certain administrative proceedings. In connection with the construction of the new road the applicant company wanted to be sure that it could continue its exploitation of the clay pit without endangering the road, and to this end it entered into negotiations with the Provincial Government to fix the conditions of this exploitation. Only after several rounds of negotiation the Provincial Government declared that it was not competent to fix such conditions. At the same time it failed to inform the company that it might be necessary to obtain a planning permission from the competent district authority at Schärding. It is submitted that at the relevant time it was at least unclear whether or not such a planning permission was needed at all. The Code of Trade then in force did not contain detailed regulations on this matter and the predominant practice still was not to require such a permission. This practice, however, has gradually changed and the 1973 Code of Trade finally introduced a clear legal basis. The events in the present case, however, took place before that time. The applicant company in fact applied for a planning permission in 1969, but the district authority did not take a decision. The company denies in this context that it failed to comply with certain conditions set by the authority. The reason why the district authority did not take a decision was that it wanted to await the outcome of the dispute concerning the above public way.

57. The applicant company has finally emphasized the importance of the consequences which the authorities' failure to take a decision in time had for the development of its production. It is claimed that the production of tiles which had been the basis for the profitability of the enterprise had to be discontinued because of the construction of the new road and the authorities' failure to fix the conditions for the continued exploitation of the clay pit. Without this production the enterprise was no longer economically viable and therefore was

forced to sell its plant. If the decision on the compensation had been taken earlier, the company's manager would at least have had the possibility to engage in other activities on a basis of certainty as to the means available to him. He was however left in uncertainty for many years and the profitability of his new business was gravely affected by the lack of capital which he still hoped to obtain through the proceedings. The continuation of the proceedings, and in particular the taking of objectively unnecessary evidence, also caused the company considerable costs which it would otherwise not have had. These costs include in particular the fees for the company's lawyer and the costs for private experts consulted by it in order to shake the findings of the court's official experts.

As to the alleged violation of Art. 13 of the Convention

58. The applicant company does not accept the Government's argument that the hierarchical appeal under section 78 of the Act on the Organisation of Courts of Law is an effective remedy within the meaning of Art. 13 of the Convention. In this respect it relies in particular on the Commission's decision on the admissibility of application No. 7464/76 where the Commission already found that a hierarchical appeal cannot be considered as an effective remedy for the purposes of Art. 26 of the Convention. The Government's further argument that the introduction of an administrative remedy would violate the constitutional principle of the separation of powers does not convince. The constitutional principles are not an end in themselves and they cannot be invoked to privilege the judge if a citizen is unable to secure his right to a judicial decision. The meaning of the above constitutional principle can only be to protect the judge against unjustified interferences with his function. It is furthermore incorrect that a devolution of the decision to another judge must necessarily lead to further delays. Such devolution, if legally possible, would have led to the intervention of only one further judge, whereas in the present state of the law there were five judges who successively had to deal with the case.

B. Submissions of the respondent Government

As to the alleged violation of Art. 6 (1) of the Convention

59. The Government did not oppose the admissibility of this complaint on the ground that it was manifestly ill-founded. They nevertheless consider that the complaint is not well-founded having regard to all the circumstances of the case.

60. In the Government's view the length of the proceedings can mainly be explained by the complexity of the case and the applicant company's own behaviour. Although they admit that some circumstances which were beyond the control of the court also contributed to the length of the procedure, they are of the opinion that the way in which the court handled the case can as such be justified.

61. The Government submit that the company's claim, which they

consider as grossly exaggerated, raised a number of difficult questions. This is already shown by the size of the file. In view of the importance of the claim and of the difficult issues before him the judge apparently wanted to base his eventual decision on well-established grounds. To this end, he was legally bound to examine ex officio all circumstances and conditions likely to influence the decision and to hear thereon the parties and other persons knowledgeable in the matter, including, if necessary, experts. It must not be overlooked that in most cases the facts crucial to the final decision only emerge clearly in the course of the proceedings, but in the interest of the speedy conduct of the case the court must take all the evidence which at first sight seems required to prepare the foundations for the eventual decision. Naturally, upon issuing the decision, it may be found that not all the evidence taken produced results which were essential to the decision.

62. The Government further submit that in justification of its claims the company made a number of assertions which it was absolutely necessary to verify, if for no other reason because of their ultimate financial implications. These assertions concerned the company's economic situation, in particular the importance of the expropriated land for the continuation of its operations, as well as the geological features of the expropriated land. The questions raised in this context could not have been evaluated without consulting experts. Since the Austrian law in principle imposes the costs of the proceedings on the expropriator, the company was in a position to ask for any evidence it considered desirable or useful without incurring much financial risk. In the light of this legal position, it appears only too understandable that the company made use of all facilities offered to it by procedural law in order to bolster the claim it thought it was entitled to. But it was also legitimate for the defendant, the Province of Upper Austria, to attempt through costs appeals to block the excessive use of existing facilities by the company, even if this in the nature of things entailed a further delay in the proceedings.

63. The appointment of the various experts was not only justified, it was also not opposed by the applicant company at the relevant time. The company, on the contrary, solicitated the consultation of at least some of these experts and asked for supplementary reports being made by them. It cannot be said that the relevant facts had clearly emerged in 1972 and that the continuation of the taking of evidence after this time was useless. The eventual judgment of the District Court shows that the court in fact based its findings to a large extent on the various expert opinions. The Regional Court's judgment did not expressly say that the opinions of the experts were "superfluous", it only stated that they had not been necessary under all the circumstances (nicht unbedingt notwendig).

64. As regards the individual experts, the Government admit that the first two of them gave their opinion at a rather late date. The court did not consider it necessary to put specific questions to them until it had heard the other evidence. This approach did not in itself entail further delays because the experts then submitted their opinion rather speedily. It is of course true that the court could have appointed other experts residing in Upper Austria itself. But after

the above two experts had already become familiar with the facts it would have been unreasonable to replace them by other persons. This would only have prolonged the procedure. It could not be foreseen at the time of their appointment that these experts would find it difficult to coordinate their dates with those agreeable to the geological expert, and the court considered it useful that these experts should be present at the court hearings.

65. The Government admit that the geological expert submitted his reports rather late. However, this was for reasons beyond the control of the court which thought that the opinions of this expert were indeed essential. The request for a supplement of his first opinion was necessary because the applicant company's private expert had criticised the geological expert's opinion at the court hearing on 23 January 1975. The delay in the submission of the reports was in part caused by the cost proceedings. The question of who should bear the very considerable costs had to be clarified once and for all by a decision of principle. It was therefore reasonable for the district court to submit the entire file to the courts dealing with the cost issues, and to await the outcome of these proceedings before going on with the case. If it had been decided that the company was to bear the costs it would probably have withdrawn certain claims.

66. The appointment of an expert for tile production methods was particularly difficult because there were only very few persons with a specific knowledge in this field. The applicant company's manager apparently considered himself as the only expert in Austria. When an expert was eventually found, the company itself raised objections against him. He did, however, submit his opinion rather speedily and the proceedings were in fact not delayed by his intervention.

67. As regards the various cost proceedings, the Government submit that they were taken by the Province of Upper Austria in exercise of its legitimate rights as a party to civil proceedings. The behaviour of the Province in this capacity in principle cannot entail any international responsibility of the Republic of Austria - it was a party to civil proceedings like any other private party. The Federal authorities also would not have had any possibility in internal law to influence the Province's behaviour in this respect. This behaviour in any event was not of a type that it could be considered as implementation of the Convention.

68. The Government regret the fact that in particular due to the illness of the first judge it was necessary for altogether five judges to deal successively with the case. They observe, however, that the reasons for this were beyond the control of the authorities.

As to the alleged violation of Art. 13 of the Convention

69. The Government first stress the accessory character of Art. 13. Since they are of the opinion that Art. 6 (1) was not violated in this case they consider that an issue under Art. 13 cannot arise.

70. Apart from this the Government refer to their arguments submitted in the Karrer case, application No. 7464/76. The Commission's attention was there drawn to the possibility of effectively countering

delays by filing a complaint with the appropriate supervisory authority (Dienstaufsichtsbeschwerde) under section 78 (1) of the Act on the Organisation of Courts-of-Law. While this hierarchical appeal may not constitute a remedy to be exhausted in accordance with Art. 26 of the Convention, the Government submit that it nevertheless meets the criteria of an effective remedy before a national authority in the sense of Art. 13. Most other countries of the Council of Europe do not have other remedies to speed proceedings up, e.g. provisions on the devolution of the court's competence to another tribunal, or provisions making it possible for other authorities to give instructions to the court. The passing of responsibility for determining the case to another person or body would entail that the parties would have to place a pending legal dispute before another judge or judicial body. Especially in difficult cases this would lead to further delay because the new judge or court would have to re-examine the case ob initio. Such a mechanism cannot therefore be regarded as an effective remedy in the sense of Art. 13. A hierarchical appeal, on the other hand, assumes that the case will remain in the hands of the competent judge and that the appropriate supervisory authority will only take steps to speed the matter up. Any further action by an administrative authority to influence the operation of the independent courts would be incompatible with the constitutional principle of the separation of the judiciary from the administration.

IV. OPINION OF THE COMMISSION

Points at issue

71. The Commission is called upon to express an opinion on the following questions:

A. Was the applicant company's civil right to the award of a compensation in respect of the expropriation of its land determined within a "reasonable time" as required by Art. 6 (1) of the Convention?

B. Was an effective remedy to a national authority (Art. 13 of the Convention) available to the applicant company to assert its right under Art. 6 (1) of the Convention to the determination of its civil rights within a reasonable time?

A As to the issue under Art. 6 (1) of the Convention

72. The Commission has already held in its decision on the admissibility of this case (cf. Annex I) that the fixing of the compensation to which an expropriation gives rise is a matter which concerns civil rights and obligations of the expropriated party. Art. 6 (1) is accordingly applicable to court proceedings in which the amount of this compensation is being determined, and this includes inter alia an obligation on the part of the competent authorities to determine the compensation in question within a "reasonable time".

73. The reasonableness of the length of proceedings coming within the scope of Art. 6 (1) must be assessed in each case according to the particular circumstances (cf. ECHR, judgment in the Buchholz case of 6 May 1981, Publications of the Court, Series A, Vol. 42, § 49). Relevant factors to be taken into account in civil cases are in particular: the general duty placed on the Contracting States to organise their legal systems so as to allow the courts to comply with the requirements of Art. 6 (1), including that of trial within a "reasonable time" (ibid. § 51); the type of the proceedings in question, the nature of the claim and its importance for the parties, the complexity of the case, and the conduct of both the applicant and of the competent authorities (ibid. § 49 with further references). The Commission will in turn deal with each of the above-mentioned elements.

74. The proceedings with which the Commission is here concerned in the first place are the non-contentious court proceedings taken by the applicant company under the Railway Expropriation Act before the District Court of Raab. It is however relevant in connection with the question of the reasonable length of these proceedings that they could only be taken after administrative proceedings which concerned not only the expropriation itself but also the fixing of the compensation at first instance. The examination of this issue - i.e. an issue which already involved a preliminary determination of the applicant

company's civil rights - thus began not with the commencement of the above court proceedings on 2 December 1969, but already when the above administrative proceedings were started, following an application by the Provincial Road Administration of 28 October 1968.

75. The fact that the judicial determination of a civil right or obligation is preceded by an administrative proceeding does not in itself give rise to a problem under Art. 6 (1) of the Convention provided that all the institutional guarantees laid down in this Article are respected in the subsequent court proceedings. Since both the administrative proceedings and the court proceedings concerned the determination of the same civil right the concept of "reasonable time" must be applied at both levels.

76. The administrative proceedings on compensation which took place before the Provincial Government lasted just one year until 2 October 1969. The Commission considers that the duration of these proceedings was in no way excessive. Even taking into account that the case involved a retroactive expropriation, regularising a situation which de facto had existed since 1965, and that a quick decision was required already for this reason, it cannot be overlooked that the applicant company's claim raised from the very outset difficult questions of fact and law which were further complicated by the new arguments relating to the alleged existence of a public way which emerged only at the hearing on 20 February 1969. The consultation of an expert was no doubt necessary, and so was the request for a supplement of his report in view of the above new facts. The expert submitted his opinion each time quite speedily, and the eventual administrative decision was also taken without undue delay after the completion of the file.

77. The court proceedings instituted by the applicant company took place before the District Court of Raab. They lasted from 2 December 1969 until 6 October 1977 at first instance. Much of this delay can be explained by organisational reasons: The court consisted of one judge only with a very small organisational basis. The competent judge was ill during prolonged periods and therefore had to be replaced by other judges. The judge subsequently appointed - after a vacancy of half a year - remained in the post for only 1 1/2 years and until a decision was given in this case it had been handled by altogether five judges. The Government while expressing regret with regard to this situation, seem to consider that it was a normal and unavoidable consequence of the organisational structure of these small courts.

78. The Commission does not underestimate the organisational difficulties with which the authorities are confronted in their task to provide at any time adequate staff for every single court, in particular where as in the present case a need arises to replace a judge for reasons of health during prolonged, but necessarily irregular periods of time. The Commission nevertheless finds it appropriate to observe that in carrying out this difficult task the competent authorities should generally have in mind the necessity to arrange for a reasonable

continuity of staff, in particular if it is known to them that a voluminous and difficult case has for a considerable time been pending before the court concerned and will unavoidably be further delayed by the assignment or appointment of a new person each time when a necessity for such measures arises. The staffing arrangements made for the District Court of Raab during the relevant time can indeed be criticised in several respects. The Commission cannot avoid the impression that the unusually frequent changes of the judge in this case led not only to an unnecessary repetition of certain acts of procedure, but also to a certain lack of consistency in the approach to the case, in particular as regards the taking of the expert evidence and the control of its relevancy for the decision on the legal issues involved.

79. The proceedings were governed by the Non-Contentious Proceedings Act 1854. Unlike the Code of Civil Procedure which is applicable in contentious court proceedings this Act provides (section 2 (2) No. 5) that the proceedings have to be conducted ex officio (Offizialmaxime). This means that the court must take the necessary procedural steps according to its own discretion. The pace of the proceedings is therefore in principle not dependent on applications made by the parties. The parties are nevertheless free to make requests e.g. for the taking of particular evidence, but the court must also have regard to circumstances which come to its knowledge from other sources (section 2 (2) No. 6). The court must in any event hear the parties, other persons with a knowledge of the matter, and, if necessary, experts on all facts and circumstances which are relevant to its decision (s. 2 (2) No. 5) without attaching too much importance to formalities (s. 2 (3) No. 10).

80. The Railway Expropriation Act lays down certain additional procedural rules. It provides in particular that all circumstances relevant to the determination of the compensation have to be established on the site and with consultation of one, and if the special circumstances so require, of two experts according to the principles of non-contentious proceedings (s. 24 (1)). It further provides for a possibility to challenge the competence of the experts (s. 24 (3)). Section 25 (1) provides that the court shall invite the experts after the inspection of the expropriated object to submit their opinion on the compensation to be paid, and paras. (2) to (5) of the same section lay down what particulars have to be taken into account in these expert opinions. Section 28 gives the expropriated party a possibility to specify its claims and the expropriating party to make an offer. The Railway Expropriation Act furthermore contains certain provisions (ss. 22 and 29) designed to favour a friendly settlement between the parties on the amount of the compensation. A basic principle is that the compensation shall always be paid before the expropriation is actually carried out (s. 33). The costs of the proceedings have to be borne by the expropriating party unless they are caused by an unjustified intervention of another party (s. 44).

81. Turning to the facts of the particular case the Commission observes that it no doubt involved a number of difficult and complex

issues of fact and law. The circumstance that the applicant company put forward a very high claim - a claim which the Government consider as having been unreasonable from the outset - does not, however, place it in a special category justifying a longer procedure than in another comparable case. Whatever the amount of the claim, the court was in any event required under the Railway Expropriation Act to consult one or more experts on the matter, and the real difficulty with which the court and the experts were confronted was not due to the amount, but to the nature of the applicant company's claim. It was alleged that the taking of the relatively small piece of land which had been expropriated was at the root of the company's total breakdown because it had thereby been deprived of its essential raw materials. The question whether or not this claim was well-founded in law depended essentially on the establishment of a link of causality between the expropriation and the company's loss of profit. For this purpose it was certainly justified to take voluminous and detailed evidence which necessarily required considerable time.

82. On the other hand there existed special reasons for the court in this case to speed up the proceedings as much as possible. The applicable expropriation law is based on the rule that compensation should in principle be paid before the expropriation is actually carried out. In the instant case, however, the expropriation had been pronounced retroactively, several years after the applicant company had in fact been deprived of its property. It was therefore impossible to comply with the above rule of the substantive law. Also the procedural situation between the parties was reversed for this reason, because in a normal case the expropriation decision cannot be executed before the compensation has been finally determined and it is therefore the expropriating party which will be interested in a quick decision whereas the expropriated party may feel tempted to use the compensation proceedings as a means to delay its actual loss of property. This mechanism did not work in the present case. Having regard to this imbalance in the parties' procedural position it was for the court to avoid any disadvantage which could result from this situation for the applicant company. It should at least have ensured a progress of the proceedings at the normal speed which is applied in other expropriation cases.

83. The Commission notes however that the court proceedings of first instance in the present case lasted from 2 December 1969 until 6 October 1977, that is more than 7 years and 10 months. Having regard to the circumstances of the case including the economic and social position of the applicant company and its manager, Mr. Hannak, the Commission finds that this length of the proceedings does not come within the normal range of what can be considered as reasonable in cases of this sort even taking into account the undeniable complexity of the particular facts. The fact that the appeal proceedings before the Regional Court and the Supreme Court, taken together, lasted only about 9 months (until 1 June 1978) and were thus conducted quite speedily could not make good the loss of time which had already occurred by the date of the District Court's decision.

84. One factor which might have held up the course of the proceedings in the initial phase is the civil litigation between the municipality of Andorf and the applicant company concerning the alleged existence of a public way cutting off the expropriated part of the company's land from its clay pit. Related to this dispute were administrative proceedings before the District Authority of Schärding aiming at the issue of a permission to work the clay in this part of the land. The question at issue in the above litigation was no doubt of considerable importance for the determination of the expropriation compensation although it cannot be said that it was directly prejudicial to it because the development of the proceedings on the public way showed that the municipality would have been prepared under certain conditions to give up its way property rights even if their continued legal existence could have been established. Consequently it was not necessary for the court to await the outcome of the contentious proceedings concerning this way which were also pending before it before going into the further issues of the compensation case. A certain delay resulting from the necessary co-ordination of the two proceedings can nevertheless be regarded as justified. As the court in fact took certain procedural decisions in the compensation case by appointing two experts in May 1970 and a further expert in January 1971 it cannot be said that the latter case was unduly retarded by the parallel civil litigation.

85. The development of the proceedings during the subsequent period was mainly characterised by the taking of various expert opinions. The consultation of one or two experts is imperative under the applicable provisions of the Railway Expropriation Act, it is clearly justified in this type of proceedings and therefore does not as such raise any problems under the Convention.

The court in the present case, however, appointed altogether four experts and it appears that in doing so it repeatedly failed to observe the standard of care which could be expected from it. The very time consuming and costly geological expert opinions, in effect, turned out to be almost completely redundant, and this was due to the court's failure to proceed in the logical order of the legal issues raised in the case. This was confirmed in the appeal decision of the Regional Court of Ried of 24 January 1978.

86. Apart from the non-observance of procedural economy in the general approach to the taking of the evidence there was also a considerable loss of time caused by the way in which the court selected, instructed and supervised the individual experts.

87. The first two experts were appointed in May 1970 at the court's own initiative. The court did not, however, immediately formulate the questions on which it wished to obtain these experts' opinion. It was only after six years and after they had participated in three court hearings (in November 1970, January 1975 and March 1976) that it was discovered that they were not qualified to deal with the applicant company's production methods but only with the question of the agricultural value of the land. The court then asked them to give their opinion on this issue. It may be true that at this moment it had

no other reasonable choice, but this is not a valid excuse for the earlier omissions.

As the experts' task was not discussed at all at the initial stage the parties cannot be blamed for having failed to raise objections against their qualification in accordance with s. 24 (3) of the Railway Expropriation Act. It is also hardly understandable why these experts were subsequently summoned to appear at two further court hearings, and why one of these hearings was even postponed in view of difficulties in their timing, without a precise idea as to their eventual role in the proceedings. The appointment of these two experts moreover led to grossly exaggerated costs and some further delay due to the parties' objections against the relevant cost decision.

Nevertheless it must be said despite the generally unsatisfactory approach of the court in dealing with these experts that the long interval between their appointment and instruction was principally due to the very long time which it took the court to obtain first a geological expert opinion (see below). Thereafter the experts submitted their report within a period of only two weeks from the receipt of their instructions (10 - 26 April 1976). In effect it was therefore only to a minor degree that the consultation of these two experts contributed to the total length of the proceedings.

88. As already stated above, the longest delays occurred through the consultation of the geological expert. Contrary to the Government's submissions his nomination was not exclusively due to the applicant company's procedural behaviour. In fact it was only because the Provincial Government challenged the correctness of the geological data underlying the private expert opinion submitted by the company that both parties agreed at the hearing in November 1970 that the expert in question should be consulted.

89. It is noteworthy that throughout the relevant period the court itself did not exercise a close control on the expert's task and the development of his activities. In the order for the appointment of the expert of January 1971 his tasks were circumscribed in a very summary fashion, and from then on almost everything was left to the expert's and the parties' discretion. Thus the court did not intervene when it turned out after the rejection of the Province's first cost appeal in March 1971 that the expert was absent from Austria during a considerable period of time, and this although the applicant company complained of the delay and eventually asked for a replacement of the expert by another person. The court was also not associated with the inspection of the site which the expert finally undertook together with the parties in December 1971. It was on this occasion that the expert's concrete intentions how to proceed were discussed. When a dispute on the scope of the expert's activities arose shortly afterwards, in February 1972, the court refused a hearing which had been requested by the Provincial Government with a view to reexamining the expert's role. It is true that this decision was taken in accordance with the wishes of the applicant company which had opposed the Provincial Government's move as an unjustified attempt to protract the proceedings, and it is also true that a postponement of the

drilling operations ordered by the expert was thereby prevented. However, by leaving unclarified the exact scope of the functions assigned to the expert, the court laid the ground not only for the expert's activities assuming wholly unreasonable dimensions, with unforeseeable cost consequences, but also for their taking a direction which subsequently required supplementation. The court moreover did not fix a time limit for the submission of the expert's report, nor otherwise urge him to complete his task at an early date. The expert's first report was therefore submitted only in June 1973, i.e. 2 1/2 years after his appointment, and more than 1 1/2 years after the actual start of his operations. The Commission considers that the time which elapsed until the submission of this first report was already excessive. Nevertheless the court took a further 1 1/2 years to arrange a hearing (in January 1975) at which this evidence was discussed.

90. The Government's argument that the above delays can be explained by a necessity to await the outcome of the proceedings which the Provincial Government had in the meantime taken against the relevant cost decisions cannot convince. The cost decisions in question have been taken after the event, and therefore it was already too late to prevent unjustified demands by the applicant company, or unreasonable decisions of the court in relation to the scope of the expert evidence by these proceedings.

91. At the hearing in January 1975 both parties put certain questions to the expert and it was agreed that he would deal with them in a supplementary report. The court again did not itself give detailed instructions to the expert, but left the formulation of the questions to the parties who were asked to submit them within a fixed time-limit. However, the court apparently did not set a deadline for the submission of the expert's supplementary report. It became very voluminous (600 pages) and was not completed before October 1975. While the time needed for its preparation was perhaps not disproportionate to the size of this report it nevertheless seems exaggerated that a mere supplement to a previously submitted comprehensive expert opinion should have assumed such a dimension. The Commission considers that with some closer control by the court the expert could have been compelled to submit a supplementary report of a reasonable size at a much earlier date. The time until the holding of the next hearing (March 1976) could thereby have been considerably shortened, and it could perhaps also have been avoided to ask the expert for yet further supplementary observations as it happened after this hearing in June 1976.

92. After the court hearing in March 1976 there was no further excessive delay caused by the work of any of the experts. All four experts, including the newly appointed expert for tile production methods, completed their task within a few months from this date. The last expert opinion, i.e. the one prepared by the expert on production methods, arrived at the court in early August 1976.

It was however not before October 1977 that the District Court pronounced its decision. After all the delays which had already occurred during the taking of the evidence the court thus took again

exceptionally long for preparing its decision (1 1/2 years since the last court hearing, more than a year since the submission of the last expert evidence).

93. As regards the applicant company's own procedural behaviour, the Commission finds that it generally did not include any action aimed at deliberately prolonging the proceedings. While it is true that the company tried to defend its legal point of view by all legitimate means, including in particular requests for the taking of certain expert evidence, it must also be observed that it repeatedly complained of the slow pace of the proceedings and that it indicated to the authorities its vital interest in the speedy termination of these proceedings.

94. The only remedy which would have been available to the company for this purpose would have been a "hierarchical appeal" (Dienstaufsichtsbeschwerde) under s. 78 of the Organisation-of-Courts Act. This provision reads as follows:

> "Complaints by parties about tribunals, presidents of courts and judicial officers on the grounds of denial or delay of the administration of justice may be lodged with the president of the immediately higher tribunal or if they are made against a member of a court, also with the president of that court. All complaints which are not manifestly ill-founded shall be communicated to the respective court or judicial officer together with an order to redress the complaint within a specified time and to submit a report thereon or to notify any obstacles preventing such measure to be taken. The order may be accompanied, if need be, by a warning of disciplinary measures."

95. The Commission recognises that it is the specific aim of this provision to give the parties to judicial proceedings a possibility of bringing to the attention of the hierarchical superiors of the competent judge any allegedly unjustified delays in the proceedings. As the Commission has already observed in connection with an earlier case (decision on the admissibility of application No. 7464/76, DR 14, p. 51) the hierarchical appeal does not however give the individual a right to a formal decision, nor to the exercise of its supervisory powers by the State. The applicant company in the present case cannot therefore be blamed for having failed to use this possibility. It is sufficient that the competent court, and the supervisory organs, were in fact aware of the long delay in the proceedings and of the applicant company's interest in a speedy decision, and that they nevertheless did not take any appropriate action in this respect.

96. In conclusion it can therefore be said that in the present case the non-contentious proceedings of first instance were at various stages delayed in an inappropriate way, without any fault of the applicant company itself. There were however no unreasonable delays in the prior administrative proceedings nor in the subsequent appeal proceedings.

B. As to the issue under Art. 13 of the Convention

97. Art. 13 of the Convention provides that "everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official

capacity."

98. According to the terms of the above provision, the right to an effective remedy before a national authority can be invoked by everyone who claims a violation of any of his Convention rights. This must in principle include the rights under Art. 6 of the Convention.

99. As already observed above, the only remedy which would have been available to the applicant company to speed up the proceedings in the present case is a "hierarchical appeal" (Dienstaufsichtsbeschwerde) under s. 78 of the Organisation-of-Courts Act. However, the Commission considers that it need not decide in the present case whether or not a hierarchical appeal is in general to be regarded as an effective remedy within the meaning of Art. 13 of the Convention. The applicant company in fact had the possibility of raising complaints against the unreasonable length of the proceedings determining its civil rights before the competent court itself, but it did not make use of a hierarchical appeal. The Commission has already found that its failure to do so did not invalidate its claim under Art. 6, but there is no sufficient basis to examine in addition the alleged ineffectivity of this remedy under Art. 13 of the Convention.

Conclusions

100. The Commission finds by a unanimous vote that the applicant company's right under Art. 6 (1) of the Convention to the determination of its civil rights within a reasonable time has been violated.

The Commission does not find it necessary to make a separate finding under Art. 13 of the Convention as the essence of the applicant company's complaint in the concrete case has already been dealt with under Art. 6.

Secretary to the Commission — President of the Commission

(H.C. KRUGER) — (C.A. NØRGAARD)