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STAFF UNION OF THE EUROPEAN PATENT OFFICE SUEPO
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Zentraler Vorstand . Central Executive Committee . Bureau Central

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Report

EPO Internal Justice System

Introduction and background

Over last months[1], the President has announced his intention to introduce in the EPO a further reform labelled "Social Democracy". SUEPO also shares the view that a debate on the Social Democracy in the EPO of the 21st century is indeed overdue, but does not agree with the narrow meaning given by Mr. Battistelli to that subject: Social Democracy is not only about ensuring a "better dialog between staff and management, e.g. in the GAC and other forums"[2], it is above all creating a solid system which is consistent with the all fundamental principles of our democratic society. SUEPO believes it should encompass Justice, Social Dialog and Social Contract. Rather than going in this direction, it appears that Mr Battistelli aims at further curtailment of staff rights, confirming the trends of the past 2 years.

A critical aspect which needs to be addressed before discussion on other aspects is Justice: the recognition of fundamental rules of law and a functioning legal protection system. Once this essential pillar of Social Democracy has been put in place, the Social Dialog including the role of the Social partners can be addressed. And once these two pillars have been anchored in our system, the Social Contract existing between Staff and the Office[3] can be addressed.

The present document will focus on a concern expressed by Staff since the mid 90s of what can be considered as a vacuum of fundamental rights and the chronic lack of an effective administration of justice in the European Patent Organisation. The failure of the EPO to address the concerns of staff in this regard, has given rise to suspicion that the President is exploiting the legal vacuum to introduce further negative measures including further degradations to the legal protection systems.

The main areas of concern discussed in the sections below are the following:

1. the functioning of the justice mechanisms, including but not limited to their independence
2. weaknesses with regard to the protection of fundamental employment rights and standards
3. excessive delays and related procedural problems.

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[1] see Communiqué 41
[2] see Communiqué 35 - SUEPO fears that it will mean a curtailing of the last independent organ in the Office, the Staff Representation
[3] For more details see *Trias Politica, a "Feuille de Route" for Social Democracy by SUEPO*

Executive Summary and Recommendations

Problems

Access to justice for staff of the EPO exhibits a number of serious deficiencies:

1. *There are problems with the functioning of the internal appeal processes, and the ILOAT. A clear lack of independence exists within the internal appeal process. This is exacerbated by an increasing trend of the President to reject the opinion of the IAC. Problems exist with regard to disclosure and evidence taking. The ILOAT does not correct these errors since it does not carry out fully independent evidence gathering; rather it relies on the pleadings of the parties and the opinion of internal bodies.*

2. *There exist weaknesses with regard to the protection of fundamental employment rights and standards. No such rights are recognised as binding on the EPO. This creates a vacuum in which the EPO has wide discretion to introduce legislation, or to interpret/apply existing legislation which is not consistent with such fundamental rights. Recent examples are the regulations on strikes, and the so called "well-being" regulations which deal with sick leave control. The ILOAT does not provide protection of these rights since it primarily limits itself to the application of the internal regulations of the EPO. The Tribunal claims to protect "general legal principles including human rights" but does not define what these are. When a staff member claims protection of a fundamental right, the Tribunal systematically rejects this claim stating that such rights apply to the member states and not the organisation.*

3. *The bodies tasked with the administration of justice are experiencing excessive delays and related procedural problems. Delays to the internal appeals procedures are between 3-5 years and are expected to increase. Delays to the ILOAT are at best between 4-5 years, at worst in excess of 15 years. The combined minimum delay expected from filing an internal appeal to receiving judgement from the ILOAT is 7 years; in practice this will be much longer for most cases. The standard set by the European Court (ECHR) is between 2 and 5 years, but rather towards the 2 year limit for labour related cases.*

Consequences

It is to be expected that an increasing number of staff file request to national courts and/or the ECtHR. According to precedent the maintenance of the immunity of the EPO where adequate protection is not provided is itself a violation of the Convention and a number of cases are already pending before the ECtHR. The problems are also likely to contribute to social unrest and a lack of trust in the senior management of the EPO.

Recommendations

Urgent action is required to address these problems. With regard to the backlogs it is clear that substantial increases in capacity are required in the long term and special transitional measures to reduce the backlogs in the short term.

With regard to the other issues, the history of failed dialogue on this topic suggests that bilateral discussion between the staff representation and the President are unlikely to result in resolution of the problems. It is therefore proposed that an independent panel of internationally recognised legal experts is commissioned to prepare a detailed analysis of the problems with the justice mechanisms and make proposals for reform. This panel must be paritary in nature with members nominated by both the EPO and staff. It should hear concerns from all parties and provide recommendations as to how the address the problems in the short and long term. A key issues that must be addressed is how to provide effective protection of fundamental workplace rights and guarantee conformance to European standards.

1. INDEPENDENCE AND IMPARTIALITY OF INTERNAL DISPUTE RESOLUTION SYSTEMS

The legal protection system of the European Patent Organisation consists of two parts: internal bodies such as the Internal Appeals Committee (IAC) which advise the President, and the Administrative Tribunal of the ILO (ILOAT).

When considering the independence and impartiality of the internal mechanisms, it should be noted that all internal bodies have an advisory character; it is the President alone who decides. This means that when taking a decision regarding an appeal, the President must review a previous act or decision taken either by himself, or under his authority. Put another way, he is both the Executive head of the EPO (Office) and final Judge in case of an appeal. To be truly impartial under these circumstances would require extraordinary qualities.

For this reason although the internal bodies can help resolve many problems, it must be recognised that formally they are all management review mechanisms and should not be confused with proper judicial review. Nevertheless, staff are required to exhaust these internal means prior to making an appeal to the ILOAT.

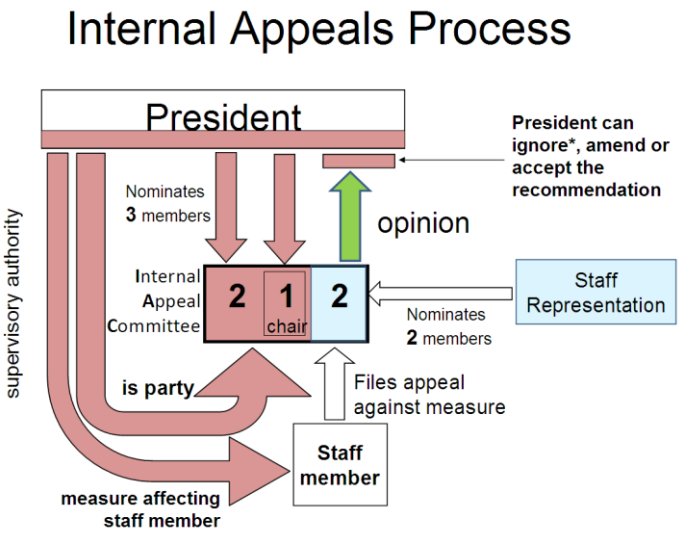
Despite their lack of independence internal mechanisms can help with fact finding, however, this is not without limitation. The President (or the Office) can withhold information or even make false representations to such bodies without any serious consequences. No means exist to hold the Office or individuals to account for such actions. Neither are there any means to provide urgent protection where needed, for example injunctive measures.

The situation with regard to the role of the President in the internal appeals process is depicted in Fig. 1. from which the dominance of the President over the process from initial decision (or act) to a final decision can be seen. At the heart of this process is the Internal Appeals Committee (IAC).

There are some measures which aim at securing the impartiality of the IAC inter alia: the members are prohibited to seek or take instructions and that the Committee has a quasi-paritary structure in which both the President and the Staff Committee nominate members. However, a number of factors can undermine the quality and impartiality of the process:

- the President is a party to the appeal process however, he alone decides on the outcome;
- the committee is not truly paritary: the President nominates 2 members and the Chairman, whereas the Staff Committee nominates only 2 members;
- the President is the supervisory authority for all members; and as such indirect pressure may exist
- the President controls all resources available to the appeal process;
- there are no obligations upon the Office to disclose facts[4] or means to prevent false representations by the Office.

Figure 1 - Role of the President in the Internal Appeals Process



The recommendation of the IAC, even where this is unanimous, is not formally binding; the President may amend the recommendation or simply replace it with his own. The ILOAT has ruled that the President must take the opinion into account and provide reasons for deviating from it, however, the case law is

[4] Prior to the reform of the appeal system in 2013 the Appeal Committees had the power to order disclosure. This was removed from Article 113(1) in the new regulations.

divergent with regard to the justification of such action.

The Staff Committee has received feedback from appellants that in an increasing number of cases during 2013 the President has not followed unanimous and majority opinions from the IAC. For 2013 there were 12 majority or unanimous opinions to allow the appeal, and a further 16 to be allowed in part. According to information received the President has not followed the majority of these opinions. This is problematic for a number of reasons: first it undermines confidence in the impartiality of the internal appeal process; secondly, it leaves the staff member concerned without reasonable expectation of legal protection since the delays at the ILOAT are very high; and lastly it further contributes to the caseload of the ILOAT since the staff member has no other options available except to file an appeal to the ILOAT.

Another problem in this is that prior to the President´s recent reform of the appeal procedure, the staff member and the President both received a copy of the opinion directly from of the IAC. With the new procedures, only the President receives a copy, the staff member is sent the opinion by the President only once the President has taken his decision regarding the appeal. The procedures and outcome of an internal appeal are secret, no public observation or supervision is possible.

These problems of lack of independence and impartiality are not resolved at the level of the ILOAT since the Tribunal relies upon the opinion of internal bodies, both for clarification of the facts, and also the analysis and opinion. Since the impartiality of the internal appeals process is not guaranteed, the reliance on the findings / opinion does not exclude any bias introduced in the internal process if and when a case is brought before the ILOAT. In addition to the reliance on internal means the independence of the Tribunal has also been criticised for other deficiencies with regard to securing it's independence and impartiality[5].

[5]The Judicial Independence of the International Labour Organisation Administrative Tribunal: Potential for Reform, AILC 2007, available at https://www.suepo.org/rights/public/archive/iloat.independence.ailc.final.02.06.07.pdf

2. PROTECTION OF FUNDAMENTAL EMPLOYMENT RIGHTS AND STANDARDS

A second problem with the EPO justice system, is the failure of the Organisation to recognise fundamental employment rights in a manner which permits them to be effectively enforced.

The rights which staff are seeking to protect those which are considered fundamental in the member states of the EPO. This lack of protection is of particular concern since the EPO has legislative rights regarding the internal employment law and there are very limited means to review the law or its implementation / interpretation for conformity with fundamental rights. Examples of deficiencies in this respect are the rights contained in the European Convention of Human Rights, the ILO Conventions, Health and Safety at Work standards, and data protection rights.

The EPO claims that such rights are protected by the Administrative Tribunal of the ILO (ILOAT). However, whilst the Tribunal claims to protect what it calls "general legal principles including human rights", these are only vaguely defined and an examination of the case law of the Tribunal clearly demonstrates deficiencies. When a claimant seeks protection of a right which is codified in an international treaty or convention such as the ECHR or the ILO conventions, the Tribunal has systematically rejected this claim, arguing that such treaties apply to the member states only and not the EPO[6]. The Tribunal usually goes on to claim that it protects general legal principles, but it rarely defines what these are, nor does it refer to the judgements of authoritative bodies, such as the ECtHR, to determine the practical meaning of such rights.

All that would be required to resolve these problems for the EPO to formally recognise that the EPO is subject to fundamental rights, including part I of the ECHR, the ILO conventions and essential elements of health and safety law as set out in national and EU

[6] August Reinisch and Ulf Andreas Weber, "In the Shadow of Waite and Kennedy" International Organisations Law Review 2004, p. 94-100...

regulations. It is not necessary that the EPO becomes a party to the conventions in questions, it would only be necessary to incorporate these by reference to the conventions and include the cases law into the service regulations of the EPO. Once these are recognised as binding law, any judicial or quasi-judicial review would be obliged to meet these standards of protection.

2. 1 Other issues with Legal Protection

A number of other problems exist with the ILOAT and internal appeals procedures:

- There is no injunctive action to deal with urgent cases
- There is no review of decisions regarding the immunity of Office[7]
- There are no judicial means to resolve collective disputes
- Staff representation bodies do not have standing before appeals bodies
- The fact finding of the ILOAT is mostly limited to the pleadings and opinion of internal appeal bodies. No oral hearings or hearing of witnesses are undertaken even in complex cases
- There are no consequences for abuse of the procedure, for example false statements of failure to disclose information before the appeals process, the bodies therefore have limited means to ensure fairness of the procedures.

The solution of some of these problems is implicit in recognition of fundamental rights since the judicial review must then apply the standards, others are necessary to support proper social dialogue and effective collective dispute resolution.

3. DELAYS AND RELATED PROCEDURAL PROBLEMS

A third major issue with the internal justice systems are the time delays. Considerable backlogs exist both with the internal advisory body (IAC) as well as with the ILOAT.

3.1. ECHR REASONABLE TIME CRITERIA

From the analysis in ANNEX “ECHR and reasonable time Criteria”, the following can be determined:

- The period to be counted starts when a staff member files a formal request challenging the decision or act. For most cases this will be a Management Review (Art 109 Serv. Regs.), but it could also be a procedure under Circular 341, or a conciliation procedure for staff reporting.
- The period ends with the implementation of the judgement issued by the ILOAT. This can be important since sometime significant delays exist between announcement of a judgement and its implementation.
- Delays of greater than 2 years could result in a finding of a violation of Article 6.1 ECHR.
- Delays of greater than 5 years would be a violation of Art 6.1 unless extenuating circumstances were present.
- Systematic problems particularly where the authorities have failed to act to resolve delays can give rise to a more stringent criteria being applied.
- The failure to provide an effective remedy (Article 13 ECHR) may also be engaged by systematic delays.
- It is likely that for EPO cases the limits will be nearer 2 years, since labour cases are treated as having greater priority.

3.2. ILOAT DELAYS

Following a simple calculation of the backlogs at the ILOAT combined with the policy to limit the number of EPO cases treated per year to 10 (5 cases per session), the expectation is that the delay from filing to judgement will be **in excess of 15 years.** There are rumours as to whether the ILOAT will maintain this limit, however even if this limit is lifted, the **expected delays would still be approaching 5 years on average.**

[7] *Rombach-Le Guludec v. EPO*, ILO Administrative Tribunal, 30.01.1997, Judgment No. 1581

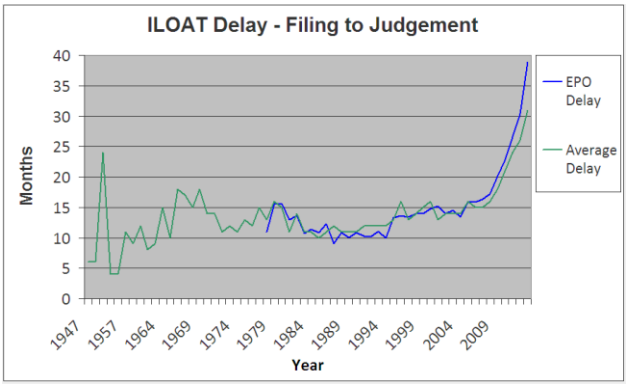


Figure 2 : ILOAT Average delays / EPO

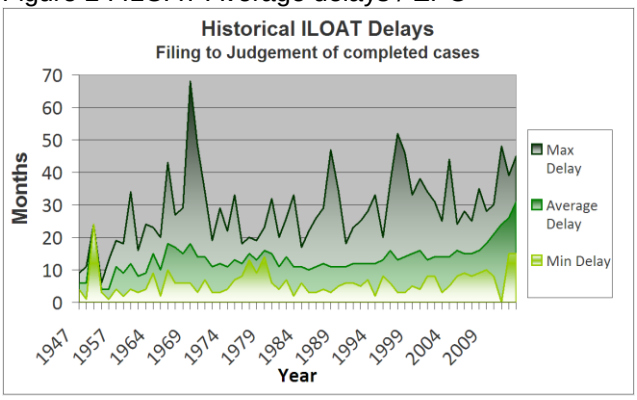


Figure 3: ILOAT Delay figures Min / Avge / Max

As can been seen from Figs. 2 & 3, the average delay of judgements at the ILOAT has increased rapidly over the last 3 years. The figures presented in these figures are related to completed cases filed between 15 and 45 months ago[8]. The current anticipated delays must be calculated from the processing capacity of the ILOAT and the pending caseload. Current data on the **backlogs** estimates them to be approaching **500 cases**; taking the average processing rate to be 100 cases per year, it is clear that the pendency times for current and new cases will **continue to increase and will reach 4-5 years over the next 3 years**.

From the delay data (Fig 2) a difference in the delay for EPO cases can already be seen and this shows that even before the 10 case per year limit problems specific the EPO existed. The limitation for the EPO judgements to 10 per year [9] means that delays for EPO cases would be further increased and in excess of 15 years. A plot of the estimated backlog of EPO cases is presented in Fig 4 together with overall case load data.

In the 113th and 114th sessions, the number of EPO cases was in fact limited to 5 cases only. This is in contrast to an average of over 11 cases in previous sessions. These figures demonstrate that the ILOAT had limited the number of EPO cases. However, in the 115th session the ILOAT pronounced 9 EPO Judgements, and from the Tribunal's website more EPO cases are planned for the 116th Session[10]; the Tribunal states that a total of 122 cases will be decided in 61 judgements, 60 being cases from the EPO. This is an unprecedented number of cases for one session and it remains to be seen how this has been achieved, since it is not apparent that the Judges were available for longer periods than usual. These judgements of the 116th Session will be announced on 5th Feb 2014.

In addition to the removal of the cap, the ILOAT has written to some complainants announcing an extra session in Feb 2014. It is unclear whether this session will be limited to EPO cases.

However, even with the removal of the 5 case limit and the planned additional session, it is not clear that the problems of delay with the Tribunal will be resolved. In the best case these measures could reduce the backlog of pending cases by 200 or so, but this would **still leave a 300 case backlog**. Although the Tribunal does not provide detailed figures, estimates suggest that roughly 140 new cases are filed per year. It seems unlikely that without structural reform the increased number of case handled in the 116th session can be maintained. The main reason this could have been possible is the large number of cases for which the preparatory work was completed. Once these are exhausted increasing the number of session will not result in more cases since these are limited by the capacity of the Tribunals secretariat.

[8] Figures are the min and max delays from the ILOAT Judgements pronounced in 2013 the average for 2013 being 31 months.

[9] The Registrar of the Tribunal declared to staff representatives in July 2012 that the Tribunal had decided to limit the number of cases per Organisation per session to five. This was apparently communicated to the EPO 6 months earlier, and can be seen from communications to complainants regarding case load and the practice of the Tribunal following this decision. The Tribunal has been strongly criticised for this practice and it appears to have modified the decision, however, no official information is available.

[10] http://www.ilo.org/public/english/tribunal/news

No plans have been announced to address these problems.

The data in Fig 4 shows that the caseload versus capacity issues have been known for sometime. In addition over the last 15 years the number of staff of International Organisations subject to the Jurisdiction of the Tribunal has increased substantially. Despite this to date no action has been taken to increase the capacity of the ILOAT.

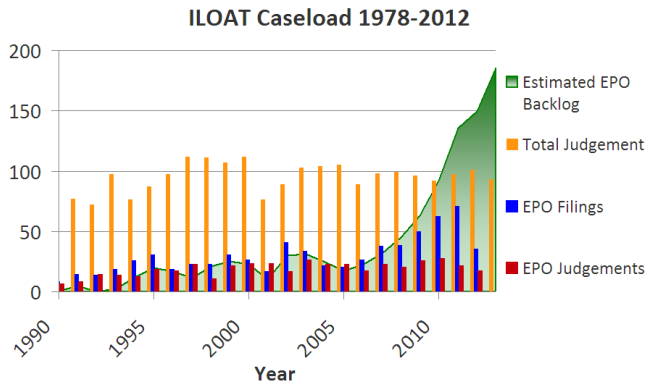


Figure 4: Case handling rates and EPO Filing / Backlog estimates

The data also does not take into account the need to improve the functioning of the ILOAT. An example is the systematic refusal to hold hearings. The last hearing held by the Tribunal was in 1989, since then there have been 2258 cases. In 426 of these cases explicit requests were made for hearings. In a meeting of legal advisors in 2009 the President of the Tribunal stated that oral hearings could not be held due to the lack of resources. Such a practice is not consistent with fundamental rights (i.a. Art 6.1 ECHR). Correcting this deficiency will result in a greater load on the Tribunal.

As stated above, it is as yet unclear how the Tribunal has found the capacity to treat 122 cases in the 116th session. If this has been done at the expense of "quality" then it will simply mean trading the backlog problem for another one, as appears to be the case with regard to oral hearings.

In summary, delays expected in processing EPO cases at the ILOAT resulting from the cap on EPO cases would be so excessive that by itself, it can be considered as a denial of justice. However, recent measures will reduce this, however, it is unlikely these can be continued without structural reform. **Case processing times in excess of 3 years are still to be expected.**

What is needed is an urgent review of the issues and a substantial increase in the capacity of the Tribunal to process the cases.

3.3. IAC DELAYS

The delays at the ILOAT are not the complete picture; EPO staff are also required to exhaust the internal review procedures before filing cases to the ILOAT. These procedures are also experiencing substantial delays.

The Internal Appeals Committee (IAC) has a **current backlog of over 700 cases.** During the last 10 years it has treated between 80 and 120 cases per year. Current delays are 3 years on average[11]. However, considering the growth of the backlog applying a similar analysis to the situation with the ILOAT the **expected delays for new cases are in excess of 5-6 years.**

The cause of these delays appears to result from two major bottlenecks, one is the IAC itself, the other is with the legal department responsible for defending the EPO before the IAC and the ILOAT (Directorate 5.3.2).

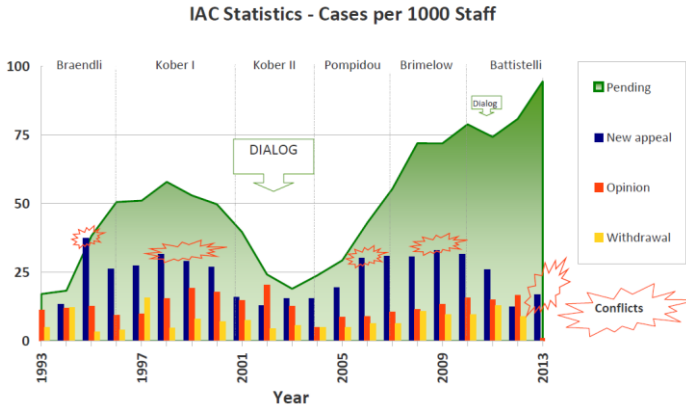


Figure 5: IAC backlogs (see fig 6 for absolute figures)

In 2008, following the advice of a working group set up under Mrs Brimelow, additional staff were provided to address these backlogs. There were also limited efforts to review and where possible settle pending appeals. These efforts resulted in a reduction of the backlogs however, the measures were

[11] The figure is 3.1 years including the decision of the President.

not sufficient to address the problems. The contracts for these additional staff have not been renewed, and expire in 2013.

During the discussions with Mr Battistelli in 2010 the Staff Committee requested that problems with the system of justice were addressed. These problems were,

- Backlogs and processing times
- Lack of normative control for legislative acts
- Need to recognise fundamental rights as binding law
- Standing of staff representation bodies to make appeals
- Need for accelerated procedures in urgent cases
- Clarification and simplification of jurisdictional issues with regard to IAC and ACAC.
- Need for proper review of management decisions to resolve the issues prior to processing the appeal.

In the reform implemented in 2012 Mr Battistelli only really addressed the last issue. The concern of the staff with regard to this point was that the Office was failing to undertake a review of the decision under the procedure for this which already existed. The observed practice, with the exception of a few rare cases, was that the management simply issued a negative decision or waited until the statutory review period had expired. The request of the staff representation was that this review would be undertaken properly.

However, the solution proposed by Mr Battistelli was to introduce a compulsory additional procedural step, the Management Review Procedure, prior to making an appeal. It was claimed that this "new" review procedure would resolve a large proportion of the issues resulting in fewer appeals.

Mr Battistelli's reform has not resulted in a reduction in the number of appeals, as he claimed, but rather it has introduced **a further procedural delay of roughly 4 months**. **In most cases the outcome of the review is negative.** In 2012 there were 227 new cases. For 2013 the figures are 156 cases as of start of December. Whilst this may appear to be a reduction, the requirement to file a Management Review has distorted the figures. Under the new procedures staff must file a request for Management Review within 3 months of the decision (or act) challenged. The review must be completed within 2 months. Thereafter the staff member may file an appeal. As a consequence the filing of an appeal is delayed by between 3 and 5 months in comparison to the previous procedures. If a estimate of 4 months is taken this would reduce the number of appeals filed in 2013 by one third, meaning that the comparison figure is not 227 but rather 151, almost exactly the same rate proportionately.

The EPO has responded to the failure of the review procedure by claiming that it is staff who are misusing it as merely a formal step to be exhausted in preparation for an appeal. This is simply wrong:

- the vast majority of claimants would favour a proper review of their case and to have their concerns addressed in a dialogue rather than file appeals.
- It is the failure of the EPO management to do this in a fair and proportionate manner that results in the appeals.

In fact it has long been the view of staff that if the management behaved appropriately in the first place the level of conflict (and hence appeals) in the EPO would by substantially be lower. This effect can be clearly seen in Figure 5 showing the appeals over the last 20 years.

3.4. SUMMARY OF PROBEMS WITH DELAYS

From the above it is clear that delays in handling appeals has reached a level well in excess of the standards defined by the ECtHR.

The IAC is experiencing delays in the order of 3-6 years, and the ILOAT delays are to be expected in the area of 3-4 years (best case). According to the European Court the clock starts at the very latest when a Request for Management Review is filed[12]. Meaning the **access to court for staff of the EPO is at best subject to delays in the order of 6 to 10 years** assuming the ILOAT does hold an additional session and continues with the

[12] In fact this could be earlier for cases subject to other compulsory procedures prior to management review, for example harassment cases or reporting problems.

processing rate of the 116th session, if not the delays will be longer[13].
Comparing this to the standards set by the European Court it is to be expected that any cases filed to the European Court will result in the finding of a violation of Article 6 ECHR.

The problems of limited capacity of the appeals process has been clear for at least 15 years and the backlogs have been growing steadily over this period as can be seen from the data presented (Figs 2-6). At the same time the EPO, and other organisations using the ILOAT have increased in size, and there has been a steady stream of new organisations recognising the jurisdiction of the ILOAT.

It is likely that the European Court would conclude that the EPO has failed to meet the standards of Article 6 ECHR, and that this **failure is systematic**. Therefore, that the host states are in default of their Convention obligations since they have failed to ensure the Convention rights are adequately protected within the EPO.

This will result in a situation where the **maintenance of the immunity by national courts will no longer be consistent with ECHR obligations**[14], and an increase in the number of cases filed to the ECtHR and in national courts is to be expected.

4. REACTION OF THE EPO TO THE PROBLEMS

As stated above, the Staff Representation raised the issues with legal protection and recognition of fundamental rights with the President in discussions regarding the social agenda in 2010. In response to these requests efforts were made by VP4 (McGinley, B.) in late 2010 until mid 2011 to seek settlement of pending appeals. This process has some success as can be seen by from the data in figure 5. These efforts seem to have stopped sometime in late 2011.

A working group was established towards the end of 2011 to examine reform of the appeals process and the staff representation participated in these discussions. As stated above (3.3) this working group failed to address the concerns of staff. The outcome was a reform which was strongly challenged by the staff. This reform was implemented in Jan 2013 and the results show that it has had no effect in reducing the number of appeals filed.

In a recent response to the concerns of staff[15] the President claims that the recent developments at the ILOAT, including the holding of a special session, is proof that the Tribunal is fit for purpose. He also claims that this issue is not a matter for strike, but rather co-operation.

The truth is that President has consistently refused to co-operate with the staff representation on this issue. The Office has clearly taken some action with regard to the backlogs, but no detailed information has been provided, despite repeated requests. It is difficult to assess what exactly has influenced the Tribunal but it would be incorrect to claim that this is the sole result if the Office intervention. SUEPO has undertaken actions including filing appeals in national courts and at the ECHR. National courts have reacted to the delays at the ILOAT by setting the immunity of the EPO aside. Trade union federations and other bodies have lobbied the Governing Body of the ILO.

SUEPO agrees with the President that such an issue is a matter that should be dealt with jointly, however, as can be seen by the reactions of the President, this is not the case and requests of the staff representation for co-operation have been rejected.

Despite the seriousness of the matter, the President is still refusing to co-operate with staff or to provide any detailed information regarding the problems or explain / propose measures taken by Office to resolve the problems.

The developments at the ILOAT are clearly not sufficient to address the problems. In

[13] In the case that the limit is re-imposed, then overall delays will be of the order of 13 to 20 years. If the capacity of the Tribunal secretariat is not increased then its ability to maintain the capacity of the 116th Session will expire within one year since the preparation of the cases is dependent on the secretariat and not the availability of the Judges.

[14] https://www.suepo.org/rights/public/archive/nl-epo-immunity-entranslation.pdf

[15] President's Communique 42 - Letter to the Chairman of the Staff Committee dated 3-12-2013

addition, the delays at the Tribunal, internal delays are also very high with backlogs exceeding 700 cases. Many of these cases include mass appeals with hundreds of complainants; it is believed that the total number of complaints exceeds 5000. Internal processing delays are expected to be in excess of 3.5 years, and these will grow over the next few years as the impact of the backlog takes effect. Despite this, the President has refused to increase the capacity of the IAC and has refused to renew contracts of a number of staff involved in the appeals process. The number of cases handled in 2013 is very low compared to previous years. Current estimates are in the order of 60 for 2013. This figure is substantially below the cases handled in previous years and will result in a further increase in the backlogs.

At the very least these problems demonstrate the need for greater capacity of the appeals processes, priority handling of urgent cases, and the means of filing collective appeals.

The reaction of the President has been to suggest that the problems result from abuse of the appeals system (largely by the staff representation) and he is therefore unwilling to enter into discussion on problems.

The President appears to consider the problems are limited to the delays at the ILOAT. This stance ignores not only the concerns of staff, but also the obligations of the Office to provide and effective protection of staff rights. His claim that these matters are not suitable subject matter for strike, and must be addressed jointly, is simply inconsistent with his failure enter into meaningful dialogue and to address the problems.

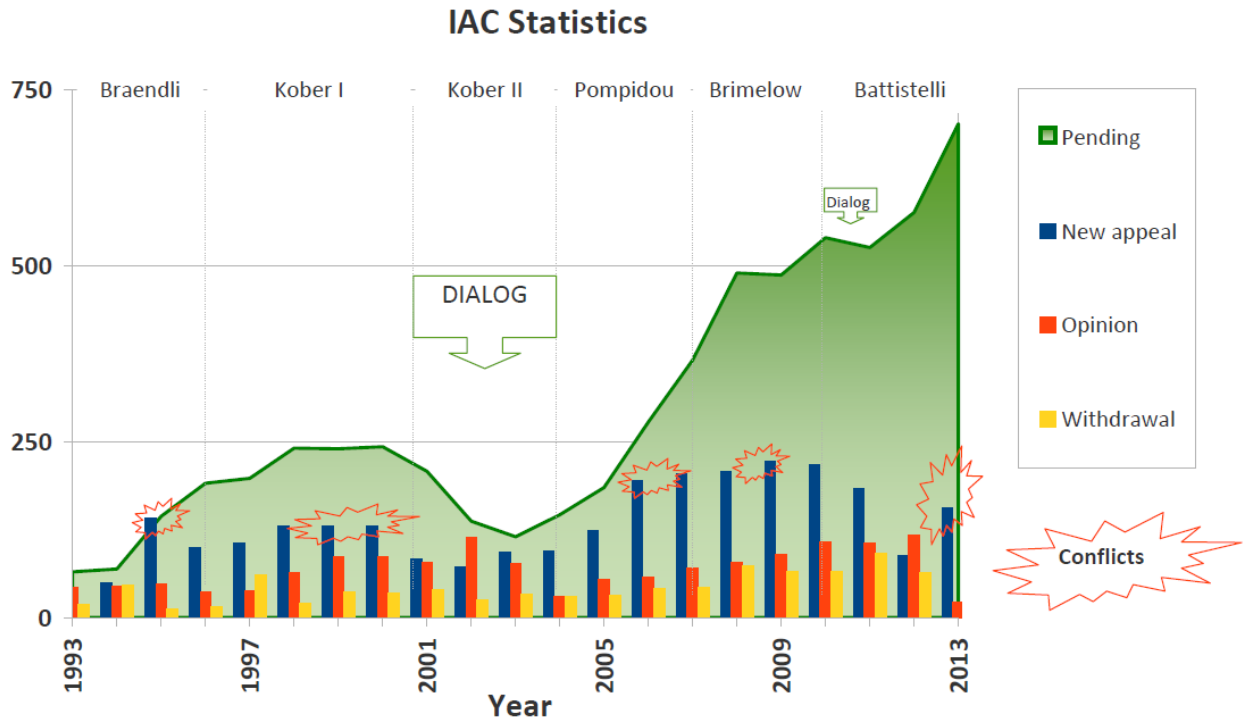


Figure 6: number of cases in front of the IAC

ANNEX: ECHR AND REASONABLE TIME CRITERIA

4.1. WHAT IS THE FIRST INSTANCE WITH REGARD TO ARTICLE 6 OF THE ECHR?

All internal means of resisting acts or decisions of the EPO are subject to final decision of the President. For this reason alone, none of them meet the criteria of a Tribunal in the meaning of Article 6 ECHR. There are other problems with the internal means with regard to Article 6 however, since they already fail the criteria of independence these are not discussed further.

Despite a number of marked deficiencies with respect to Article 6, the ILOAT is the only Tribunal which may be considered to fulfil the requirements. Even if it does not meet all criteria, for example it fails to hold oral hearings, even for complex and reasoned cases, it is the only, tribunal available to staff.

4.2. WHAT IS THE PERIOD TO BE CONSIDERED?

In proceedings classified as civil (i.e. not criminal) by the ECtHR, the time starts to run from the moment the action is brought before the courts. However, In the case of contentious-administrative proceedings the time starts to run from the day the individual lodges an objection to the administrative act in question. 16 For EPO staff this means that all administrative review procedures which must be exhausted before making an appeal to the ILOAT must be included in the reasonable time criteria. These are not limited to Internal Appeal procedures, but also the Management Review, procedures under Circular 341, and conciliation procedures for staff reports.

The reasonable time criteria includes all stages of the legal proceedings including enforcement of the decision since execution of a judgment given by any court is regarded as an integral part of the trial for the purposes of art. 6.17

4.3. WHAT IS A REASONABLE TIME?

Regarding the limits themselves the European Court has maintained that it depends on circumstances and declined to set general limits. Nevertheless, some trends and limits can be determined from the Court's case law. In a detailed study on the reasonable time criteria, Calvez[18] concludes[19]:

> "The procedural phases of a case deemed to comply with the requirement of reasonable time generally last **less than 2 years. When this period lasts longer than 2 years but goes uncriticised by the European Court, it is nearly always the applicant's behaviour that is to blame** and the delay is at least partly down to their inactivity or bad faith[20].
>
> …
>
> **For any proceedings lasting longer than 2 years**, the ECHR examines the case in detail to check the diligence of both national authorities and the parties in the light of the case's complexity; for proceedings short of the two-year mark, the Court does not carry out this detailed examination. **What is at stake for the applicant in the dispute** is a major criterion for assessment and may prompt the European Court to reconsider its usual practice of considering a period of less than 2 years as acceptable for any court instance[21]."

[16] König v. Germany, of 28 June 1978. See also Janssen v. Germany, 20 December 2001; Nowicky v. Austria, of 24 February 2005; and Hellborg v. Sweden, of 28 February 2006

17 European Court of Human Rights: Estima Jorge v. Portugal, of 21 April 1998.

18 EUROPEAN COMMISSION FOR THE EFFICIENCY OF JUSTICE (CEPEJ).Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights, Ms Françoise Calvez, Judge (France) This report has been adopted by the CEPEJ at its 8th plenary meeting (Strasbourg, 6-8 December 2006)

19 Idem 11 , page 83-84

20 Dosta v. Czech Republic judgment, 25 May 2004

21 Le Bechennec v. France judgment of 28 March 2006

In a table summarizing the findings of the European Court, Calvez states, priority administrative cases over 2 years duration are considered to be a violation of Article 6.1, whereas regular or complex cases over 5 years duration are considered to be a violation[22].

From this it can be concluded that cases taking over 2 years could be a violation of the reasonable time criteria and that the upper limit of reasonable time in will be 5 years. In determination of a violation between 2-5 years the court will make a detailed assessment of the factors involved including the urgency of the case, the role of the complainant in contributing to the delays, and the complexity of the case. It should be noted here that the European court classifies cases as administrative, civil and labour according to their content and will not restrict itself to the definition of "administrative" simply because the cases were heard before the ILOAT. Many of complaints made by EPO staff will be treated as labour cases which have been treated with greater priority by the European Court.

However, where the delays are systematic, as is the case with the EPO Justice system, the Court can and does apply different criteria as described in Edel 1996[23]:

> "In some European countries certain types of litigation have given rise to breaches of the right to a trial within a reasonable time so frequent, so recurrent and so tolerated by the state – as evidenced by its failure to offer a genuinely appropriate remedy – that excessively long proceedings have become almost institutionalised, an unwritten rule. In such cases the Court has found, since its *Bottazzi v. Italy* judgment of 28 July 1999, that there exists "a practice that is incompatible with the Convention".
>
> When such a "practice" forms the background to a case the Court considers itself justified in applying a much more summary standard of scrutiny than usual, and […] the Court does not examine the specific circumstances of the case: the existence of previous judgments against the state in the same sphere and an established absence of appropriate general measures to remedy the situation are adequate evidence of non-compliance with the Convention."

The delays in access to justice for staff of the EPO are systematic, and result from a chronic failure of both the EPO administration, and the ILOAT to provide sufficient resources to meet the actual caseload. A pending crisis has been evident for at least 10 years and no adequate action has been taken to resolve the problems. Furthermore, neither the EPO nor the ILOAT provide any effective remedy for the violation of the reasonable time requirement.

22 Idem 11, summary table page 6

23 The length of civil and criminal proceedings in the case-law of the European Court of Human Rights Frédéric Edel Docteur en Droit Chargé de recherche à l'Ecole Nationale d'Administration (ENA), Strasbourg (France); Council of Europe Publishing 1996, page 36.