CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

COURT (PLENARY)

CASE OF SRAMEK v. AUSTRIA

(Application no. 8790/79)

JUDGMENT

STRASBOURG

22 October 1984

In the Sramek case*,

The European Court of Human Rights, taking its decision in plenary session in pursuance of Rule 50 of the Rules of Court** and composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. R. RYSSDAL,
Mr. J. CREMONA,
Mr. Thór VILHJÁLMSSON,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. E. GARCIA DE ENTERRIA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. C. RUSSO,
Mr. J. GERSING,

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

Having deliberated in private on 27 March and 24 September 1984,

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

PROCEDURE

1. The present case was referred to the Court, within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), by the European Commission of Human Rights ("the Commission") on 16 May 1983 and then by the Government of the Republic of Austria ("the Government") on 25 May 1983. The case originated in an application (no. 8790/79) against Austria lodged with the

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* The case is numbered 5/1983/61/95. 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 revised Rules of Court, which entered into force on 1 January 1983, are applicable to the present case.

Commission on 19 September 1979 under Article 25 (art. 25) by Mrs. Viera Sramek, a United States citizen.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Republic of Austria recognised the compulsory jurisdiction of the Court (Article 46) (art. 46), and the Government's application referred to Article 48 (art. 48). The purpose of the request and of the application was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 6 para. 1 (art. 6-1).

2. In response to the inquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that she wished to take part in the proceedings pending before the Court and designated the lawyer who would represent her (Rule 30).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. F. Matscher, the elected judge of Austrian nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 27 May 1983, the President drew by lot, in the presence of the Deputy Registrar, the names of the five other members, namely Mr. Thór Vilhjálmsson, Mrs. D. Bindschedler-Robert, Mr. D. Evrigenis, Sir Vincent Evans and Mr. C. Russo (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. Having assumed the office of President of the Chamber (Rule 21 para. 5) and having on each occasion consulted, through the Registrar, the Agent of the Government, the Delegate of the Commission and Mrs. Sramek's lawyer, Mr. Wiarda

- decided, on 13 June 1983, that there was no call for memorials to be filed (Rule 37 para. 1);

- directed, on 17 November, that the oral proceedings should open on 24 January 1984 (Rule 38).

The Registrar, acting on the President's instructions, requested the Commission to produce certain documents, which were received on 29 November 1983. On 13 and 14 December, the applicant filed her claims under Article 50 (art. 50) of the Convention.

On 17 December, the President granted the applicant's lawyer leave to use the German language (Rule 27 para. 3).

5. The hearings were held in public at the Human Rights Building, Strasbourg, on the appointed day. Immediately before they opened, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr. H. TÜRK, Legal Adviser
in the Ministry of Foreign Affairs, *Agent*,
Mr. M. MATZKA, Federal Chancellery,
Mr. G. LIEBL, Office

of the Government of the Tyrol, *Advisers*;
- for the Commission
Mr. F. ERMACORA, *Delegate*;
- for the applicant
Mr. E. PROKSCH, Rechtsanwalt, *Counsel*.

The Court heard addresses by Mr. Türk and Mr. Matzka for the Government, by Mr. Ermacora for the Commission and by Mr. Proksch for the applicant, as well as their replies to its questions. During the course of the hearings, the Government filed a document.

6. Following deliberations held on 26 January, the Chamber decided under Rule 50 of the Rules of Court to relinquish jurisdiction forthwith in favour of the plenary Court.

Having taken note of the agreement of the Agent of the Government and the concurring opinion of the Commission's Delegate and Mrs. Sramek's lawyer, the Court decided on 27 March that the proceedings should continue without resumption of the hearings (Rule 26).

7. Various documents were produced to the Court by the Government on 6 February, 27 March and 25 April, and by the applicant on 1 and 7 February and 28 March. The Government also replied on 27 March to two supplementary questions which the Registrar had addressed to them on the instructions of the President.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

8. The applicant, who is a United States citizen, lives in Munich in the Federal Republic of Germany.

Wishing to build a holiday residence in Hopfgarten, a village in the Austrian Tyrol, she approached, with the assistance of municipal officials, the owners of a plot of land which had until then been used for agricultural purposes. Sale negotiations began in 1971 and apparently led, in 1973, to an initial contract. One year later, Mrs. Sramek paid to the vendors the greater part of the agreed price. However, the definitive contract was not drawn up until 13 January 1977.

9. Under section 3 of the Tyrolean Real Property Transactions Act (Grundverkehrsgesetz) 1970, as amended by, inter alia, an Act of 28 November 1973 which came into force on 1 January 1974 ("the 1970/1973 Act"), the contract could not take effect unless it were approved by the local Real Property Transactions Authority (Grundverkehrsbehörde); in fact, it contained a clause which so provided.

The 1970/1973 Act applies to agricultural and forestry land and also to any land over which rights are acquired by, in particular, a natural person who does not possess Austrian nationality (section 1(1) and (2)).

10. The local Real Property Transactions Authority for Hopfgarten at the office of the Kitzbühel District Administration (Bezirkshauptmannschaft), to which the contract had been submitted, approved it on 7 March 1977; the decision (Bescheid) was dated 31 March.

11. On 6 April, the Real Property Transactions Officer (Landesgrundverkehrsreferent, "the Transactions Officer", see paragraph 23 below) at the Government Office of the Tyrol (Amt der Landesregierung) in Innsbruck exercised his right of appeal (Berufung) to the Regional Real Property Transactions Authority (Landesgrundverkehrsbehörde; section 13(3) of the 1970/1973 Act and see paragraphs 22-23 below). In his view, the contract fell foul of section 4(2) of the 1970/1973 Act.

Under that sub-section, where the purchaser of real property is a foreigner a contract of the kind in question can be approved only

> "if the acquisition of rights (Rechtserwerb) is not contrary to political (staatspolitisch), economic, social (sozialpolitisch) or cultural interests; such a conflict (Widerspruch) is deemed to exist, in particular, where,
>
> (a) having regard to the extent of existing foreign ownership or to the number of foreign owners, there is a risk of foreign domination (Uberfremdung) in the municipality or locality concerned,
>
> (b) ... ."

In the submission of the Transactions Officer, there were, in fact, already 110 foreign landowners in Hopfgarten and it could be seen from a series of decisions of the Regional Authority that this municipality was one of those where the danger of foreign domination was imminent. The contract in question was therefore contrary to social and economic interests within the meaning of the above-mentioned Act.

The applicant received a copy of the appeal but did not file any observations in reply.

12. The Government Office of the Tyrol was organised in a number of "groups" and each group comprised several "divisions". In the present case, the Transactions Officer was the director of group III; his secretariat was provided by one of the seven divisions in that group, namely division III b. 2.

13. On 3 June 1977, the Regional Real Property Transactions Authority at the Government Office of the Tyrol held a hearing. The Regional Authority sat in camera but the parties, namely the Transactions Officer and Mrs. Sramek, were present. The latter appeared in person, without the assistance of a lawyer.

In accordance with section 13(4), no. 1, of the 1970/1973 Act (see paragraph 24 below), the Regional Authority was composed as follows: the

elected mayor of a municipality in the Tyrol, who was a farmer experienced in real estate matters, as chairman; a judge of the Innsbruck Court of Appeal; a civil servant from division III b. 3 - one of the seven divisions in group III - of the Government Office, as rapporteur; the head of group III d; the director of the Regional Forestry Service, being the head of group III f; a farmer; and a lawyer.

The secretariat was provided by division III b. 3, to which the rapporteur belonged.

14. According to the minutes of the hearing, the rapporteur presented the facts and read out the expert opinions and observations received during the course of the investigation; the latter concerned, inter alia, the percentage of the parcels of land in Hopfgarten which was in foreign hands. The Transactions Officer then requested the Authority to uphold his appeal on the ground that as there was already a risk of foreign domination in Hopfgarten, the acquisition of the land in question would be contrary to social and political interests.

The applicant stated that she had signed the initial contract (Erstvertrag), which could not then be found, on 13 March 1973. As early as 23 January 1971, she had reached an agreement to purchase (Vertragsabsprachen) and had received assurances that all would go well. Since that time, she had come to Austria several times each year to settle the matter. Her husband was living with the family in Munich, where he worked, but would be retiring shortly. She declared that she herself was prepared to apply for Austrian nationality. Their permit to reside in the Federal Republic was temporary and she did not wish to return to the United States. She added that she had already made a first payment of 111,591 schillings. In conclusion, she requested that the contract be approved.

15. On the same day, that is 3 June 1977, the Regional Authority upheld the appeal: referring to the above-mentioned section 4(2)(a) of the 1970/1973 Act, it refused to approve the transfer of title. Its decision (Bescheid) was dated 16 June.

The Authority noted firstly that according to a statement from the municipality of Hopfgarten, which had not been challenged at the hearing, there were 110 foreign landowners in Hopfgarten, owning 5.6 hectares of land. There were 4,800 inhabitants and 1,100 families in the locality, though not all of them were landowners. The proportion of non-Austrian owners already exceeded 10 per cent and the extent of their holdings revealed a tendency towards foreign domination.

The Authority then recalled that for some years past it had been refusing to approve the transfer of land in Hopfgarten to foreigners since it had concluded that there was a risk of foreign domination in the area. It had to take account, inter alia, of the effects of its decision on third parties. According to the Authority, experience showed that the approval of a contract between a landowner and a foreigner led to an influx of other

foreigners who also wished to buy land in the locality. This caused prices to rise substantially, making it very difficult, if not impossible, for the indigenous population to find housing for themselves. For these reasons and in view of the scarcity of building plots in the Tyrol, very strict legal (gesetzlich) control had to be exercised: sales and purchases could normally be approved only if they contributed to the establishment or maintenance of an effective (leistungsfähig) agricultural population or if they served to satisfy domestic land needs (inländischer Bodenbedarf) for any kind of public or social purposes.

However, Mrs. Sramek was intending to use the land in question - at least for some time - for the construction of a holiday residence. Such an objective could easily be satisfied by the local hotel trade which, furthermore, was losing potential customers as a result of the construction of villas by foreigners. The acquisition contemplated was therefore prejudicial to economic and social interests and thus fell foul of, in particular, section 4(2)(a) of the 1970/1973 Act.

Lastly, the Regional Authority rejected the applicant's argument that she had already concluded a contract in 1973, that is at a time when American citizens were treated on an equal footing with Austrians by virtue of a bilateral treaty dating from 1928. The Authority emphasised firstly that it had to base itself on the factual and legal situation obtaining at the time when the decision had to be taken. In its view, the 1928 treaty had not established any equality between citizens of the two States in the area concerned. In the case in question, the transfer of ownership contemplated fell under Article 1 para. 2, as interpreted by the Ministry of Foreign Affairs in a 1973 memorandum which stated that the general regulations with regard to foreigners were applicable. Even if this interpretation had not been known at the time when the initial contract had allegedly been concluded (13 March 1973, see paragraph 14 above) - though this was not the case, since the above-mentioned memorandum dated from early 1973 -, Mrs. Sramek could not claim that she had acted in good faith: she was obliged under section 15 of the 1970/1973 Act to seek approval of the contract within two months and she alone bore the responsibility for not having done so.

16. On 22 August 1977, the applicant appealed to the Constitutional Court (Verfassungsgerichtshof) against the decision of the Regional Authority. She claimed that her right to inviolability of property and her right to a decision by the legally competent court (gesetzlicher Richter) had been infringed and relied on Article 5 of the Basic Law (Staatsgrundgesetz), Article 83 para. 2 of the Federal Constitution (Bundes-Verfassungsgesetz) and Article 6 (art. 6) of the Convention.

As concerns the first complaint, Mrs. Sramek alleged that the Regional Authority had applied section 4(2)(a) of the 1970/1973 Act in a misconceived (denkunmöglich) manner by adopting an illogical approach;

amongst other things, it had concluded that there was a danger of foreign domination in Hopfgarten without being in possession of detailed documentation, without defining the risk in question and without enquiring into the actual position in Hopfgarten regarding real property ownership.

She further contended that the Regional Authority was not an "independent tribunal" within the meaning of Article 6 (art. 6) of the Convention.

On these grounds, she requested the Constitutional Court to annul the decision under appeal or, in the alternative, to refer the case to the Administrative Court (Verwaltungsgerichtshof).

Mrs. Sramek supplemented her grounds of appeal on 9 March 1978. She asserted that her lawyer had not been able to consult the minutes of the Regional Authority's deliberations. She had, in fact, learnt that the Authority had not given its ruling on 3 June 1977, immediately after the closure of the hearing. She inferred from this that the decision complained of had not been taken by the legally competent court.

She requested the Constitutional Court to provide her lawyer with an opportunity of reading the above-mentioned minutes.

17. The Constitutional Court dismissed the appeal on 3 March 1979 (Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes, 1979, vol. 44, no. 8501).

It took the view that the Regional Authority was indeed a "tribunal" within the meaning of Article 6 (art. 6) of the Convention. It gave decisions which the executive could neither annul nor vary. As regards its members - who included a judge -, they had a degree of independence equal to that of judges. They were not bound by any instructions in the exercise of their functions and they could not be removed during their three-year term of office, except for reasons which would have precluded their appointment or if they were permanently prevented from carrying out their duties. The Constitutional Court accordingly held that Article 6 (art. 6) had not been violated.

The applicant's other ground of appeal was also rejected. Recalling that it had already held in another case, in 1974, that it was not misconceived to conclude that there was a danger of foreign domination in Hopfgarten, the Constitutional Court stated that it saw no reason to change its opinion in the instant case. As regards the facts noted by the Regional Authority, they had not been the subject of any dispute during the administrative proceedings.

The Constitutional Court sat in camera and gave judgment without holding a hearing.

18. Even before the above-mentioned judgment had been delivered, the plot in question was sold to an Austrian who, according to the Government, turned it back into grazing-land. The Regional Authority had taken the view that it could examine the new contract, provided that its decision was held in abeyance pending the outcome of the Constitutional Court's proceedings.

19. The Government stated that during the last ten years or so the Regional Authority had not approved any acquisition of real property in Hopfgarten by a foreigner. They supplied a list of thirteen refusals in the period between July 1973 and February 1983; according to the applicant, the list was insufficiently detailed to be conclusive.

II. RELEVANT LEGISLATION

20. Under Article 15 of the Federal Constitution, as interpreted by the Constitutional Court, the regulation of real property transactions is a matter coming within the jurisdiction of the Länder. Most of the Länder have enacted legislation whereby all contracts relating to agricultural or forestry land and also, in some cases, real property transactions with foreigners have to be approved by special authorities.

21. In the Tyrol (see paragraph 9 above), section 15(1) of the 1970/1973 Act obliges the purchaser to seek such approval within two months of the conclusion of the contract. No entry can be made in the land register until the transaction has been approved by the competent authority (section 1(4)). If approval is withheld, the acquisition is null and void (section 16(1)).

22. When the contract relates to agricultural or forestry land and irrespective of the purchaser's nationality, the first-instance authority is the Höfekommission ("Farm Commission") (section 13(1)(a)). The Farm Commission is established at the seat of the District Administration and has three members: the head of the District Administration, or a legally qualified (rechtskundig) official of that Administration appointed by him, as chairman; a person designated by the chamber of agriculture of the district; and another person, designated by the municipality in question, who is engaged in agriculture or forestry (section 9 of the Tyrolean Farms Act of 12 June 1900; Gesetz betreffend die besonderen Rechtsverhältnisse geschlossener Höfe).

The decisions of the Farm Commission are taken by majority vote (section 13(2) of the 1970/1973 Act); they are subject to appeal to the Regional Authority (see paragraph 24 below) by, amongst others, the parties to the contract or the Transactions Officer (section 13(3)).

23. The Transactions Officer, who is appointed for three years by the Government of the Tyrol, must be a person who is experienced in real property transaction matters (section 14).

His secretariat is provided by a division of the Office of the said Government.

24. If the case is referred to it, the Regional Real Property Transactions Authority established at the Office of the Land Government takes a decision as the second and final instance (section 13(4)). Its membership varies according to the subject-matter of the contract to be examined. In the case of

agricultural or forestry land - whether the buyer be Austrian or foreign - its voting members are (section 13(4), no. 1):

> "(a) a person experienced in real property transaction matters, who shall act as chairman;
>
> (b) a member of the judiciary (Richterstand);
>
> (c) a legally qualified civil servant from the Office of the Regional Government, with training in real property transaction matters, who shall act as rapporteur;
>
> (d) a senior civil servant from the Agricultural Services Department (technischer Agrardienst) of the Office of the Regional Government;
>
> (e) a senior civil servant from the Forestry Services Department (forsttechnischer Dienst);
>
> (f) an agricultural expert;
>
> (g) a lawyer (Rechtsanwalt or Notar)."

25. The above-cited provision, which was introduced by the Act of 28 November 1973 (see paragraph 9 above), replaced a text which the Constitutional Court had held to be incompatible with Article 6 (art. 6) of the Convention, as interpreted by the European Court in its Ringeisen judgment of 16 July 1971 (Series A no. 13). The Constitutional Court had ruled that the Regional Authority, as it was constituted under the original Act of 1970, could not be considered an "independent and impartial" tribunal because its members included, as chairman, one of the members of the Government of the Tyrol (section 13(1), no. 1(a), former version). Furthermore, so the Constitutional Court held, the Act did not fix the duration of the members' term of office, conferred on the said Government the power of appointing the members (save for a judge, who was appointed by the Federal Minister of Justice) and did not lay down the circumstances in which members might be removed from office (judgment of 29 June 1973, Erkenntnisse und Beschlüsse des Verfassungsgerichtshofes, 1973, vol. 38, no. 7099).

26. Following this judgment, the Tyrolean legislature amended, by the same Act of 28 November 1973, the provisions in section 13 concerning, inter alia, exercise of the office of member of the Regional Authority. Sub-sections 5 to 13 of that section read as follows:

> "(5) The member of the Regional Real Property Transactions Authority appointed from the judiciary (sub-section 4, no. 1 (b)), shall be appointed by the Federal Minister of Justice and the remaining members, by the Regional Government. For each member a substitute member shall be similarly appointed.
>
> (6) Only Austrian citizens who have reached the age of 25 years and are in full possession of their legal rights shall be eligible for appointment as members or

substitute members. Persons who by reason of a criminal conviction are disqualified from jury service or from acting as lay assessors shall be ineligible.

(7) Members and substitute members shall hold office for three years. Members or substitute members who are appointed within the general three-year term of office shall cease to hold office at the end of that term. Re-appointment is possible. Members and substitute members shall continue to perform their duties after expiry of their term of office until they have been replaced.

(8) The quorum of the Regional Real Property Transactions Authority shall be constituted if the chairman, the member appointed from the judiciary, the rapporteur and at least two other members are present. Decisions shall be taken by majority vote. If the votes are equally divided, the chairman shall have a casting vote. Abstention shall count as a negative vote.

(9) In the performance of their duties the members of the Regional Real Property Transactions Authority shall not be subject to any instructions; the executive may neither annul nor vary their decisions.

(10) The details of the Real Property Transactions Authorities' procedure (such as the convening of sittings, summoning of substitute members, conduct of voting, keeping of minutes and signing of decisions) shall be laid down by the Regional Government in rules of procedure (Geschäftsordnung) for the said Authorities.

(11) Unless they are civil servants, members of the Real Property Transactions Authorities shall receive for their work remuneration and a travel allowance, the amount of which shall be laid down in regulations made by the Regional Government.

(12) A member or substitute member shall be removed from office, before the end of his term of office, if:

(a) circumstances intervene which would have made him ineligible for appointment;

(b) the regular performance of his duties becomes per80

manently impossible.

(13) If an official of a "territorial" authority (Gebietskörperschaft) is suspended from duty under the regulations governing his employment, he shall cease to exercise his functions as a member or substitute member of a Real Property Transactions Authority for the duration of the suspension."

Sub-section (9), cited above, corresponds to Article 20 para. 2 of the Constitution, which reads:

"If a Federal or a Land Act makes provision for the last-instance decision to be given by a collegiate body at least one of whose members is a judge and whose decisions cannot be annulled or varied by the executive, the other members of that body shall also not be subject to any instructions."

Article 20 para. 3 of the Federal Constitution obliges the members of the Regional Authority not to disclose facts which have come to their

knowledge in the exercise of their functions, if the interests of a "territorial" authority or of the parties so require (Amtsverschwiegenheit).

27. Procedure before the Real Property Transactions Authorities is governed by the General Administrative Procedure Act 1950 (Allgemeines Verwaltungsverfahrensgesetz).

The parties are entitled to consult the case-file (section 17) and must be given an opportunity of presenting their arguments (section 37). The competent authority may decide to hold a hearing (section 39(2)), which will not take place in public; the parties have the right to be heard (rechtliches Gehör) and, inter alia, to adduce their arguments and evidence and comment on facts presented and submissions made by other persons appearing, witnesses or experts (section 43(3)).

In certain circumstances which may give reason to doubt his impartiality, the civil servant concerned must arrange to be replaced (section 7).

28. By an order (Verordnung) of 13 September 1966, the Government of the Tyrol issued rules of procedure for the Real Property Transactions Authorities.

Under Article 3 para. 1, the Authorities shall deliberate and vote in the absence of the parties, if appropriate after oral hearings. The deliberations shall be recorded in minutes to which the right to consult the case-file (Akteneinsicht), guaranteed by Article 17 of the General Administrative Procedure Act, does not extend (Article 3 para. 3). The Authorities' resolutions (Beschlüsse) must be recorded, but may be altered as long as they remain unpublished (nicht nach aussen in Erscheinung getreten) (Article 3 para. 4). Their decisions (Bescheide), which are to be reached on the basis of those resolutions (Article 4 para. 1), shall be given in writing but may in case of urgency be given orally by the chairman (Article 4 para. 2).

Before the Regional Real Property Transactions Authority, the rapporteur shall, after setting out and commenting on the results of the investigation (Ermittlungsverfahren), present conclusions (Antrag); those who wish to propose alternative conclusions (Gegen- oder Abänderungsanträge) shall give reasons for them (Article 9 para. 2). The chairman shall decide the order in which voting on the conclusions is to take place (Article 9 para. 3).

29. Decisions of a Regional Authority may be challenged before the Constitutional Court but not before the Administrative Court (Verwaltungsgerichtshof; Articles 133 para. 4 and 144 of the Federal Constitution).

PROCEEDINGS BEFORE THE COMMISSION

30. In her application of 19 September 1979 to the Commission (no. 8790/79), Mrs. Sramek alleged that she had not received a fair and public hearing by an independent and impartial tribunal established by law; she relied on Article 6 para. 1 (art. 6-1) of the Convention.

31. On 4 March 1982, the Commission declared the application admissible. In its report of 8 December 1982 (Article 31) (art. 31), the Commission expressed the opinion, by eleven votes to one, that there had been a violation of Article 6 para. 1 (art. 6-1).

The full text of the Commission's opinion and of the separate opinion contained in the report is reproduced as an annex to the present judgment*.

FINAL SUBMISSIONS PRESENTED BY THE GOVERNMENT

32. At the close of the hearings on 24 January 1984, the Government requested the Court "to hold that in the present case the provisions of paragraph 1 of Article 6 (art. 6-1) of the Convention ... were not violated and that, as a consequence, the facts underlying the dispute do not indicate any breach by the Republic of Austria of its obligations under the Convention".

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

33. Article 6 para. 1 (art. 6-1) of the Convention reads as follows:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

In the submission of the applicant, the Regional Real Property Transactions Authority was not an "independent and impartial tribunal"; in addition, it had not afforded her a "fair" and "public" hearing. The Government disputed all these contentions; the Commission, for its part, upheld them in so far as they related to an absence of independence and impartiality.

A. Applicability of Article 6 para. 1 (art. 6-1)

34. Having purchased a plot of land, Mrs. Sramek was entitled to have the sale contract approved if, as she maintained, it satisfied the statutory conditions. An unfavourable decision in the matter would - and did - mean that the transaction was null and void. Accordingly, the outcome of the proceedings at issue was "decisive for private rights and obligations" (see the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 39, para. 94), with the result that Article 6 para. 1 (art. 6-1) was applicable in the present case; this was, in fact, accepted by the Government.

35. Mrs. Sramek's case came before three bodies, namely the District Real Property Transactions Authority for Hopfgarten, then the Regional Real Property Transactions Authority and finally the Constitutional Court.

The Hopfgarten District Authority is not relevant for the present purposes: it had approved the contract and was not the subject of any complaint on the part of the applicant.

The Constitutional Court was not called upon to determine the actual merits of the dispute ("contestation"), but solely to review the Regional Authority's decision for conformity with constitutional law (see, mutatis mutandis, the Buchholz judgment of 6 May 1981, Series A no. 42, p. 15, para. 48).

The question which has to be decided, therefore, is whether the requirements of Article 6 para. 1 (art. 6-1) of the Convention were met by the Regional Authority.

B. Compliance with Article 6 para. 1 (art. 6-1)

1. "Tribunal established by law"

36. Under Austrian law, the Regional Authority is not classified as one of the courts of the respondent State. For the purposes of Article 6 (art. 6), however, it comes within the concept of a "tribunal" in the substantive sense of this expression: its function is to determine matters within its competence on the basis of rules of law, following proceedings conducted in a prescribed manner (see paragraph 71 of the Commission's report and, mutatis mutandis, the Campbell and Fell judgment of 28 June 1984, Series A no. 80, p. 39, para. 76).

The Regional Authority is also a tribunal "established by law", that is to say, by the 1970/1973 Act.

2. "Independent and impartial tribunal"

37. In addition to the foregoing, it has to be shown that the Regional Authority exhibits the independence and impartiality which are required by Article 6 para. 1 (art. 6-1).

In the submission of Mrs. Sramek, this condition was not satisfied on account, inter alia, of the composition of the Authority and the manner of appointment of its members; of the position of the Transactions Officer - representing the Land Government, in their capacity as a party to the case - vis-à-vis the civil-servant members; of the brevity of the members' term of office (three years); and of the three-fold fact that the Authority has its headquarters in the Office of the Land Government, that the Land Government lays down the Authority's rules of procedure and that the Land Government remunerates the Authority's members.

The Government compared the Tyrolean Regional Authority with the Upper Austrian Regional Real Property Transactions Commission. They contended that the independence of the former was even more extensive than that of the latter, a body which had been recognised by the Court to be independent in its above-mentioned Ringeisen judgment (Series A no. 13, p. 39, para. 95). According to the Government, this was shown by the composition of the Authority; by the length of its members' term of office; by the fact that they cannot be removed, save for reasons laid down by statute; by the rules expressly forbidding the giving of instructions to the members; and by the absence of any "functional and organisational link" between the Transactions Officer and the civil-servant members.

In the Commission's view, the present case gave rise to more issues of principle than did the Ringeisen case. The Commission considered that certain of the factors relied on by the Government were not without relevance, but nevertheless did not ensure full independence and impartiality of the members of the Regional Authority. In particular, the composition of the Regional Authority and the position of the Transactions Officer vis-à-vis the rapporteur prevented the Regional Authority from being regarded as sufficiently independent of the executive and of the appellant.

38. In the opinion of the Court, the Tyrolean Act, as modified following a judgment by the Constitutional Court (see paragraphs 25-26 above), satisfies the requirements of Article 6 (art. 6) as regards the length of the term of office of the members of the Regional Authority and the - limited - possibility of removing them. Again, the procedure applicable under the General Administrative Procedure Act 1950 involves the participation of both parties (revêt un caractère contradictoire) (see paragraph 27 above). Although the power of appointing the members - other than the judge - is conferred on the Land Government, this does not suffice, of itself, to give cause to doubt the members' independence and impartiality: they are appointed to sit in an individual capacity and the law prohibits their being given instructions by the executive (see paragraph 26 above).

39. As far as the membership of the "tribunal" was concerned, the Regional Authority was composed of a farmer, who was the mayor - elected by universal suffrage - of a municipality in the Tyrol, as chairman; a judge of the Innsbruck Court of Appeal; another farmer, sitting as an agricultural expert; a lawyer; and three civil servants from the Office of the Land Government, one of whom acted as rapporteur (see paragraphs 13 and 24 above).

40. No question arises as to the independence and impartiality of the judge. The same applies to the agricultural expert. As for the lawyer, the applicant argued that he might on occasion have received instructions from the Land Government if he had been engaged to represent them in legal proceedings. However, even if he had - an eventuality that can in fact be discounted since it does not appear to have materialised in the present case - , his impartiality could not be called in question on that score alone.

Neither is there any problem as regards the fact that the person who, by reason of his experience in real estate matters, acted as chairman of the Regional Authority happened to be a mayor. It is true that the municipalities in Austria exercise their powers - whether in their own right or under delegation - subject to the supervision of the Land or the Federation (see Articles 119 and 119 (a) of the Constitution and paragraph 77 in fine of the Commission's report); however, it cannot be concluded from this that their mayors do not act independently in matters which - like those involved here - fall outside the ambit of those powers.

41. There remain the three civil servants from the Office of the Land Government who, in accordance with the 1970/1973 Act (see paragraph 24 above), were, and had to be, included amongst the members of the Regional Authority.

In considering their position, it has to be recalled that it was held in the above-mentioned Ringeisen judgment that the presence of civil servants on the Upper Austrian Regional Commission was compatible with the Convention (Series A no. 13, pp. 39-40, paras. 95-97). Furthermore, in proceedings of the kind at issue the Government of the Tyrol are prevented by law from giving their civil servants instructions on carrying out their judicial functions.

However, the present case is distinguishable from the Ringeisen case in that the Land Government, represented by the Transactions Officer, acquired the status of a party when they appealed to the Regional Authority against the first-instance decision in Mrs. Sramek's favour, and in that one of the three civil servants in question had the Transactions Officer as his hierarchical superior (see paragraph 12 above). That civil servant occupied a key position within the Authority: as rapporteur, he had to set out and comment on the results of the investigation and then to present conclusions; the secretariat was provided by his department, namely division III b. 3 (see paragraphs 13 in fine, 14 and 28 in fine above).

As was pointed out by the Government, the Transactions Officer could not take advantage of his hierarchical position to give to the rapporteur instructions to be followed in the handling of cases (see paragraph 26 above), and there is nothing to indicate that he did so on the present occasion.

42. Nonetheless, the Court cannot confine itself to looking at the consequences which the subordinate status of the rapporteur vis-à-vis the Transactions Officer might have had as a matter of fact. In order to determine whether a tribunal can be considered to be independent as required by Article 6 (art. 6), appearances may also be of importance (see, mutatis mutandis, the above-mentioned Campbell and Fell judgment, Series A no. 80, pp. 39-40, para. 78, and the Piersack judgment of 1 October 1982, Series A no. 53, pp. 14-15, para. 30).

Where, as in the present case, a tribunal's members include a person who is in a subordinate position, in terms of his duties and the organisation of his service, vis-à-vis one of the parties, litigants may entertain a legitimate doubt about that person's independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society (see, mutatis mutandis, the above-mentioned Piersack judgment, Series A no. 53, pp. 14-15, para. 30).

There was accordingly a violation of Article 6 para. 1 (art. 6-1).

3. Fair and public trial

43. The applicant further contended that she did not receive a fair hearing and objected to the fact that the proceedings were not conducted in public.

The conclusion in the preceding paragraph renders it unnecessary for the Court to rule on these complaints (see paragraph 83 of the Commission's report and, mutatis mutandis, the above-mentioned Piersack judgment, p. 16, para. 33).

II. APPLICATION OF ARTICLE 50 (art. 51)

44. Under Article 50 (art. 50) of the Convention,

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

45. The applicant claimed, for pecuniary loss, compensation which she quantified provisionally at 1,000,000 schillings. She alleged that she would have to pay 1,200,000 schillings to buy a similar plot of land today, as compared with 120,000 schillings at the time in question, and that, taking

into account the interest which she could have earned on the latter sum in the meantime, she had suffered a loss of one million schillings. Moreover, she added, the construction of the residence which she had had in mind would now cost her 490,000 schillings more than formerly and her inability to implement this project had caused her a loss of income of at least 500,000 schillings. However, she made no immediate claim for the last two amounts.

Mrs. Sramek also sought reimbursement of 100,000 schillings for legal costs before the Austrian authorities - notably the Real Property Transactions Authorities of the Tyrol, the Ministry of Foreign Affairs and the Constitutional Court - and the Strasbourg institutions; according to her, she had actually spent more than this.

The Government submitted, in essence, that the applicant had not suffered any pecuniary loss; they did not comment on the claim for legal costs. The Commission, for its part, expressed no opinion on any of the claims.

46. The Court considers that the question is ready for decision (Rule 53 para. 1, first sentence, of the Rules of Court).

As far as material damage is concerned, Mrs. Sramek's claims proceed solely from the assumption that if the Regional Authority had constituted an "independent and impartial tribunal" within the meaning of Article 6 para. 1 (art. 6-1), it would have approved the contract of sale. However, the evidence in the file does not warrant the conclusion that had it been differently composed the Regional Authority would have arrived at a decision in Mrs. Sramek's favour and it is not for the Court to inquire whether, under Austrian law, the Regional Authority ought to have given such a decision. The applicant's allegations as to pecuniary loss cannot therefore be upheld.

On the other hand, the Court allows the claims for legal costs, which were not contested by the Government: it sees no reason to doubt that they satisfy the criteria which emerge from its case-law on the subject (see, amongst other authorities, mutatis mutandis, the Zimmermann and Steiner judgment of 13 July 1983, Series A no. 66, pp. 14-15, paras. 36 and 38).

FOR THESE REASONS, THE COURT

1. Holds by thirteen votes to two that there has been a violation of Article 6 para. 1 (art. 6-1);

2. Holds unanimously that the respondent State is to pay to the applicant one hundred thousand (100,000) schillings for costs and expenses;
3. Rejects by fourteen votes to one the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing at the Human Rights Building, Strasbourg, on 22 October 1984.

Gérard WIARDA
President

Marc-André EISSEN
Registrar

The separate opinions of the following judges are annexed to the present judgment in accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 52 para. 2 of the Rules of Court:

- concurring opinion of Mr. Ganshof van der Meersch and Mr. Evrigenis;

- dissenting opinion of Mr. Garcia de Enterria;

- dissenting opinion of Sir Vincent Evans and Mr. Gersing.

G.W.
M.-A.E

SEPARATE CONCURRING OPINION OF JUDGES GANSHOF VAN DER MEERSCH AND EVRIGENIS

(Translation)

We have voted with the majority of our colleagues for the violation of Article 6 para. 1 (art. 6-1) of the Convention and we concur with the reasoning with regard to the position of the rapporteur in the Regional Authority (see the judgment, paras. 41 and 42). We nonetheless consider that, as far as the requirements of the Regional Authority's independence and impartiality as a "tribunal" within the meaning of Article 6 (art. 6) of the Convention are concerned, the finding of a violation should be cumulatively grounded on the presence on the Regional Authority of three civil servants from the governmental services of the Land dealing with agricultural and forestry real property matters. Since these services were responsible for defining and implementing government policy in the area in which the disputed case arose, it would be hardly compatible with the principles of judicial independence and impartiality to confer on officials from these very services the task of deciding disputes where the Government was a party and its policies were subject to challenge. To our mind, it would be misconceived to require persons forming part of an apparatus responsible for implementing a given policy, subsequently to act, in conditions of conflicting public duties, as independent and impartial judges in proceedings brought by a litigant to contest the basis in law of the application of that policy in his or her case. In such circumstances, there is an institutional lack of independence and impartiality. A system of this kind, if it were made generally applicable to the whole of the domain covered by Article 6 (art. 6), would be bound to have particularly negative consequences for the guarantees which, by virtue of the Convention, attach to both civil and criminal proceedings.

Furthermore, it should not be overlooked that the position occupied by these three civil servants within the Regional Authority is reinforced by a series of other factors. Thus, under the terms of the Act, one of these civil servants has conferred on him the task of rapporteur to the Regional Authority and the report that he is required to present need not necessarily be reasoned (see the judgment, para. 28); the votes of these three civil servants could possibly have sufficed for the taking of a decision (see the judgment, para. 26); the substantive rules of law applicable in the present case (see the judgment, para. 11) are extremely general provisions with a strong political connotation, leaving great latitude to the bodies responsible for their application. These special aspects of legal context, added to the numerical factor, ensure a predominant role for the civil-servant members of the Regional Authority.

Finally, the presence in force of civil servants belonging to the governmental services whose policies are being challenged in legal actions such as the present one allows a clear distinction to be drawn between the instant case and the Ringeisen case (see the judgment of 16 July 1971, especially para. 97) where in this respect the facts before the Court were not the same or even similar.

DISSENTING OPINION OF JUDGE GARCIA DE ENTERRIA

(Translation)

My disagreement with the majority, which I regret, concerns the final conclusion of the judgment, namely that concerning (save in regard to costs and expenses) the claim for compensation submitted by the applicant under Article 50 (art. 50) of the Convention.

The Court did not uphold the arguments put forward by Mrs. Sramek in this connection. For my part, whilst I also find misconceived the reasoning and the assessment of damages relied on by the applicant (to the effect that a properly constituted "tribunal" would certainly have authorised acquisition of the land she was intending to purchase), I do not consider that it would have been inappropriate to afford "just satisfaction".

As from the moment when the Regional Authority refused her the approval sought until the moment when execution of the present judgment leads to the constitution of a "tribunal" in conformity with the Convention, the applicant will have been deprived of a fundamental right, that is, the right to a fair hearing. Execution of the judgment should therefore restore this right to her, but the Court cannot prejudge what would be the outcome of the exercise of this right. The right to a fair trial is aimed specifically at securing the proper conduct of proceedings, but does not, of course, guarantee any particular result as regards the merits of the case.

The possibility of a favourable outcome of the proceedings obviously cannot ground entitlement to compensation, but neither can speculation as to this possibility be relied on to deny such entitlement. The prejudice sustained by the applicant is that she was deprived of the formal right to a proper trial of her action over a long period of time. The Court has taken the view that this kind of damage was capable of giving rise to compensation in various cases relating to unreasonable length of civil proceedings (see, in particular, the König judgment of 10 March 1980, Series A no. 36, pp. 16-17, para. 19, and the Guincho judgment of 10 July 1984, Series A no. 81, p. 18, para. 44). And in the instant case there certainly has occurred a delay.

The Court would not have been straying outside the limits of its jurisdiction had it awarded Mrs. Sramek compensation for this concrete and ascertainable damage, provided that the award had not been greater than the amount claimed. This, to my mind, is what should have been done in the present case, in the form of a decision affording to the applicant a lump sum, which I consider unnecessary to quantify.

DISSENTING OPINION OF JUDGES SIR VINCENT EVANS AND GERSING

1. We regret that we are unable to agree with the majority of the Court that there has been a violation of the Convention in the present case. In our view, this case is not distinguishable from the Ringeisen case (Series A no. 13) to such an extent that we find it justifiable to arrive at a different decision on the question whether the Regional Real Property Transactions Authority was an independent and impartial tribunal as required by Article 6 para. 1 (art. 6-1).

2. In paragraph 41 of its judgment, the Court first points out that the Transactions Officer represented the Land Government which thus acquired the status of a party during the appeal proceedings. In the Upper Austrian system (which was the subject of the Court's judgment in the Ringeisen case), the right of appeal is conferred on the Regional Chamber of Agriculture (section 20(3) of the Agricultural and Forestry Real Property Transactions (Approval) Act 1954, as subsequently amended by an Act of 1 July 1960). The Austrian Government submitted during the oral proceedings - and this was not contested by the applicant - that the Chamber is a body established under public law and that it can in a certain sense also be considered to be part of the public administration. At any rate, one may presume that both in Upper Austria and in the Tyrol the right of appeal is conferred on representatives of the public interest. The difference between the two systems in this respect seems therefore to be of a mainly formal nature.

The second argument of the majority is that the Transactions Officer as the head of group III in the Government Office of the Tyrol was the hierarchical superior of the rapporteur who served in division III b.3 which also provided the secretariat for the Regional Real Property Transactions Authority. However, section 13 (9) of the Tyrolean Real Property Transactions Act 1970/1973 expressly provides that in the performance of their duties the members of the Regional Authority shall not be subject to any instructions, and this provision reflects Article 20 para. 2 of the Austrian Constitution itself (paragraph 26 of the judgment). Moreover, there is nothing to indicate that the Transactions Officer, contrary to these statutory and constitutional injunctions, abused his position to influence the rapporteur in Mrs. Sramek's case. Nevertheless, the majority finds that the mere appearance of such a possibility is sufficient to constitute a violation of Article 6 para. 1 (art. 6-1).

In our view, the following considerations should also be taken into account. As explained by the Government in reply to a question put by the Court, the Transactions Officer, even in his capacity as head of group III, had no competence to intervene in decision-making within the jurisdiction of the division to which the rapporteur belonged. Furthermore, the

rapporteur was only one of the seven members of the Regional Authority - or one out of five of the members constituting the quorum. Two more members of the Authority were civil servants from the office of the Land Government, and they could - in theory - form a majority together with the rapporteur if the decision were taken by the quorum of five members, but they had no hierarchical relationship with the Transactions Officer, and, as stated by the majority, it was held in the Ringeisen case that the presence of civil servants on the Authority was compatible with the Convention.

The situation in the Piersack case, to which the Court refers in paragraph 42 of the judgment, was in our opinion by no means comparable. In that case, the problem was that the presiding judge of the Assize Court before which the trial took place had been the head of a section of the public prosecutor's department responsible for the prosecution instituted against Mr. Piersack and, as the hierarchical superior of the deputies in charge of the file, he had been entitled to intervene in the proceedings leading to Mr. Piersack's prosecution (Series A no. 53, pp. 15-16, para. 31). This is very far from the situation in the present case where there was no legal possibility for the Transactions Officer to impose his views on the rapporteur.

3. We cannot, for the above reasons, subscribe to the conclusion that the Regional Authority did not offer sufficient guarantees of independence.

4. There is nothing in the minutes of the hearing or in the other facts presented to the Court to indicate that the applicant did not receive a fair hearing and, as to the question of publicity, we agree with the Court's reasoning in the Ringeisen case that the reservation in this respect made by Austria on ratification of the Convention a fortiori covered proceedings before the Regional Authority.

5. In conclusion, therefore, we do not find that there has been a violation of Article 6 para. 1 (art. 6-1) in the present case.