



**The Non-compliance of the International Labour
Organisation Administrative Tribunal with the
Requirements of Article 6 ECHR**

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Keith J. Webb
Arthur van Neck

Supervised by
Joost P.J. van Wielink, LL.M.

AMSTERDAM INTERNATIONAL LAW CLINIC



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INTRODUCTION

This report has been requested by the Staff Union of the European Patent Office (SUEPO). This is the third report by the Amsterdam Law Clinic in respect of the International Labour Organisation's Administrative tribunal.¹

The present report aims at establishing clear and serious breaches by the International Labour Organization Administrative Tribunal (ILOAT) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR or Convention) and of the case law of the European Court of Human Rights (ECtHR). For that purpose the dispute settlement mechanism of the European Patent Organisation (EPO)² will be assessed, the EPO having recognised the jurisdiction of the ILOAT.

International organisations, such as the International Labour Organisation (ILO), in principle enjoy immunity from jurisdiction of national courts, either as member of the organisation or as hosts to the offices of the organisation. Nevertheless, States parties to the ECHR remain responsible for the sovereignty transferred to international organisations, as will be seen in Chapter 2. In this logic immunity of international organisations is limited by the responsibility under the ECHR of their member States. States are bound by the duty to safeguard reasonable alternative means to protect the rights guaranteed by the Convention and, only if this duty is complied with immunity of international organisation can be lawfully invoked.³

Only if the requirement of the reasonable alternative means can be seen as fully incorporating the minimum requirements set out by the ECtHR, the compliance with these requirements can be used to support the maintenance of immunity for an international organisation. However for practical reasons this report assumes, that the “notion of reasonable alternative means” encompasses primarily the requirements derived from article 6 ECHR.

¹ Vincent A. Böhre, Sophia E. von Dewall, LL.M., Ingeborg J. Middel, Cassandra E. Steer, The (Non-) Application of International Law by the ILO Administrative tribunal: Possible legal avenues for establishing responsibility, Amsterdam International Law Clinic, July 2004; Nicole E. Kuijter, Susan L. Park M.I.A., Judicial Independence of the ILO Administrative Tribunal: The potential for reform, Amsterdam International Law Clinic, April 2005.

² Service Regulations of the European Patent Office (Codex)

³ *Infra*, See 2.4, p. 10-11.



Therefore, the procedures and the functioning of the employment dispute settlement organs of the international organisations studied, will be assessed only in the light of article 6 ECHR.

To determine whether the requirements of public hearings are fulfilled under the ECHR, account must be taken of the entire proceedings. The entire proceedings have to provide for reasonable alternative means in order to justify immunity pursuant to the requirements of the ECtHR. The question whether the ILOAT procedure fulfils the requirements of article 6 ECHR is highly dependent on upstream procedure i.e. dispute settlement mechanism within the organisation members of the ILOAT. This report will argue that the dispute settlement mechanisms of the EPO, and those of the ILOAT statute and the ILOAT itself do not constitute “reasonable alternative means” and therefore that member states, party to the ECHR, can be held responsible for the breaches.

Responsibility of the member states is based on the lack of securing adequate legal avenues to protect the rights guaranteed by the Convention when transferring powers to international organisations, which are characterized by immunity. The responsibility is based on the breaches of the ECHR by the ILOAT in conjunction with the internal dispute mechanisms of the international organisation party to the ILOAT statute.

In a first series of developments (Chapter 1) we will attempt to define the reasonable “alternative means test”, which is the criterion developed by the ECtHR to determine whether the immunity of the international organisation should be upheld, and whether the forum state can be held responsible or not.

In Chapter 2 we will outline how employment conflicts are attempted to be solved within the EPO.

In Chapter 3 we will assess the entire proceedings of employment dispute settlement mechanisms constituted by the EPO and the appeal before the ILOAT.

In Chapter 4 we will assess the entirety of these proceedings in the light of certain requirements of Article 6 ECHR.



Chapter 1. ORGANISATIONAL IMMUNITY OR STATE JURISDICTION UNDER THE ECHR: THE “REASONABLE ALTERNATIVE MEANS” TEST

1.1 Immunity of international organisations

In principle, international organisations enjoy immunity before national courts. Immunity stems from the constitutive treaties, the headquarter agreements of the international organisations and from customary international law.⁴ Yet, according to the functional necessity theory, international organisations enjoy only those immunities that are necessary for their functioning.⁵ Although theoretically limited, this immunity prevents private parties from bringing cases involving international organisations before national courts. Many international organisations have legislative powers covering their field of competence, and also use their legislative powers to regulate relations with their staff. However, the immunity granted to international organisations does limit the application of legal obligations upon such organisations since it “is [only] a procedural barrier to the adjudication and / or the enforcement of legal obligations which themselves remain unaffected.”⁶

1.2 The notion of immunity in its context

The major issues to be dealt with in this report are as Reinisch⁷ puts it:

“The right of access to court of individuals involves a complex three-party relationship, comprising:

- (1) an individual’s substantive entitlement vis-à-vis an international organization and his or her human right of access to court vis-à-vis a forum state;*
- (2) the forum state’s obligation vis-à-vis the individual to provide access to court and its potential obligation vis-à-vis the defendant international organization to grant immunity; and*
- (3) the international organization’s substantive obligation vis-à-vis the individual and its potential right to immunity vis-à-vis the forum state”.*

From this quotation we can derive that there exists a conflict between on the one hand, the obligation of States to provide a forum, that fulfils fundamental requirements, to adjudicate claims arising on their territory or involving their nationals. And on the other hand, the

⁴ Malcolm N. Shaw, *International law*, Fifth Edition, 2003, p. 692.

⁵ Jan Klabbbers, *An Introduction to International Institutional Law*, (Cambridge, 2000), p. 148; C.F. Amerasinghe, “Principles of the Institutional Law of International Organisations”, (1996), *Cambridge Studies in International & Comparative Law*, p. 370; Philippe Sands and Pierre Klein, *Law of International Institutions*, (London: Sweet & Maxwell, 2001), p. 487.

⁶ August Reinisch, *International Organisations before National Courts*, (Cambridge University Press, 2000), p. 265.

⁷ *Ibid.*, (p. 289).



obligation of states to respect the immunity of international organisations by not adjudicating claims involving the acts of these organisations even if these acts affect the nationals of that State or the international organisation is located in that State.

Within this scheme the reasonable “alternative means test” was conceived by the ECtHR⁸ to determine whether the forum state is under a duty to grant immunity to a particular international organisation or whether it is empowered or has a duty to exercise jurisdiction over the dispute to which the international organisation is a party.

1.3 The development of the notion of reasonable alternative means

In the subsequent developments we will demonstrate how the ECtHR came to the reasoning that the access to national Courts for employees of international organisations can only exist when “reasonable alternative means” are not provided for within the international organisation.

1.3.1 The *Waite and Kennedy* dispute before the Commission

In the *Waite and Kennedy*⁹ and *Beer and Regan*¹⁰ disputes before the European Commission on Human Rights (Commission or ECmmHR), the applicants brought actions concerning employment disputes before the German labour courts against the European Space Agency (ESA). The German courts held that the ESA was immune from jurisdiction before the German courts. Subsequently a claim was brought before the ECmmHR against Germany for not guaranteeing the right to a fair trial to the applicants. The granting of immunity was only permissible under the Convention if “an equivalent legal protection”¹¹ was secured.

The Commission further stated that the applicants “did not [...] receive a legal protection within the European Space Agency which could be regarded as equivalent to the jurisdiction of the German labour courts.”¹²

⁸ *Waite and Kennedy v. Germany*, [1999] ECHR (app. 26083/94); *Beer and Regan v. Germany*, [1999] ECHR (App. 28934/95).

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Waite and Kennedy v. Germany*, [1997] ECmmHR, (app. 26083/94), para. 74.

¹² *Ibid.*, para. 79.



Nevertheless in the following paragraph the Commission considered that the proportionality test cannot be applied “to force an international organisation to be a party to domestic litigation on a question of employment governed by domestic law.”¹³ On this matter Reinisch considers that the “equivalent legal protection” test was not taken seriously.¹⁴ Reinisch seems to point out that if the test had been taken seriously the ESA appeals board would not have been labelled as a “equivalent legal protection”. In other words the Commission created a test and demonstrated that this test was not complied with but the Court abandoned it when coming to the final decision, relying solely on an issue of proportionality.¹⁵

1.3.2 The right of access to a court

According to the ECtHR,¹⁶ which on this point confirms that the abovementioned case before the Commission, the right of access to a court is not absolute and therefore this right can be restricted. According to the case law of the Court the restrictions have to pursue a legitimate aim and the means employed must be proportional to the aim pursued, and it should not have an effect of precluding the applicants right to access a court altogether. In other words pursuant to the case law of the ECtHR, the access to court can be restricted but not precluded.

1.3.3 Immunity: a legitimate restriction of the right to access a court

When considering the legitimacy of the restriction of the right to access a court by granting immunity the Court stated that: “the attribution of privileges and immunities to international organisations is an essential means of ensuring the proper functioning of such organisations free from unilateral interference by individual governments”.¹⁷ This statement unequivocally demonstrates the view that the grant of immunity to international organisations serves a legitimate purpose.

1.3.4 The proportionality test and the right to access a court

According to the ECtHR, immunity granted to international organisations is not objectionable if the constitutive instruments of an international organisation or its derivate rules provide alternative means of dispute settlement:

¹³ *Ibid*, para. 80.

¹⁴ August Reinisch, *International Organizations before National Courts*, (Cambridge University Press, 2000), p. 305, “Taking the equivalent legal protection requirement seriously could have resulted in a different finding.”

¹⁵ *Waite and Kennedy v. Germany*, [1997] ECmHR, (app. 26083/94), para. 80.

¹⁶ *Ashingdane v. United Kingdom*, [1995] ECHR (app. 8225/78) para. 57.

¹⁷ *Waite and Kennedy v. Germany* [1999] ECHR (app. 26083/94), para. 63.



“For the Court, a material factor in determining whether granting ESA immunity from German jurisdiction is permissible under the Convention is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.”¹⁸

By this statement the Court abandons the “equivalent legal protection test” created by the Commission and replaces it by the “reasonable alternative means test”. The Court stated that the ESA Appeals Board as set out in the ESA Staff Regulations and the ESA convention, provided a reasonable alternative means. The Courts conclusion was based on the independent character of the appeals board *vis-à-vis* the agency as stated in Regulation 33 of then ESA Staff Regulations, and on the jurisdiction of the appeals board i.e. to “hear disputes relating to any explicit or implicit decision taken by the Agency and arising between it and a staff member”.

Furthermore, according to the Court, the claimants had the possibility of bringing an action before the local courts against the companies that had placed them at the ESA’s disposal.¹⁹ In other words, the Court did not accurately consider whether the ESA appeals board constituted a reasonable alternative means because the Court held the view that alternative means were available to the applicants pursuant of German law. The adequacy of the ESA Appeal Board was not directly challenged by the applicants therefore, the Court has to a large extent overlooked this issue. The “reasonable alternative means” test was applied to the ESA, however not on a substantial level, because this was not relevant for the final decision of the Court.

In making its assessment of the ESA Appeals Board, the Court relied wholly on the statutes establishing the Board; no further investigation was undertaken. The Court also noted that if an employment relationship between the applicants and the ESA was established, the applicants should have access to the Appeals Board, but the Court failed to indicate how such a relationship could be established, or which forum was competent to adjudicate a dispute on this matter. The Court did not consider the fact that it was unlikely that the applicants had standing before the internal dispute mechanisms of the ESA.

¹⁸ *Waite and Kennedy v. Germany* [1999] ECHR (app. 26083/94), para. 68; *Beer and Regan v. Germany* [1999] ECHR (App. 28934/95), para. 58.

¹⁹ *Waite and Kennedy v. Germany*, [1997] ECmmHR, (app. 26083/94), para. 70.



While the ECtHR establishes a test to determine whether international organisations should be granted immunity or not, it did not state the reasons why the ESA fulfilled this test. In other words the outcome of the test is clear but not how it is applied. The Court made clear that the restriction was proportionate and that it did not preclude the exercise of the right to access a court. But again the final decision of the Court seems to be motivated by the proportionality test which, “cannot be applied in such a way as to compel an international organisation to submit itself to a national litigation...”²⁰

1.4 The reasonable alternative means test

In *Waite and Kennedy*²¹ and *Beer and Regan*²² the Court established a test i.e. the “reasonable alternative means” test, which it applied superficially to the facts of the case but decided on other grounds that there was no violation of article 6 § 1 of the Convention.

The Court has defined the notion of “reasonable alternative means” but not in sufficient detail to determine what this means in practical terms. The aforementioned case law of the Court suggests that the appeals board of the ESA fulfils this requisite, but the Court did not substantially assess whether the ESA Appeals Board did constitute “a reasonable alternative means”. It therefore must be assumed that the Court was not aware of the actual functioning of this body. Or at least that the Court was not put in a position to rule on this issue.

The interpretation of the law by the European Commission of Human Rights (ECmHR) and the ECtHR makes clear that parties to the ECHR cannot absolve themselves from their obligations deriving from the ECHR by concluding international agreements.²³ We can conclude from *X v. Federal Republic of Germany* and *Matthews v. U.K.*²⁴ that parties to the ECHR remain bound by all its requirements even when they transfer powers to international organisations. When States delegate powers and at the same time grant immunity to international organisations they are required to secure adequate alternative means to ensure that the rights guaranteed by the Convention are protected.

²⁰ *Waite and Kennedy v. Germany*, [1997] ECmHR, (app. 26083/94), para. 72.

²¹ *Ibid.*

²² *Beer and Regan v. Germany* [1999] ECHR (app. 28934/95).

²³ *X v. Federal Republic of Germany* [1958] ECommHR (app. 235/56); *Matthews v. U.K.*, [1999] ECHR (app. 24833/94), para. 32.

²⁴ *Ibid.*



Since the existence of immunity is conditioned to the availability of alternative means, it is of paramount importance to know what standards must be met by an “alternative means”. The alternative means would have to meet the requirements of the Convention and therefore the grant of immunity may be proportional to the aim.

According to August Reinisch and Ulf Andreas Weber, “the mere existence of such alternatives would not suffice to justify immunity”.²⁵ The same authors further state that, “the obligation of international organisations to make available to claimants “reasonable alternative means to protect their rights” is not limited to providing a forum. It is also necessary that such an alternative forum fulfils certain criteria as to its effectiveness”.²⁶ This was also confirmed by the Court,²⁷ which stated that the rights to be guaranteed by alternative means should: “not [be] theoretical or illusory rights, but rights that are practical and effective”.

Reinisch acknowledges that: “there seems to be a growing awareness not only that alternative fora must be available in order to justify a grant of immunity to international organisations but, that they have to conform to international standards of due process”.²⁸

Reinisch and Weber are of the opinion that: “there remains a requirement upon the member state to ensure that fundamental rights protection meets equivalent standards within the organisation as those within that member state.”²⁹ This view is supported by the ECtHR in the *Matthews* decision.

Alternatively, since the maintenance of immunity is dependent on the provision of “reasonable alternative means” it may be argued, that pursuant to the case law under the Convention, the reasonable alternative means must provide the same level of protection as that expected from the Contracting Parties.

²⁵ August Reinisch and Ulf Andreas Weber, “In the shadow of Waite and Kennedy”, (2004), *International Organizations Law Review*, p. 89.

²⁶ *Ibid*, p. 93.

²⁷ *Waite and Kennedy v. Germany* [1999] ECHR (app. 26083/94), para. 67.

²⁸ August Reinisch, *International Organizations before National Courts*, (Cambridge University Press, 2000), p. 309, (referring to Seidl-hohenveldern, “Die internationalen Beamten”, p. 443).

²⁹ *Ibid*, p. 94, (reasoning based on *Matthews v. U.K.*, [1999] ECHR (app. 24833/94)).



The same view was expressed by Emmanuel Gaillard and Isabelle Pingel-Lenuzza: “One might question whether the means of recourse that were available were effective, [...] to satisfy the requirements of the convention”.³⁰ These authors consider that alternative means only qualify as reasonable, when they provide the same levels of protection as those provided by the Convention.

Ireland also took the same position in the *Bosphorus*³¹ case and argued on the basis of the *Waite and Kennedy* and the *Matthews*³² case law that it was “not contrary to the Convention for States to join international organisations once those bodies provide human rights protection equivalent to that of the convention”.³³ The Court reinforced this view and confirmed that State compliance with legal obligations resulting from its membership of an international organisation or treaty is justified “as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides”.³⁴

This position confirms that the definition of a “reasonable alternative means” is to be understood as one which encompasses requirements of the Convention.

³⁰ Emmanuel Gaillard and Isabelle Pingel-Lenuzza, “International Organizations and Immunity from Jurisdiction: To restrict or to bypass”, (2002), January, *International & Comparative Law Quarterly*, p. 3.

³¹As stated in: Karel Wellens, “Fragmentation of International Law and Establishing an Accountability Regime for International Organisations: The Role of the Judiciary in closing the Gap”, (2004), summer, *Michigan Journal of International Law*, p. 5. Also see: Decision on the Admissibility of the Application, *Bosphorus Hava Yollari Turzimve Ticaret AS v. Ireland* [2001] ECHR (app. 45036/98).

³² *Matthews v. U.K.*, [1999] ECHR (app. 24833/94).

³³ *Supra*, footnote 31.

³⁴ *Bosphorus Hava Yollari Turzimve Ticaret AS v. Ireland* 30 June 2005 ECHR (app. 45036/98) para155.



Chapter 2. INTERNAL CONFLICT RESOLUTION MECHANISM OF THE EUROPEAN PATENT OFFICE

For an employee of the European Patent Office (EPO) regulations relating to employment are carried in a central file known within the EPO as the Codex. The definition of an employee of the EPO is any permanent employee, a former permanent employee, or a rightful claimant on his behalf, such as a surviving dependent of a deceased employee that had permanent status.

Title VIII “APPEALS” of the Codex concerns the regulations concerning appeals. Article 106 (1)³⁵ informs an employee that if after a dispute with his or her employer an adverse decision is found against that specific employee it will be communicated to him or her in writing and state the grounds on which it is based. The decision, if the authority is the President of the EPO, must be communicated to the employee within two months from the date the request was made. Where the authority is the Administrative Council the period will be from the date on which the request was submitted to the first meeting of the Council following the request. Should there be no reply within these time constraints, it will be deemed an implied rejection of the request.³⁶

Should an employee as defined above disagree with the adverse or implied decision of rejection, an internal appeal may be lodged however, an appeal does not suspend the original decision implied or otherwise.³⁷ An internal appeal must be lodged with the appointing authority which gave the decision appealed against. That authority will and where appropriate advise the superiors of the employee of the appeal and seek the superior’s opinion. The appeal must be lodged within a period of three months from the date on which the appellant became aware (or should have been reasonably aware) of the decision and in the case of implied rejection, from the expiry of two months following the submission of the request for a decision.³⁸ If the President of the EPO or the Administrative Council considers that a favourable decision cannot be given, the appeal is forwarded to the Appeals Committee for an opinion.

³⁵ Any decision relating to a specific individual to whom these service regulations apply shall at once be communicated in writing to the person concerned. Any decision adversely affecting a person shall state the grounds on which it is based.

³⁶ EPO Codex Title VIII Article 106.

³⁷ *Ibid*, Article 107.

³⁸ *Ibid*, Article 108.



Once the Appeals Committee has completed its investigations and formed an opinion by majority, the opinion is forwarded to the relevant authority who must take this opinion into consideration when making their final decision.³⁹

Should the President of the EPO take no decision within two months from the date that the internal appeal was lodged, the appeal is deemed to have been rejected and internal means exhausted.

2. 1 The Appeals Committee

The Appeals Committee comprises of a chairman and four full members. Additional staff necessary to support the functioning of the committee are appointed by the President of the EPO. All members of the Appeals Committee and support staff are bound to secrecy.⁴⁰ There are two internal appeal bodies; the Administrative Appeals Committee and the Internal Appeals Committee.

In respect of appeals against decisions of the Administrative council; the Council annually appoints a chairman and two full members. The Staff Committee nominates two full members. A deputy chairman and four alternative full members are appointed in a the same manner to ensure the operational ability of the committee at all times.⁴¹

In the case of an appeal against decisions of the president of the EPO, the President appoints after consulting the General Advisory Committee, a chairman and two full members of the Committee with the Staff Committee nominating two full members to complete the Committee. Two deputy chairmen and four alternative full members are appointed in the same manner.⁴²

As stated in Article 111 of the EPO Service Regulations contained in the Codex of the EPO, the chairman and members of the Appeals Committees and their alternatives ‘shall be completely independent in the execution of their task’ and ‘shall neither seek nor accept any instructions’.

³⁹ *Ibid*, Article 109.

⁴⁰ *Ibid*, Article 110.

⁴¹ *Ibid*, Article 110 (3).

⁴² *Ibid*, Article 110 (4).



The function of the Appeals Committee is to deliver a reasoned opinion on cases brought before them.

The opinion includes a statement of both the facts and of the law, the grounds on which it is based including any dissenting views of any member of the Committee and ‘a recommendation as to the decision which the appointing authority is required to take’.⁴³ The opinion is formulated from the majority view of the members. The chairman and all members sign the opinion. Members may present a dissenting opinion. The opinion is forwarded to the relevant authority and to the appellant.⁴⁴

2.2 Procedure of the Internal Appeals Committee

Internal appeals are governed by Articles 106 to 113 of the Service Regulations. And the Rules of Procedure of the Internal Appeals Committee referred to in Article 110 (4) contain 13 articles.

All papers submitted to the Appeals Committee ‘should include all the material’⁴⁵ required for the investigation to the case, all papers must also be ‘transmitted to the appellant’.⁴⁶ Should the Committee require further information it is at liberty to carry out further investigations. For this purpose it may receive oral or written evidence. The appellant has under Article 113(3) the right to be heard, and may also be represented or assisted by any person of their choice. Any new fact or document found during the investigation should be forwarded to the appellant.

The Committee may admit during the investigation the appellant and those persons noted in Article 113(3) along with the heads of the employee’s department or their representatives. The proceedings otherwise shall take place in Camera.⁴⁷ All costs incurred by the appellant such as representation costs must be borne by him, unless the appointing authority decides otherwise.

⁴³ *Ibid*, Article 112 (2) (d).

⁴⁴ The authority is either the President of the EPO or the Administrative Council.

⁴⁵ *Ibid*, Article 113 (1).

⁴⁶ *Ibid*, Article 113(1).

⁴⁷ *Ibid*, Article 113 (5).



The Internal Appeals Committee (IAC) furnishes copies of the case papers and the employers written position of the disputed issue to the appellant inviting a response within a certain time, the time requirements are in all likelihood decided by the IAC. Information regarding an expected date for hearings is provided with the case papers.⁴⁸ If a hearing is requested by the appellant a summons to appear is issued; if the appellant waives his rights to a hearing written proceedings are conducted.⁴⁹ The IAC gives its opinion following its investigation and internal discussions. Hearings may be postponed but only in urgent cases.⁵⁰ The IAC's time limits are intended according to the Codex to expedite the proceedings.⁵¹ All written submissions must reach the IAC in time for transmission to all its members and the opposing party in advance of the hearing.⁵²

2.3 The role of the Chairman of the Internal Appeals Committee against decisions of the President

Article 3 of the Rules of Procedure of the Internal Appeals Committee referred to in Article 110 (4) of the Service Regulations states that 'As a rule, the chairman shall act as rapporteur'. Article 9 (1) says that the chairman shall have a copy of the of the entire appeal file communicated to the members it also states in 9 (2) that the rapporteur shall provide the committee with a provisional opinion containing at the very least a statement of the facts and the relevant law. Article 19 (1) further goes on to state 'The opinion for the President shall be drawn up by the rapporteur on the basis of the results of the internal deliberations and that further 'The President shall receive, along with the Committees opinion, the entire appeal file with the exception of the witnesses statements, minutes and tape recordings'.⁵³

2.4 Decision of the President of the EPO

Pursuant to the Service Regulations contained in the EPO Codex, a section headed Information Regarding the EPO's Internal Appeal Procedure in Respect of Appeals against Decisions of the President of the office states in paragraph 7 that, '[o]n the basis of the dossier and the IAC opinion, the President then decides on the appeal'.

⁴⁸ EPO Service Regulations, Rules of Procedure Internal Appeals Committee, Article 14.

⁴⁹ Codex 1a, p. 23, para. 4.

⁵⁰ EPO Service Regulations, 'Internal Appeals Procedure Information, p. 23, para. 4.

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ Rules of Procedure of the Internal Appeals Committee referred to in Article 110 (4), and Article 19(5).



If he rejects it (by actual or implied decision), all internal dispute resolution means are exhausted and an appeal may be made to the Administrative Tribunal of the International Labour Organisation'.⁵⁴

2.5 IAC Languages in appeals against decision of the President

The EPO has three official languages⁵⁵ however; the IAC has no language of proceedings. Parties can therefore use any of the official languages during the proceedings however, if the appellant's knowledge of a language is insufficient for the purpose of the hearing; this language should not be used.⁵⁶ No simultaneous interpreting is provided for hearings. The appellant will receive a translation of the Committee's opinion if the Committee considers the request justified.

2.6 Procedures for internal appeals against decisions of the Administrative Council

As with appeals against the decisions of the President of the EPO, appeals against the Administrative Council have similarities, and rules regarding the appeals process are contained in 13 articles.⁵⁷ Article 2 states that the chairman shall normally act as rapporteur. The appeal file will be accompanied by the provisional opinion of the rapporteur, containing at the very least a statement of the facts and the relevant law.⁵⁸ Use of any of the three official languages of the EPO may be used in hearings however, simultaneous interpreting shall be provided⁵⁹ in contrast to the rules of the appeals against the decisions of the President. The Opinion of the Administrative Council will be drawn up by the rapporteur.⁶⁰

⁵⁴ ServRegs – Internal Appeal Procedure, January 2004, p. 24.

⁵⁵ English, French and German - Article 14 of the European Patent Convention.

⁵⁶ Rules of Procedure of the Internal Appeals Committee referred to in Article 110 (4) and Article 15(1).

⁵⁷ Rules of Procedure of the Appeals Committee of the Administrative Council.

⁵⁸ Rules of Procedure of the Appeals Committee of the Administrative Council, Article 4 (2).

⁵⁹ *Ibid*, Article 6.

⁶⁰ *Ibid*, Article 10.



Chapter 3. ANALYSIS OF THE CONFLICT RESOLUTION MECHANISMS PROVIDED BY THE EPO

3.1 The internal appeal

Should an employee disagree with the decision of the authority he or she may make an internal appeal.⁶¹ Only a permanent employee, a former permanent employee, or a rightful claimant on his or her behalf may make such an appeal.⁶² The appeal must be lodged within a period of three months from the latest date on which the appellant became aware of the decision and in the case of implied rejection, from the expiry of two months following the submission of the request for a decision.

3.1.1 Stages to the internal appeals process within the EPO

Appeals within the European Patent Office have a two-stage system. It is important to note that at the first stage the appellants heads of department are called upon to advise the President of the Office in the dispute; these persons are often those that took the decision that gave rise to the appeal.⁶³ Following this advice, if the President is unable to provide a favourable response to the appeal the second stage becomes operative and the appeal is forwarded to the Internal Appeals Committee for an reasoned opinion. At any stage during this process the appellant has the right to withdraw from proceedings.⁶⁴

3.1.2 The Internal Appeals Committee

If the President of the Office considers that a favourable decision cannot be given to the internal appeal,⁶⁵ the matter is referred to the Appeals Committee to deliver an opinion. This opinion will be forwarded to the President who 'shall take a decision having regard to this opinion'.⁶⁶ The composition of the Committee is detailed in this report under heading 3.1. The composition of the membership to the IAC requires no legally trained members although, the chairman normally has some legal training and a previous chairman held judicial qualifications.⁶⁷

⁶¹ EPO Codex Title VIII, Article 107.

⁶² *Ibid*, Article 106.

⁶³ *Ibid*, Article 108 (1).

⁶⁴ EPO Codex, p. 23, para. 1.

⁶⁵ *Ibid*, Article 109.

⁶⁶ *Ibid*, Article 109 (1).

⁶⁷ Information provided by Staff Union of the EPO.



3.1.3 Internal appeal - fact finding

During the first stage of the internal appeal process, a review is conducted by the authority, and the appellants heads of department are requested to advise and give an opinion on the issue or issues.

Should the authority still maintain its position on the matter following the review, it is registered by the authority and the Internal Appeals Committee is requested to provide an opinion and forwarded all documentation,⁶⁸ along with the 'Position of the Office' in respect of the internal appeal.⁶⁹

This process is purely an internal organisational mechanism for dispute settlement and has the purpose to undertake fact finding and provide a reasoned opinion upon which the relevant authority will take a final decision. The internal appeals process has few of the substantive features required by the Convention to meet the status of a tribunal.

3.1.4 Fact finding by the IAC

Once the Internal Appeals Committee (IAC) has received the appeal it will send copies of all documents and the 'Position of the Office' to the appellant inviting him to respond within a time period designated by the IAC. When forwarding the documents the IAC chairman advises the likely hearing date.

If the appellant waives the right to a hearing, written proceedings are conducted. Article 113 of the Codex Service Regulations of the EPO concern the procedure of the Internal Appeals Committee and clearly states in Article 113(1) 'That the papers submitted to the Appeals Committee shall include all the material necessary for the investigation of the case'. Should the committee require further information the said committee '[has to]carry out additional investigation'. It may also receive any oral or written evidence that it considers relevant '[...] the chairman may, on its behalf, call for any document or information relevant to the matter before it'.⁷⁰

⁶⁸ EPO Codex, p. 23, para. 2.

⁶⁹ *Ibid.*

⁷⁰ Article 113 (2) Service Regulations contained in the Codex of the EPO, p. 76.



The Appellant has the right to be heard and may be represented or assisted by any person of his choice.⁷¹ Should any new document or fact be produced during the investigation by the IAC the appellant must be informed.

If any such information is submitted after the appellant has been heard, the appellant may ask to be heard again or make comments on this information in writing.⁷²

During the investigation the Committee may admit the appellant and their representative and the heads of the appellants department or their representatives. The Committees proceedings will otherwise take place in camera.⁷³

3.1.5 The law applied by the IAC

It was reported that the law applied by the Internal Appeals Committee goes beyond the Service regulations, in that some general principles are applied, and case law of the ILOAT which also derives from general principles.⁷⁴ Such impressions cannot be confirmed since only limited access was available the case law of the IAC, which is not public. However the Service Regulations are applied having no regard to the requirements of the European Convention on Human Rights.

According to a section of the Service Regulations headed ‘ Information Regarding the EPO’s Internal Appeal Procedure in Respect of Appeals Against Decisions of the President of the Office’⁷⁵ it clearly states that: ‘[...]the facts and legal aspects of the case are discussed’ although no clarification on the sources of law is provided.

Article 9 of the ‘Rules of Procedure of the Internal Appeals Committee’ state that the Rapporteur⁷⁶ shall provide the Committee with a provisional opinion containing at the very least a statement of the facts and the relevant law’ before the case is heard, however, it is unclear what sources of law are meant to be included in this provision.

⁷¹ *Ibid*, Article 113 (3).

⁷² *Ibid*, Article 113 (4) .

⁷³ *Ibid*, Article 113 (5).

⁷⁴ *Ibid*, footnote 67.

⁷⁵ EPO Codex ServRegs, p. 24, para. 5.

⁷⁶ The Rapporteur under Article 3 of the Rule of Procedure of the Internal Appeals Committee normally being the chairman of the Committee.



Article 110 (2) of the Service Regulations of the EPO states that: ‘The President of the Office shall provide the staff necessary for the Committee to carry out its functions’. Given the lack of requirements for legal training for the members of the Committee it must be assumed that Article 110(2) should mean that such staff would include legally qualified persons to advise the chairman and the committee, however, once again assumptions must be made.

The lack of clarity as to the law applicable by the IAC is in direct contradiction to fundamental concepts in law.

3.1.6 Does the IAC constitute a judicial instance?

From the convening of the Appeals Committee (AC) as discussed earlier in this chapter, and a request for it to provide a reasoned opinion on an appeal which follows from an unfavourable decision by the president of the office, the AC formulates an opinion based on the facts presented and their investigations. The opinion once formulated is forwarded to the Authority for a decision to be made. This Authority is under no obligation to adopt the finding of the Appeals Committee. A Recent case of the ILOAT suggests that where the Authority does not adopt the opinion of the Appeals Committee, reasons must be provided.⁷⁷ However, it is not yet clear what requirement such reasoning must meet, or whether such judgements will be followed in a consistent manner.

The opportunity for an employee to make a further appeal to the International Labour Organisations Administrative Tribunal (ILOAT), suggests that the ILOAT is a second instance available to staff. However, the Appeals Committee merely provides a reasoned opinion to the Authority having taken the challenged decision and is not judicial but advisory in nature.

The non-judicial nature of such internal bodies has also been recognized by the ILOAT, for example in *re Qin*.⁷⁸

⁷⁷ *Mr T. N. v. the European Patent Organisation*, [2004] ILOAT (judgement 2339) Consideration 5.

⁷⁸ *Re Qin (Nos 1 and 2)* [1998] ILOAT (judgement 1752) Considerations para. 6.



Article 112 (1) of the EPO Service Regulations (Codex) states that ‘*The Appeals Committee shall deliver a reasoned opinion on each case brought before it*’. Article 112 (2) (d) states that the opinion shall include ‘*a recommendation as to the decision which the appointing authority is required to take*’. Although confusing in their formulation, these two articles do not grant any power of decision to the IAC, and the internal regulations appear to contradict the view of the ILOAT expressed inter alia in *Mr T.N. v EPO*⁷⁹ since there is no provision in the regulations which compels the Authority to provide grounds should it decide not to follow the opinion of the IAC.

The ECtHR has developed according to Kuijer⁸⁰ ‘its own substantive requirements of a tribunal’.⁸¹ These requirements contain several elements one of which is the ‘Power of Decision’ as discussed in the Amsterdam International Law Clinics’ second report.⁸²

The European Commission of Human Rights in the case of *Sramek*⁸³ defined the requirement of the ‘power of decision’ of a tribunal more clearly of that ‘[...] a tribunal, being an authority with the power to decide legal disputes with binding effect on the parties’.

The Court has reinforced the position of the Commission with regard to the paramount importance of the requirement to have binding judgments in municipal courts. As in the case of *Bentham*⁸⁴ as Kuijer⁸⁵ further points out ‘[t]he then *Afdeling contentieux* of the *Raad van State* (the judicial division of the Dutch *Conseil d’État*) was merely able to give a non-binding advice to the Crown (the executive). The Crown, in the Court’s opinion, did not itself comply with all the intrinsic requirements of Article 6 ECHR since it could not be regarded as being independent. The *Afdeling contentieux*, however, could not be considered as a ‘tribunal’ in the sense of Article 6 ECHR since this judicial division of the *Raad van State* did not possess the

⁷⁹ *Supra*, footnote 77.

⁸⁰ Kuijer M, *The Blindfold Lady of Justice* E M Meijers Institute Leiden 2004, p. 175.

⁸¹ *Demicoli v. Malta* [1991] ECHR (app. 13057/87); *Belilos v. Switzerland* [1988] ECHR (app. 10328/83), “[...] Characterized in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner [...] It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members’ terms of office; guarantees afforded by its procedure- several of which appear in the text of Article 6 (1) itself.”

⁸² *Supra* Nicole E. Kuijer, Susan L. Park M.I.A., *Judicial Independence of the ILO Administrative Tribunal: The potential for reform*, Amsterdam International Law Clinic, April 2005.

⁸³ *Sramek v. Austria* [1982] ECHR (app. 8790/79).

⁸⁴ *Bentham v. Netherlands*, [1985] ECHR, (app. 8848/80).

⁸⁵ *Supra*, footnote 80, (p. 176).



necessary ‘power of decision’, alternatively, in order to qualify as a judicial instance, that body must hold the power of binding decision making. In the case of *Van de Hurk*.⁸⁶ The Court further stated that a decision ‘may not be altered by a non-judicial authority to the detriment of an individual party’.

In the light of the European Commission and the European Court’s judgments the Internal Appeals Committee is not a tribunal since it does not hold binding decision making power as defined in the *Sramek*⁸⁷ and *Benthem*.⁸⁸

Unlike the EPO’s Internal Appeals Committee, the Appeals Board of the European Space Agency (ESA) is clearly a Tribunal of first and last instance. Regulation 41.17 (i) of the ESA Regulations states that ‘No appeal shall be possible against the decision of the Appeals Board, which shall be final and binding on both parties’. The EPO’s Internal Appeals Committee has no such regulation and at best can only formulate an opinion. The lack of independence of the Appeals Committees is a serious deficiency.

The structural bias towards the Administration having a majority of members appointed by the President or Administrative Council raises further questions regarding the impartiality of the committees. The President, or Administrative Council, nominate 3 of the 5 members of the respective committees, this provides a structural bias towards the appointing authority. Leaving aside the questions with regard to the ability of the members of the committee to act fully independently since they are all members of staff, the above deficiencies lead to the conclusion that the Appeals Committees of the EPO cannot be considered as judicial bodies within the meaning of Article 6 ECHR since a clear bias towards the administration exists, and the power of decision in respect of the Appeals Committees lies unequivocally with the Appointing Authority (President or Administrative Council).

3.2 External appeal to the ILOAT

When all internal means of redress have been exhausted an appellant may make an appeal to the Administrative Tribunal of the International Labour Organisation.

⁸⁶ *Van de Hurk v. Netherlands*, [1994] ECHR, (app. 16034/90) para. 45.

⁸⁷ *Sramek v. Austria* [1982] ECHR (app. 8790/79).

⁸⁸ *Benthem v. Netherlands*, [1985] ECHR, (app. 8848/80).



The Statute and Rules of the Administrative Tribunal were first adopted in 1949 and the current version was last amended in 1998. The ILOAT was established as a Tribunal competent to hear complaints of ILO staff as outlined in Article II of the Statute.⁸⁹ Many Organisations such as the EPO have recognized the competence of the ILOAT as set out under the annex to the statute and defined in Article II (5).

3.2.1 Standing before the ILOAT

Article 109 (3) of the EPO Service regulations states that: ‘When all internal means of appeal have been exhausted, a permanent employee, a former permanent employee, or a rightful claimant on his behalf, may appeal to the Administrative Tribunal of the International Labour Organisation under the conditions provided in the Statute of that Tribunal’. Article VII of the ILOAT Statute is consistent with this provision.

3.2.2 Pleadings and fact finding by the ILOAT

Article 5 of the ‘Rules of Procedure of the Administrative Tribunal of the International Labour Organisation’ Article 5 (1) ‘The complainant may plead his own case or appoint an agent’.

When the President of the Tribunal considers the pleadings to be sufficient as outlined in Article 9 of the Rules of Procedure, the case is placed on the list to be heard by the Tribunal.

Article 11 of the Rules of Procedure give authority to the Tribunal to order ‘such measures as of investigation as it deems fit, including appearance of the parties before it’.

Article 12 allows for the parties to make application for hearings and identify parties they wish to be heard and issues they wish to have addressed by the witness. Article 12(3) confirms that ‘Hearings shall include oral submissions by the parties’ and with the tribunals permission include oral testimony by any witness. The Statute of the Administrative Tribunal of the International Labour Organisation Article V⁹⁰ presumes that oral hearings will take

⁸⁹ Article II (1) The Tribunal shall be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials of the International Labour Office, and such provisions of the Staff Regulations as are applicable in the case.

⁹⁰ Article V of the Statute provides that, ‘The Tribunal shall decide in each case whether the oral proceedings before it or any part of them shall be in public or camera’.



place. However, the ILOAT's regular practice suggests this is not so, as since 1982 only one oral hearing has been held in 1989 which, was the last oral hearing held to date.

Prior to these dates where oral hearing have been held, such hearings have not been public and no provision exists within the ILOAT Statute for public hearings.

The ILOAT relies heavily on the outcome of the proceedings of the internal dispute settlement mechanisms such as the Appeals Committee of the EPO, in particular on the evidence collection undertaken and the outcome of the oral hearings held before such bodies⁹¹ and has limited its own powers of review.⁹²

In *re Vollerling*⁹³ the ILOAT took the finding of the IAC as absolute and final. The applicant was accused of transmitting a communication which could have harmed the interests of the Organisation. The applicant maintained that the part of the communication which was deemed to be harmful resulted from an incorrect translation into German. Despite this the ILOAT relied upon the statement of the EPO that one of the members of the IAC was able to read the original text and therefore the ILOAT agreed with the conclusions of the president. The Tribunal sought no independent translation.

Since bodies such as the IAC are not judicial bodies there exist serious deficiencies with respect to their ability to conduct independent and impartial investigations. The (over)reliance of the ILOAT on these bodies raises serious questions regarding the independence and impartiality of the ILOAT itself. This is particularly serious if it is considered that the ILOAT is the first and only judicial body available to staff.

⁹¹ *Re Michael v. EPO* [1986] ILOAT (judgement 736) Consideration 4. "the President -- and likewise the Tribunal -- must attach great importance to the findings of the internal Appeals Committee. Before the Committee witnesses can be heard and questioned, and their evidence recorded; the members of the Committee will have the background knowledge necessary to evaluate the evidence properly."

⁹² *Vollerling v. EPO* (No. 21) [2002] ILOAT (judgement 2114) Considerations 14 and 15, "14. When the measure takes the form of a reprimand, the Tribunal will exercise a limited power of review. It will not interfere "unless the measure was taken without authority, or violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if it is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the facts". "15. In this case, none of the above grounds was present and the President had the authority to impose the reprimand. Considering the evidence, he did not overstep the boundaries of his authority and there was no abuse of power".

⁹³ *Ibid.*



The ILOAT thus demonstrates deficiencies which give rise to questions regarding its compliance to Human Rights standards for example the right to a fair trial.⁹⁴

3.2.3 The law applied by the ILOAT

In respect of the European Patent Office, competence of the ILOAT to apply law to a dispute between an EPO employee and the Organisation is gained from the Statute and rules of the Tribunal, in particular the Annex in accordance with paragraph 5 of Article II of the Statute. The Annex states in paragraph 1 that an organisation ‘must be either intergovernmental in character, or fulfil a number of conditions’. One of these conditions states in (b) that it shall not be required to apply any national law in its relations with its officials and enjoy immunity from legal process as evidenced by the headquarters agreement concluded with the host country’. The observance of this condition is noted in the Tribunal’s judgment *In re Rombach-Le Guludec*⁹⁵ wherein it was stated that ‘the decision whether or not to waive the President’s immunity fell within the Council’s discretion and that “such exercise of discretion is a matter outside the Tribunal’s competence, affecting as it does relations between the defendant Organisation and the member state”’.

Article II (5) of the said statute confirms that ‘[t]he Tribunal shall also be competent to hear complaints alleging non-observance, in substance or in form, of the terms of appointment of officials and of provisions of the Staff Regulations of any other international organisation meeting the standards set out in the Annex hereto which has addressed to the Director-General a declaration recognizing, in accordance with its Constitution or internal administrative rules, the jurisdiction of the Tribunal for this purpose, as well as its Rules of Procedure, and which is approved by the Governing Body’. Case law has clearly limited the regulation to be applied: "Staff Regulations that will apply are those that are applicable to the particular organisation and no other".⁹⁶

Judgment 274, in *re Connolly-Battisti No. 2*⁹⁷ under 2. The Tribunal restricts its jurisdiction: “That is to say, the Tribunal will not interfere unless the measure was taken without authority,

⁹⁴ See *infra*, Chapter 4.

⁹⁵ *Re Rombach – Le Guludec* [1997] ILOAT (judgement 1581) considerations para. 7.

⁹⁶ *Re Zhu* [1996] ILOAT (judgement 1509) Considerations para.12 ‘The reference to “Staff Regulations” means those of the organization of which a complainant is or was an official and does not include the staff regulations of any other’.

⁹⁷ *Re Connolly-Battisti No. 2* [1980] ILOAT (judgement 420) para. 2.



or violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if it is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the facts”.

As the EPO conforms to the requirements of the ILOAT Statute inasmuch as headquarter agreements between the EPO and the host countries confirm immunity from judicial process in those countries. National laws can also not be directly enforced by the ILOAT, the Tribunal is not competent to do so.⁹⁸

3.2.4 The employment contract

In respect of the contract of employment as a source of law, the Tribunal stated in *re Lindsey v ITU*⁹⁹ that: ‘The terms of appointment of international civil servants and, in particular, those of the officials of the Union, derive both from the stipulations of a strictly individual character in their normal contract of appointment and from Staff Regulations and Rules, which the contract of employment by reference incorporates’. In the same judgment the ILOAT acknowledges that there are other relevant sources such as constituent treaties of International Organisations. In respect of such treaties the ILOAT has also referred to constituent treaties of international organisations as being applicable in the areas of employment conditions. In *Re Duberg v UNESCO*,¹⁰⁰ the ILOAT relied on the constitution of UNESCO to decide the case.

In *re Kern (No11)*¹⁰¹ the Tribunal stated that ‘The interpretation of contracts is not normally a matter of evidence but a question of law, which is fully within the tribunals competence.

3.2.5 Staff regulations and staff rules

In *Poulain D’Andecy v. FAO*,¹⁰² the ILOAT stated that Staff rules must conform to and not conflict with staff regulations. “It follows that the provisions of the Regulations prevail over those of the Rules”. The ILOAT has made clear that “Staff regulations means those of the

⁹⁸ Statute of the Administrative Tribunal of the International Labour Organization, <<http://www.ilo.org/public/english/tribunal/stateng.htm#Statute%20of%20the%20Administrative%20Tribunal>>.

⁹⁹ *Re Lindsey* [1962] ILOAT (judgement 61) point 12.

¹⁰⁰ *Re Duberg v UNESCO* [1954] ILOAT (judgement 17) D para. 2.

¹⁰¹ *Re Kern*, [2002] ILOAT (judgement 2101) para. 6.

¹⁰² *Re Poulain D’Andecy v FAO* [1960] ILOAT (judgement 51) Consideration 2.



organisation of which a complainant is, or was, an official and does not include the staff regulations of any other”.¹⁰³

3.2.6 Is national law as a source of law applied

The ILOAT is consistent on the applicability of national law as being an applicable source of law. In *re Zihber v. CERN*¹⁰⁴ the Tribunal stated that: “The dispute [is] between the complainant and the organisation which employs him. The Tribunal will therefore apply the relevant terms of the contract and provisions of the Staff Regulations and Staff Rules. The provisions of municipal law are therefore irrelevant, and it is immaterial that the complainant is Swiss and that the accident of 21 December 1976 occurred on Swiss territory”.

In *re Breuckmann v. Eurocontrol No 2*¹⁰⁵ the Tribunal stated that: “it also draws upon general principles of law in so far as they may apply to the international civil service. It takes no account of municipal law, however, except in so far as such law embodies those principles.”

In *Re Saunoi*¹⁰⁶ the Tribunal held that ‘Interpol is an international organisation and not subject to any national law’ and in *re Mr. R.A.O.*¹⁰⁷ the Tribunal stated that the: ‘organisation observes that having been created by an international treaty it is not bound by any European or national legislation...[and]... is not bound by contracts entered into under national laws. The subsequent statements make it clear that the Tribunal only applies a very limited body of law.

The ILOAT has explicitly stated that it “will not review criteria laid down in any national law” and that the only rules applicable to disputes involving the EPO are only the EPO Service Regulations¹⁰⁸ and of no other organisation.

Although the ILOAT will not consider national law, municipal law concepts are employed. A review of case law of the Tribunal allows further comments to be made regarding concepts of

¹⁰³ *Re Zhu*, [1996] ILOAT (judgement 1509) para. 12.

¹⁰⁴ *Re Zihber v CERN* [1980] ILOAT (judgement 435) Consideration 3.

¹⁰⁵ *Re Breuckmann v Eurocontrol No 2* [1977] ILOAT (judgement 322) Consideration 2.

¹⁰⁶ *Re Saunoi*, [1990] ILOAT (judgement 1020) para. 11.

¹⁰⁷ *Mr. R.A.-O against UNESCO* [2003] ILOAT (judgement 2193) Considerations 8.

¹⁰⁸ *Re Geisler* (No 2) and *Wenzel* (No. 3), [1988] ILOAT (judgement 899) para. 14.



law applied by the ILOAT. In the judgments of *Ferrechia*¹⁰⁹ and *Gubin et Nemo*¹¹⁰ the ILOAT declare that ‘the ILOAT applies general principles of law’. That ‘Principles of unjust enrichment are applied’ as in the *Wakely* judgement.¹¹¹ In *Hatt and Leuba*¹¹² the Tribunal stated that the principle of estoppel ‘was potentially applicable’. In the cases of *Leff*¹¹³ and *Bernstein*¹¹⁴ the ILOAT ‘extended its jurisdiction by reference to the principles of justice and equity’. In *re Bajaj*¹¹⁵ the Tribunal confirmed that it did apply the principle of ‘equality of treatment’ where like circumstances prevail. We can conclude from this paragraph that the Tribunal applies some general principles of law even where those principles stem from national legal systems.

3.2.7 Application of international treaties

From the case law it is also clear that international instruments are not applied as in the case of *Pibouleau*¹¹⁶ wherein it was stated that: ‘[...]her dismissal was in breach of the Maternity Protection Convention (No. 103) and Recommendation (No. 95) of the ILO. Those instruments do not apply’.

3.2.8 Application of human rights

The ILOAT acknowledges that: “The law that the Tribunal applies in entertaining claims that are put to it includes not just the written rules of the defendant organisation but the general principles of law and basic human rights”.¹¹⁷ Therefore the Tribunal grants itself the discretion of applying norms, which are not explicitly referred to in the Statute.

The ILOAT has made clear that the conventions of the ILO do not apply to the WHO.¹¹⁸ With regard to the rights guaranteed by the ECHR, the ILOAT acknowledges that “the EPO as such is not a member of the Council of Europe and is not bound by the convention the same way as signatory states” but that, ‘general principles enshrined in the Convention, particularly the principles of non-discrimination and the protection of property rights, are part of human

¹⁰⁹ *Re Ferrechia* [1973] ILOAT (judgement 203).

¹¹⁰ *Re Gubin et Nemo* [1980] ILOAT (judgment 429).

¹¹¹ *Re Wakely* [1961] ILOAT (judgment 53).

¹¹² *Re Hatt and Leuba* [1979] ILOAT (judgement 382).

¹¹³ *Re Leff* [1954] ILOAT (judgement 15).

¹¹⁴ *Re Bernstein* [1955] ILOAT (judgement 21).

¹¹⁵ *Re Bajaj*, [2001] ILOAT (judgement 2023) para. 10.

¹¹⁶ *Re Pibouleau against WHO* [1978] ILOAT (judgement 351) Considerations para. 8.

¹¹⁷ *Re Franks and Vollering*, [1994] ILOAT (judgement 1333) para. 5.

¹¹⁸ *Re Pibouleau*, [1978] ILOAT (judgement 351).



rights, which, as declared by both the President of the Office and its Administrative Council in 1994 in compliance with the Tribunal's case law, applying to relations with staff".¹¹⁹ The ILOAT has also stated that the EPO is not bound by the Convention or any protocol thereto.¹²⁰ Therefore there is a large void between the standards adopted by the International Labour Organisation and the law which is applied by the organs of the ILO and by other international organisations. The ILOAT seems to act in vacuum from the ILO of which it is an organ.

The Tribunal states in the case of *Mr J.M.W. against the EPO* that: "the general principles enshrined in the Convention, particularly the principles of non-discrimination and the protection of property rights, are part of human rights, which as declared by both the President of the Office and its Administrative Council in 1994, in compliance with the tribunal's case law, apply to relations with the staff".¹²¹

Despite the repeated assertion of the Tribunal that general principles of (international administrative) law and human rights are applicable, no clear definition can be discerned from the case law as to the scope of such principles or their sources. Furthermore the ILOAT has contradicted such statements in its own case law. In *Miss E.E.H. against the EPO*¹²² the ILOAT stated that '[n]either a plea based on disregard for the principle of equity nor that based on the breach of principles enshrined in the European Convention on Human Rights, to which international organisations such as the EPO are not a party, can in any event be admitted'. Again in *Mr J.M.W. against the European Patent Office*¹²³ the Tribunal 'reject[ed] the complainant's arguments resting on the European Convention on Human Rights. The EPO is not bound by the Convention or any protocol thereto'.

In the case of *Mr M.R. against the EPO* the rights themselves and the content of these rights are determined in a discretionary manner by the ILOAT. For instance the ILOAT stated that: "the ideal... of the protection of families and children [...] carries no legal weight".¹²⁴

¹¹⁹ *Mr J.M.W. against EPO*, [2004] ILOAT (judgement 2292) para. 11.

¹²⁰ *Mr J.M. W. against the EPO*, [2003] ILOAT (judgement 2237); *Miss E.E. H. against EPO*, [2003] ILOAT (judgment 2236) para. 11.

¹²¹ *Miss E.E. H. against EPO*, [2003] ILOAT (judgment 2236) para. 11.

¹²² *Miss E.E.H. against the EPO* [2003] ILOAT (judgement 2236) considerations para.11.

¹²³ *Mr. J.M.W. against the EPO* [2003] ILOAT (judgement 2237) Consideration C para. 4.

¹²⁴ *Mr M.R. against the EPO*, [2002] ILOAT (judgement 2127).



Interestingly, the Tribunal declared in *re Awoyemi*¹²⁵ that: ‘A firm line of precedent says that rights under a contract of employment may be express or implied, and include any that flow from general principles of international civil service or human rights’. The judgment is interesting in that it confirms a further concept in addition to human rights, which is the doctrine of precedent.

The ILOAT in *re Popineau*¹²⁶ declared that: ‘There was therefore no breach whatever of his right to a fair trial’. The Tribunal therefore acknowledges that the right to a fair trial exists but it is unclear what the substantive content of this right is in cases before the ILOAT.

3.2.9 Does it constitute a judicial body?

The ILOAT does manifest many features of a judicial body as can be seen by the Statute and Rules of the Administrative Tribunal however, the ILOAT is clearly a Tribunal of ‘First and Last Instance’ and not an appellate body. The reliance of the Tribunal on internal dispute resolution systems like the IAC for fact finding and analysis, brings into grave doubt the requirement of a fair hearing as well as the requirement of independence of the tribunal as required under the Convention. The obvious partiality of the internal dispute settlement within the EPO is not remedied, by a fair hearing at the ILOAT stage, which compromises the right to a fair trial during the entire proceedings.¹²⁷ Furthermore since the ILOAT is relying heavily on the assessment made by internal conflict resolution bodies (IAC) of the international organisations party, it fails to detach itself from any bias or lack of independence of such internal procedures. The ILOAT can not therefore provide the required level of independence and impartiality to ensure a fair trial.

Under such circumstances whilst the ILOAT does constitute a judicial body, it clearly lacks independence.

¹²⁵ *Re Awoyemi against UNESCO* [1998] ILOAT (judgement 1756) Considerations para. 3

¹²⁶ *Re Popineau (No 6, 7 and 8) against the EPO* [1994] ILOAT (judgement 1363) Considerations para. 23.

¹²⁷ See *infra*, Chapter 4.



Chapter 4. THE INTERNAL PROCEEDINGS OF THE EPO AND THE ILOAT IN THE LIGHT OF THE REQUIREMENTS OF A FAIR HEARING UNDER ARTICLE 6 ECHR

The notion of a fair trial cannot be defined *in abstracto*, and should be examined according to the particular circumstances of every case; account must be taken of the entire proceedings.¹²⁸ Therefore the ECourtHR could declare the entire proceedings unfair although all formal requirements of Article 6 have been complied with.

Article 6 empowers the Court to determine whether the conditions for a fair trial are fulfilled, and for that purpose the Court also relies on criteria which are not expressly stated in this article.¹²⁹

The proceedings available to employees of the EPO consist of three distinct steps: review by the appointing Authority; further review following a reasoned opinion from an internal Appeals Committee; and appeal to the Administrative Tribunal of the International Labour Organisation. These steps are dependent on each other.

The following section assesses the entire proceedings available to staff of the EPO in the light of the requirements of the ECHR.

4.1 The applicability of Article 6 ECHR to a particular case

For article 6 to apply in civil cases three requirements have to be fulfilled. First a civil right or obligation must be at issue. The Court interprets this criterion broadly and extensively.¹³⁰ Second there must be a dispute concerning this civil right or obligation. And thirdly there must be a determination of this dispute.

Another criterion can be of relevance i.e. the fact that labour disputes concerning public officials fall outside of the scope of Article 6(1), the relevant criterion is whether the function

¹²⁸ See, e.g., *Khan v. UK* [2001] ECHR (app. 35394/97) para. 34 and 38; *Doorson v. The Netherlands* [1996] ECHR (app. 20524/92) para. 67.

¹²⁹ *Bonisch v. Austria*, [1986] ECHR (app. 8658/79) para 29; *Goddi v. Italy*, [1984] ECHR (app. 8966/80) para. 28.

¹³⁰ Philip Leach, *Taking a Case to the European Court of Human Rights*, Oxford University Press, 2005, p. 244.



involves the exercise of powers conferred by public law.¹³¹ The position of international civil servants is far from clear.

4.1.1 The existence of civil rights or obligation under article 6 ECHR

According to the case law of the Court, "the notion of 'civil rights and obligations' cannot be interpreted solely by reference to the domestic law of the respondent State".¹³² The definition of the notion of civil rights and obligations has given rise to extensive case law. The scope of this notion is very broad and its precise content is not clear.¹³³ In relation to employment disputes, the right to statutory sickness allowance,¹³⁴ the right to disability allowance¹³⁵ and the pecuniary interests related to the right to exercise a profession,¹³⁶ have been recognized as civil rights and obligations. We can reasonably conclude that labour disputes within international organisations give rise to disputes over civil rights and obligations falling within the scope of article 6 of the ECHR.

4.1.2 The need for a dispute

The second requirement relies on the existence of a claim in domestic law in relation to the civil right at stake. This is what is meant by the existence of a "genuine and serious"¹³⁷ dispute. There is no doubt as to the fact that most of the disputes within the EPO qualify as "genuine and serious" disputes.¹³⁸

4.1.3 A determination of a civil right

The second criterion i.e. the need for the determination of a civil right, makes clear that the outcome of the proceedings must be directly linked to the civil right at stake. As we will see below once the afore-mentioned conditions of admissibility are fulfilled, the Court has developed an extensive case law on the content of the right to a fair trial. When the

¹³¹ *Pellegrin v. France* [1999] ECHR (app. 28541/95) para. 66.

¹³² *König v. Germany* [1978] ECHR (app. 6232/73) para. 88-89.

¹³³ Philip Leach, *Taking a Case to the European Court of Human Rights*, second edition, (Oxford: OUP, 2005), p. 244.

¹³⁴ *Feldbrugge v. The Netherlands* [1986] ECHR (app. 8562/79), para. 40.

¹³⁵ *Salesi v. Italy*, [1993] ECHR (app. 13023/87), para. 19.

¹³⁶ *De Moor v. Belgium* [1994] ECHR (app. 16997/90), para. 47.

¹³⁷ *Sporrong and Lönnroth* [1983] ECHR (app. 7151/75;7152/75), para. 81.

¹³⁸ For e.g., *In re Goettgens*, [1995] ILOAT (judgement 1424); *In re Jaworski*, [1987] ILOAT (judgement 814).



applicability or the interpretation of a civil right is essential for the outcome of labour dispute within international organisations, this second criterion is fulfilled.¹³⁹

4.2 The substantive requirements of Article 6

The ECtHR has made clear that the right to a fair trial encompasses requirements that are not explicitly mentioned in Article 6. In the subsequent development we will study the components of the right to a fair trial, that are relevant to assess the proceedings which take place within the EPO and within the ILOAT.

4.2.1 The right of access to a court

The right of access to a court is not absolute and therefore this right can be restricted, according to the case law of the Court the restrictions have to pursue a legitimate aim it has to be proportionate and it should not have as effect of precluding the applicants rights to access a court altogether.¹⁴⁰ In other words the right of access to court is not absolute but it cannot be limited to such an extent as to destroy its “very essence”.¹⁴¹

As seen above, immunity can constitute a valid restriction to the right to access a court, and the right to access the ILOAT may also be limited to certain categories of applicants. The Court concluded in *Golder v. U.K.*¹⁴² that article 6 contains an inherent right of access to a court. The Court said in the *Golder* case that: “In civil matters one can scarcely conceive of the rule of law without their being a possibility of access to the courts”.¹⁴³

As has been assessed above, the right to access a court for the staff of the EPO is limited to the right to access the ILOAT, since the IAC of the EPO does not constitute a judicial body.

The Court further stated that: “The principle whereby a civil claim must be capable of being submitted to a judge ranks as one of the universally “recognised” fundamental principles of law; the same is true of the principle of international law which forbids the denial of

¹³⁹ For e.g., *In re Kern (no. 11)* [2001] ILOAT (judgement 2101) consideration 5; *Mr F.B., mr K.C.B. and Mr A.K. v. EPO*, [2003] ILOAT (judgement 2228) consideration 11.

¹⁴⁰ *Ashingdane v. United Kingdom* [1995] ECHR (app. 8225/78), para. 57; *Lithgow and others v. United Kingdom* [1986] ECHR (app. 9006/80;9262/81;9263/81;...), para. 194.

¹⁴¹ *Lithgow and others v. UK* [1986] ECHR (app. 9006/80; 9262/81; 9263/81;...), para. 194.

¹⁴² *Golder v. U.K.*, [1975] ECHR (app. 4451/70), para. 31.

¹⁴³ *Ibid.*, para. 34.



justice”.¹⁴⁴ Subsequently the Court stated that not only the right of access to a court must exist but must also be effective.¹⁴⁵

The existence of access to the ILOAT has been dealt with hereinabove. In subsequent developments we will consider the effectiveness of the right to access the ILOAT. It is obvious from the analysis above that there exist deficiencies with the ILOAT for example that it does not hold oral hearings even in cases where the facts are highly important for the outcome of the case.

Furthermore the ILOAT relies heavily on the facts and on the interpretation of the applicable law made by the administration of the organisations or internal dispute resolution means.

Finally, it should be noted that the success rates of applications to the ILOAT are surprisingly low. On average during the period 1978 to present 65% of applications have been rejected. 15% of the cases some claim of the applicant partially satisfied; but only 20% where the main claim is satisfied. Although in itself this is not conclusive evidence, the low success rate, for what is essentially a tribunal of first instance, suggests a bias towards the position of the administrations.

We can conclude that while the access to the ILOAT can be regarded as sufficient in the light of the requirements of article 6, fair trial rights are not sufficiently guaranteed by the ILOAT therefore the necessary effectiveness of the of the access to court is not provided.

4.2.2 An independent and impartial tribunal established by law

This topic has been dealt with in a previous report by the Amsterdam international law clinic in 2004.¹⁴⁶ This report made clear that the ILOAT Statute did not contain adequate provisions to ensure the independence of the ILOAT from the executive organs of the ILO.¹⁴⁷

¹⁴⁴ *Ibid*, para. 35.

¹⁴⁵ *Airey v. Ireland* [1979] ECHR (app. 6289/73), para. 24.

¹⁴⁶ Nicole E. Kuijter & Susan L. Park, *Judicial Independence of the International Labour Organization Administrative Tribunal: The Potential for Reform*, Amsterdam International Law Clinic, April 2005.

¹⁴⁷ *Ibid*, p. 24.



4.2.3 A public judgment

Decisions which have been taken in close session and which are subsequently not made public violate the requirements of article 6 ECHR.¹⁴⁸ Concerning the public pronouncement of the judgement, despite the strict wording of Article 6, municipal courts enjoy certain discretion in rendering decisions public.

The lack of publicity of the decision of the president of the EPO corroborates the assertion that the President of the EPO renders only an administrative decision. The decisions rendered by the ILOAT are made public by several means.¹⁴⁹

In *Preto and others v. Italy* the Court held “unanimously that the absence of public pronouncement of the Court of Cassation's judgment did not contravene Article 6 § 1”. The Court also holds that particular circumstances can justify the absence of public pronouncement of the judgement.¹⁵⁰

In *Szücs v. Austria*¹⁵¹ the Court considered that at lower instance the requirements are more stringent, because of the fact that the court of first instance did not render its judgement public it found a violation of article 6.

We can therefore conclude that the publicity requirement is complied with by the ILOAT.

4.2.4 The need for a genuine judicial process

Pursuant to the case law of the ECtHR the right to a judicial process embodies the right to adversarial proceedings and the right to examine evidence and arguments adduced by the other party. The outcome of the judicial process has to be a reasoned decision,¹⁵² however this does not mean that the Court has to provide a detailed answer to every argument.¹⁵³

¹⁴⁸ *Campbell and Fell v. U.K.* [1984] ECHR (app. 7819/77;7878/77), para. 91-92.

¹⁴⁹ TRIBLEX, <<http://www.ilo.org/public/english/tribunal/>>; SUEPO website, <<http://www.suepo.org/public/ILO/ilo.html>>.

¹⁵⁰ *Axen v. Germany* [1989] ECHR (app. 8273/78), para. 32.

¹⁵¹ *Szücs v. Austria* [1997] ECHR (app. 20602/92), para. 48.

¹⁵² *Van de Hurk v. The Netherlands* [1994] ECHR (app. 16034/90), para. 61.

¹⁵³ *Ibid*, para 61.



4.2.5 Equality of rights in adversarial proceedings

The notion of equality of arms has been defined as requiring “that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent”.¹⁵⁴

Before the IAC the proceedings are conducted by the chairman, who is appointed by the President of the EPO. Furthermore, the president of the Office takes the final decision. It is therefore obvious that for structural reasons the requirement of equality of arms cannot be met.

The ECtHR considered the concept of equality of rights as an implied component of Article 6.¹⁵⁵ In *Borgers v. Belgium*¹⁵⁶ the Court held that the role of the advocate general was incompatible with the principle of equality of arms, which resulted in a violation of article 6. The president can on a discretionary basis decide to follow or not the recommendations made by the IAC, and the president also constitutes a party to the proceedings. Thus because the president cumulates the functions of party and judge, equality of arms does not even exist from the outset.

4.2.6 Full access to documents relating to the case

In *Edwards v. U.K.*¹⁵⁷ the Court held that the fact that the prosecuting authorities did not hand over material to the defence, of which they had knowledge of its existence, constituted a breach, however the Court held that the breach had been remedied at appeal stage. The potential breaches or deficiencies before the IAC of the EPO are likely not to be remedied before the ILOAT because the parties face the impossibility to present their view through oral hearings. Although the ILOAT should be considered as the first instance, it must be held accountable for deficiencies since they cannot be remedied at a later stage, since its judgements are final.

¹⁵⁴ *De Haes and Gijssels v. Belgium* [1998] ECHR (app. 19983/92), para. 53.

¹⁵⁵ *Neumeister v. Austria* [1968] ECHR (app. 1936/63), para. 22.

¹⁵⁶ *Borgers v. Belgium* [1991] ECHR (app. 12005/86), para. 27-29.

¹⁵⁷ *Edwards v. United Kingdom* [1992] ECHR (app. 13071/87), para. 36.



The ILOAT relies on fact finding of the IAC,¹⁵⁸ it is therefore not only relying on assessments of facts and legal interpretations which are biased, but it also compromises its independence.

4.2.7 The right to public hearings

According to the formulation of article 6 ECHR everyone is entitled to a “public hearing”, however the Court has made clear that this formula also encompasses the right to an oral hearing.¹⁵⁹ However these two components still have a separate existence and a different content.

4.2.7.1 Public nature of the hearing

According to the Court, the practice of public proceedings before judicial bodies is conceived to protect ‘litigants against the administration of justice in secret with no public scrutiny’.¹⁶⁰

The Court held that article 6 did not prevent an appeal Court from dispensing itself from holding a public hearing when deciding on points of law, if it unanimously considers that the appeal is ill-founded and that oral argument is not necessary.¹⁶¹

In *Ekbatani v. Sweden*,¹⁶² the Court held that: “the question before the Court is therefore whether a departure from the principle that there should be a public hearing at which the accused has the right to be present and argue his case, could, in regard to the proceedings before the Court of Appeal, be justified in the circumstances of the present case by the special features of the domestic proceedings viewed as a whole”.

4.2.7.2 The right to an oral hearing for the parties

Account must be taken of the entirety of the proceedings and the role of the courts therein, in order to determine whether hearings in appeal proceedings are required.¹⁶³ Further in *Monnell and Morris v. U.K.*¹⁶⁴ a case which, concerned criminal proceedings that account must be

¹⁵⁸ See *supra*, footnote 91.

¹⁵⁹ For e.g. *Döry v. Sweden*, [2003] ECHR (app. 28394/95) para. 37.

¹⁶⁰ *Axen v. Germany* [1983] ECHR (app. 8273/78), para. 25; *Helmers v. Sweden* [1991] ECHR (app. 11826/85), para. 33.

¹⁶¹ *Axen v. Germany*, [1983] ECHR (app. 8273/78), para. 18 and 28.

¹⁶² *Ekbatani v. Sweden* [1988] ECHR (app. 10563/83), para. 28.

¹⁶³ *Monnell and Morris v. U.K.* [1987] ECHR (app. 9562/81 and 9818/82), para. 56.

¹⁶⁴ *Ibid.*



taken of the powers of the domestic courts “and the manner in which the applicant’s interests are presented and protected”.

Nevertheless even when oral hearings are expressly allowed the parties can validly relinquish their right to oral hearings.

a) The principle

The ECtHR stated in *Göç v. Turkey*¹⁶⁵ that: ‘in proceedings before a court of first and only instance the right to a “public hearing” in the sense of Article 6 § 1 entails an entitlement to an “oral hearing” unless there are exceptional circumstances that justify dispensing with such a hearing’, this position has been consequently upheld by the ECtHR after its development in *Håkansson and Sturesson v. Sweden*.¹⁶⁶

In *Schuler –Zraggen v Switzerland*¹⁶⁷ the ECtHR considered that oral hearings are required when issues of public importance arise from the dispute.

In *Le Compte*¹⁶⁸ the Court ruled that a tribunal competent to determine all the aspects of the matter which did not hear the applicants publicly, constituted a breach of article 6.

In *Allan Jacobsson v. Sweden*¹⁶⁹ the Court confirmed that: “according to its case-law, in proceedings, as here, before a court of first and only instance the right to a “public hearing” under Article 6 § 1 entails an entitlement to an “oral hearing” unless there are exceptional circumstances that justify dispensing with such a hearing”.

In *Ekbatani v. Sweden*¹⁷⁰ the Court reasoned that the issue to be decided on required hearing the applicant and the complainant. In *Monnell and Morris v. the United Kingdom* and *Botten v. Norway*¹⁷¹ the Court taking into account the seriousness of what was at stake for the applicant’s professional reputation and career ruled that oral hearings were necessary.

¹⁶⁵ *Göç v. Turkey* [2002] ECHR (app. 36590/97), para. 47.

¹⁶⁶ *Håkansson and Sturesson v. Sweden* [1990] ECHR (app. 11855/85), para. 64.

¹⁶⁷ *Schuler –Zraggen v. Switzerland* [1993] ECHR (app. 14518/89). para. 58.

¹⁶⁸ *Albert and Le Compte v. Belgium* [1983] ECHR (app. 7299/75;7496/76), para. 37.

¹⁶⁹ *Allan Jacobsson v. Sweden* [1998] ECHR (app. 16970/90), para. 46.

¹⁷⁰ *Ekbatani v. Sweden*, [1988] ECHR (app. 10563/83) para. 32.

¹⁷¹ *Monnell and Morris v. the United Kingdom*, [1987] ECHR (app.9562/81;9818/82); *Botten v. Norway* [1996] ECHR (app. 16206/90), para. 51.



The ILOAT constitutes the first and last judicial instance therefore it cannot unless there are particular circumstances dispense itself from holding public and oral hearings. The ILOAT cannot invoke particular circumstances to consistently refuse oral hearings. Furthermore the ILOAT has jurisdiction over all the aspects of case, therefore under the Convention the ILOAT cannot be allowed to dispense itself from holding oral hearing on a systematic basis. Finally in addition, to the fact that pursuant to the ILOAT Statute oral hearings are allowed,¹⁷² the outcome of the proceedings often have enormous consequences on the professional reputation of the applicants, therefore warranting oral hearings.

b) Courts of first instance

The fact that a municipal court of first instance jurisdiction also encompasses factual issues renders oral hearings mandatory.¹⁷³ The absence of oral hearings in civil proceedings, before a court of first and only instance, which has to rule over issues of fact and of law, constitutes a breach of the ECHR.¹⁷⁴ This leaves no doubt as to the standards the ILOAT has to comply with. The ILOAT as a court of first instance which has jurisdiction over the facts as well as the law simply has to allow oral hearings.

c) A court of appeal or cassation

The ECtHR made clear that the requirements of article 6 are also applicable in appeal and cassation proceedings.¹⁷⁵ A public hearing before an appeal or cassation instance does not legitimate or cure the absence of hearing at first instance.¹⁷⁶

In *Helmerts v. Sweden*¹⁷⁷ the Court held that “even where a court of appeal has jurisdiction to review the case both as to facts and as to law, the Court cannot find that Article 6 always requires a right to a public hearing irrespective of the nature of the issues to be decided.” In the same case the Court reached the conclusion that there were no special features to justify the Court of Appeal's denial of a public hearing. In other words, the nature of the issues to be

¹⁷² *Supra*, Footnote 96 (Article 12.3).

¹⁷³ *Fredin v. Sweden (no. 2)* [1994] ECHR (app. 18928/91), para. 21-22; *Allan Jacobsson v. Sweden (no. 2)* [1998] ECHR (app. 16970/90), para. 48.

¹⁷⁴ *Fredin v. Sweden (no. 2)* [1994] ECHR (app. 18928/91), para. 20-21.

¹⁷⁵ *Delcourt v. Belgium* [1970] ECHR (app. 2689/65), para. 18; *Pakelli v. Germany* [1983] ECHR (app. 8398/78), para. 29.

¹⁷⁶ *Albert and Le Compte v. Belgium* [1983] ECHR (app. 7299/75;7496/76), para. 36.

¹⁷⁷ *Helmerts v. Sweden* [1991] ECHR (app. 11826/85), para. 36.



decided in a particular case is of more relevance than the scope of the jurisdiction of the courts.

In *Helmerts v. Sweden* the Court of appeal had jurisdiction over the facts and taken account of the fact that the proceedings were of great importance for the professional future of the applicant, therefore the absence of hearings were unjustified.¹⁷⁸ The same reasoning was upheld in *Botten v. Norway*. Even if we were to consider the ILOAT as being a court of appeal which it is not, the decision it renders are almost always of paramount importance for the professional future for the applicants, rendering oral hearings compulsory according to the case law of the EctHR.

The ECtHR consequently held that when public hearings have been allowed at first instance a superior court can according to special features of the proceedings dispense itself of the public hearing requirement. This is not the case with the ILOAT since it constitutes the first and last instance.

In *Stallinger*¹⁷⁹ the Court stated that, only exceptional reasons can justify the refusal to allow oral hearings at second instance when they have not been held at first instance. In the same case the Court stated that no exceptional circumstance was present and that the refusal to grant oral hearings on the ground that it will not clarify the case could not allow the court to dispense with oral hearings.

When a dispute before a court of appeal or cassation concerns only points of law, or when the jurisdiction of the court is limited to legal questions, the absence of oral hearings are justified.¹⁸⁰

We can conclude that even if the ILOAT is considered as being a court of appeal, there are compelling reasons for this court to allow oral hearings.

¹⁷⁸ *Ibid*, para. 38.

¹⁷⁹ *Stallinger and Kuso v. Austria* [1997] ECHR (app. 14696/89;14697/89), para. 28 and 51.

¹⁸⁰ *Axen v. Germany* [1983] ECHR (app. 8273/78), para. 28.



d) The exception: particular circumstances

The requirement of oral hearings can be dispensed with only under particular circumstances; the Court held that the fact that questions of fact or of law can be resolved on the basis of the parties' written submission, was constitutive of a particular circumstance.¹⁸¹

In *Döry v. Sweden* the Court stated: “a hearing may not be necessary due to exceptional circumstances of the case, for example when it raises no questions of fact or law which cannot be adequately be resolved on the basis of the case-file and the parties' written observations”.¹⁸²

However the Court found in *Döry v. Sweden* that the court at stake could resolve the case solely on the basis of the written evidence available and that it was therefore constitutive of exceptional circumstances.

But the Court more often holds that there are no exceptional circumstances for instance in *Fredin v. Sweden (No.2)*¹⁸³ there were no particular circumstance allowing the court to dispense itself from refusing to hold oral hearings, furthermore it was necessary for the court to obtain clarification, by way of oral arguments, of certain essential points. A similar position was held in *Fischer v. Austria*¹⁸⁴ where the Court Stated that: “there do not appear to have been any exceptional circumstances that might have justified dispensing with a hearing.”

When we analyse the practice of the ILOAT in the light if these requirements we can conclude that the “exceptional circumstances” exception can almost never be upheld. Furthermore the ILOAT has turned the exception into a principle by never allowing oral hearings, and this practice finds no justification.

In *Schuler-Zraggen v. Switzerland*¹⁸⁵ the Court held that the practice of social security courts when following a systematic expediency policy to dispense from holding oral hearing is not contrary to the Convention. However this exception seems to be limited to special courts.

¹⁸¹ *Döry v. Sweden*, [2003] ECHR (app. 28394/95) para. 45.

¹⁸² *Döry v. Sweden*, [2003] ECHR (app. 28394/95) para. 37.

¹⁸³ *Fredin v. Sweden (No 2)* [1994] ECHR (app. 18928/91), para. 22.

¹⁸⁴ *Fischer v. Austria* [1995] ECHR (app. 16922/90), para. 44.

¹⁸⁵ *Schuler-Zraggen v. Switzerland* [1993] ECHR, (app. 14518/89), para. 58.



4.2.7.3 The conditions under which the parties can relinquish their right to an oral hearing

The ECtHR considered that the applicants failure to request oral hearing in a case that did not arise issues of public Importance, constituted a valid waiver of the right to a oral hearing.¹⁸⁶

The applicants can waive their right to an oral hearing, this waiver should be expressed freely and must be unequivocal,¹⁸⁷ but the waiver cannot run counter any important public interest.¹⁸⁸

In *Hakansson and Sturesson v. Sweden*¹⁸⁹ the Court considered that the fact that the applicants did not request for a oral hearing, before the appeal court which constituted the court of only instance, constituted an unequivocal waiver.

In this respect the ILOAT even refuses to allow oral hearings we they are expressly requested by the parties to the dispute.

¹⁸⁶ *Schuler –Zraggen v. Switzerland* [1993] ECHR (app. 14518/89), para. 58; *Zumtobel v. Austria* [1993] ECHR (app. 12235/86), para. 34.

¹⁸⁷ *Albert and Le Compte v. Belgium* [1983] ECHR (app. 7299/75;7496/76), para. 35.

¹⁸⁸ *Hakansson and Sturesson v. Sweden*, [1990] ECHR (app. 11855/85), para. 66-67.

¹⁸⁹ *Ibid*, para. 66-67.



CONCLUSION

In this report we addressed the issue, whether the entire proceeding i.e. the internal dispute settlement mechanism within the EPO and the external appeal before the ILOAT fulfil the requirements of Article 6 ECHR.

To summarise our findings, we will first explain how the ECHR became of relevance by virtue of the “reasonable alternative means test”. Secondly, we will summarise our findings as to whether the proceedings before the EPO and the ILOAT qualify as “reasonable alternative means.”

We derived from the case law of the European Court, that international organisations do have to provide “reasonable alternative means” in order to prevail upon their immunity. These alternative means have to provide the litigants with the same guarantees as those embodied in the ECHR, this is what is meant by the reasonableness criterion. Pursuant to the *Matthews v. U.K*¹⁹⁰ case, States cannot absolve themselves from their obligations under the ECHR by transferring powers to international organisations. This implies that organisations have to provide the same level of guarantees as those States have to provide by virtue of the ECHR. The reasonable alternatives have to provide litigants with the same standards as those embodied in the Convention. This is a consequence of the fact that the ECtHR only has jurisdiction to interpret the ECHR and can therefore, not create different standards applicable to States, once those States have transferred powers to international organisations.

Pursuant to immunity of organisations employees of the EPO have in principle no recourse to national means of redress, and can therefore only rely on the internal employment dispute settlement mechanisms of the EPO and subsequently on an external appeal before the ILOAT.

As a consequence the only means of dispute settlement for employees of the EPO are to be found within the EPO and the ILOAT. The issue under debate and that requires assessment is whether these alternative mechanisms could qualify as reasonable. If those means do not qualify as reasonable, employees could seek remedy before national jurisdictions.

¹⁹⁰ *Supra*, footnote 23.



The internal proceedings of the EPO, where a decision can be contested by appeal to the appointing authority and which takes a decision after having received an opinion from the IAC, does not qualify as judicial dispute settlement.

The IAC comprises of a chairman and four members, the chairman and two members being appointed by the President of the Office after consultation and, two members via the Staff Committee. This report considers that this immediately develops an imbalance of independence in the structure in favour of the President which, allied to the requirement of secrecy flies in the face of transparency albeit Article 111 of the Service Regulations of the EPO expects complete independence of this committee. Therefore, the dispute settlement within the EPO lacks the independence required for judicial organs.

We saw that in Article 3 of the Rules of Procedure of the IAC it confirms that as a rule, ‘the chairman will act as rapporteur’ That the rapporteur will provide provisional opinion containing statements of facts, relevant law and that once investigations have been finalised, the rapporteur will draw up the opinion to be received by the President of the Office, based on the internal deliberations of the Committee however, the President will not receive with the opinion any witness statements, minutes or tape recordings to formulate the decision. As the Rapporteur is normally the chairman of the IAC and not to be disregarded, an appointee of the President who holds in addition the power of a casting vote demonstrating further imbalances.

The IAC does not deliver a decision, rather a reasoned opinion which, is taken into consideration by the President of the EPO. What else is taken into consideration by the President is difficult to comprehend as he, as stated above, does not receive statements, minutes or tape recordings.

Decisions are taken on a discretionary basis by the President of the EPO which is an administrative organ, considering the fact that the EPO administration is always a party to proceedings, this cannot be seen as an independent organ therefore the decision of the president constitutes a mere administrative decision.



Furthermore the decision is not binding in character, which pursuant to the *Bentham v. Netherlands*¹⁹¹ case corroborates the fact that the dispute settlement within the EPO does not have a judicial nature, but a mere administrative nature.

Once a decision has been adopted by the President of the EPO, should an individual still disagree with the decision that had been formulated by the President taking into consideration the opinion, that individual is free to appeal against that decision to the International Labour Organisations Administrative Tribunal (ILOAT).

The ILOAT can be seen as a judicial instance, and it therefore constitutes the first and final judicial instance for the settlement of employment disputes arising within organisations which have recognised its jurisdiction. The ILOAT is far from fulfilling the requirements of a first and final judicial instance as set down by the ECtHR.

Pursuant to the case law of the ECtHR, when assessing the requirements of a fair trial account has to be taken of the entire proceedings, but in the present case legal proceedings are only to be found before the ILOAT.

Litigants can access the ILOAT, therefore the right to access a judicial instance exists, but this access must also be effective. The effectiveness of the right to access the ILOAT, is compromised by the fact that the ILOAT refuses to hold any public or oral hearings on a systematic basis, which is in clear contradiction with the requirements of the ECHR. By virtue of *Fredin v. Sweden (no. 2)*¹⁹² the absence of oral hearings in civil proceedings before a court of first and only instance which, has to rule over issues of fact and of law, constitutes a breach of the ECHR.

The ILOAT is not complying with the ECHR requirements by systematically refusing to hold oral hearings, and it lacks independence from the international organisations which have recognised its jurisdiction because it relies, without further investigations, on the facts as established by internal bodies of those organisations. It therefore appears that the ILOAT is

¹⁹¹ *Supra*, footnote 86.

¹⁹² *Supra*, footnote 171.



functionally dependent upon such bodies since it does not independently carry out its own fact assessment.

In conclusion, the maintenance of immunity becomes objectionable because for the international organisations in question, a reasonable alternative means has not been provided. Furthermore, Member States of the EPO can be held responsible for absolving themselves from the obligations incumbent upon them pursuant to the ECHR by transferring powers to the EPO without ensuring adequate protection for the rights guaranteed in the Convention.



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