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For Catherine

5

Power of International Courts to Interpret and Revise Judgments and Awards

Introduction

All international courts have certain functions, including the settlement of international disputes by adjudication and the proper administration of international justice. The decisions of international courts are final and binding on the parties to the dispute—that is, they have the force of *res judicata*, or *la chose jugée*—and only rarely is there the possibility of any recourse against the decision. Yet the rendering of a judgment might not be enough to settle the dispute, and some post-adjudication involvement might be necessary. One of the parties might allege, for instance, that the tribunal erred in law, that the tribunal was misled by fraudulent evidence, or that the international court was not properly constituted. To resolve these problems, post-adjudication procedures have been developed. This chapter examines two of these powers in detail: namely, the powers of international courts to interpret and to revise their judgments and awards, and it considers whether there is an emerging common law relating to the exercise of these powers.

I. Post-Adjudication Role of International Courts and Tribunals

A. Finality of Adjudication

There is a well-established principle in many domestic legal systems that where a final decision has been rendered by a court having jurisdiction over the parties and the subject-matter of the dispute, the parties may not dispute that decision—except on appeal—in subsequent litigation.[1] This principle is often expressed in the form of the rule of *res judicata*.[2] There are essentially two justifications for this rule. First, there is a public interest in the finality of litigation. It is not in the interests of the administration of justice for a matter to have been decided by one competent tribunal, only for that same matter to be re-litigated before the same, or even before another, tribunal. If it were otherwise, this would place an enormous burden on frequently overstretched judicial resources. Second, litigants have a right to be protected from a 'vexatious multiplication' of litigation, whether that be in the form of repeated identical civil claims, or multiple criminal prosecutions for the same alleged offence.[3]

[1] Yuval Shany, *The Competing Jurisdictions of International Courts and Tribunals* (2003) 164; Peter Barnett, Res Judicata, *Estoppel, and Foreign Judgments* (2001) 8; George Spencer Bower, AK Turner and KR Handley, *The Doctrine of* Res Judicata (1996) 9–10; Peter Herzog and Delmar Karlen, 'Attacks on Judicial Decisions', in International Association of Legal Science, *International Encyclopedia of Comparative Law* (1982) vol XVI, ch 8, 9–10.

[2] Barnett, ibid, 8; M Howard, *Phipson on Evidence* (15th ed, 2000) 988–9; Colin Tapper, *Cross & Tapper on Evidence* (9th ed, 1999) 80–2; Spencer Bower, Turner and Handley, ibid, 4.

[3] Barnett, ibid, 9; Spencer Bower, Turner and Handley, ibid, 10. These justifications are encapsulated in the Latin maxims, *interest reipublicae ut sit finis litium*, and *nemo debet bis vexari pro una et eadem causa*: Howard, ibid, 988–9.

As is the case with domestic courts, judgments of international courts are considered to be final and binding. This is expressly stated in the constitutive instruments of many international courts and tribunals.[4] In the WTO dispute settlement system, the principle of finality and the obligation on states parties to comply with the recommendations or determinations of a WTO panel or the Appellate Body are less clear;[5] nevertheless, the many separate clauses in the DSU imply the binding nature of reports adopted by the DSB.[6] Like final and binding decisions of domestic courts, such decisions of international courts have the effect of *res judicata*.[7] Various formulations of this rule have been proposed. In *Company General of the Orinoco*, the French-Venezuelan MCC held that:

> The general principle announced in numerous cases is that a right, question or fact *distinctly put in issue and directly determined* by a court of competent jurisdiction as a ground of recovery, cannot be disputed, etc.[8]

A somewhat wider formulation was put by the PCA tribunal in *Pious Fund of the Californias*:

> [A]ll parts of the judgment or the decree concerning the points debated in the litigation enlighten and mutually supplement each other, and . . . they all serve to render precise the meaning and the bearing of the *dispositif* (decisory part of the judgment) and to determine the points upon which there is *res judicata* and which thereafter cannot be put in question.[9]

The narrower test suggested by the French-Venezuelan MCC, which restricts the operation of *res judicata* to points directly determined in the judgment or award,

[4] See, e.g., *Statute of the International Court of Justice*, opened for signature 26 June 1945, 3 Bevans 1153 (entered into force 24 October 1945), arts 59–60; International Court of Justice Rules of Court, available at <http://www.icj-cij.org>, art 94; *United Nations Convention on the Law of the Sea*, 1833 UNTS 3, Annex VI ('ITLOS Statute'), art 33(1) and (2); *Convention for the Pacific Settlement of International Disputes*, opened for signature 29 July 1899, 1 Bevans 230 (entered into force 4 September 1900) ('1899 Convention'), arts 54 and 56; *Convention for the Pacific Settlement of International Disputes*, opened for signature 18 October 1907, 1 Bevans 577 (entered into force 26 January 1910) ('1907 Convention'), arts 81 and 84; *Convention for the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('ICSID Convention'), art 53(1); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('European HR Convention'), arts 44 and 46; *American Convention on Human Rights*, opened for signature 22 November 1969, 1144 UNTS 123 (entered into force 18 July 1978) ('American Convention'), art 67.

[5] John Jackson, *The World Trading System* (2nd ed, 1997) 126.

[6] Ibid; Shany, above n 1, 253, fn 114; *Understanding on Rules and Procedures Governing the Settlement of Disputes*, opened for signature 15 April 1994, 1869 UNTS 101, 33 ILM 1226 (entered into force 1 January 1995) ('DSU').

[7] See, e.g., International Law Association ('ILA'), 'Interim Report: "Res Judicata" and Arbitration' (Berlin Conference, 2004) 19–24; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (first published 1953, 1987 ed) 336–50; Michael Reisman, *Nullity and Revision* (1971) 14.

[8] 10 RIAA 184, 276 (French-Venezuelan MCC, 1905); Vaughan Lowe, '*Res Judicata* and the Rule of Law in International Arbitration' (1996) 8 *African Journal of International and Comparative Law* 38, 39.

[9] *Hague Court Reports* (1916) 1, 5; 9 RIAA 11, 12–13 (US–Mexico, 1902); Lowe, ibid, 39.

has been more widely adopted by international tribunals.[10] It is generally accepted, as suggested in the dissenting opinion of Judge Anzilotti in *Factory at Chorzów (Interpretation)*, that there are three conditions for the application of *res judicata*; these are identity of parties, identity of cause, and identity of object, or subject matter, in the proceedings.[11] As the arbitral tribunal in *Trail Smelter* held: 'There is no doubt that in the present case, there is *res judicata*. The three traditional elements for identification: parties, object, and cause are the same.'[12] The *res judicata* effect of judgments has been confirmed in the decisions of many different international courts.[13]

Res judicata can be characterized as a general principle of law;[14] it was even one of the examples cited by Lord Phillimore of the Advisory Committee of Jurists to describe the possible content of the provision in article 38(3) of the PCIJ Statute referring to the PCIJ's power to resort to 'general principles of law' as a source of international law.[15] It has also been suggested that *res judicata* can be regarded as a

[10] *SS Newchwang*, 6 RIAA 64, 65 (GB–US, 1921); *Polish Postal Service in Danzig*, Ser B, (No 11), 30 (PCIJ, 1925); *Factory at Chorzów (Interpretation)*, Ser A, (No 13), 20 (PCIJ, 1927); *Amco v Indonesia* (Resubmitted Case), 1 ICSID Rep 543, 549–50 (1988); *Waste Management v Mexico (No 2)* (2002) 41 ILM 1315, 1322–3 (NAFTA); Lowe, ibid, 39.

[11] *Factory at Chorzów (Interpretation)*, ibid, 23, 24, 27 (Diss Op Anzilotti) (PCIJ, 1927); Lowe, ibid, 40–7. See also ILA, above n 7, 21, where four preconditions are listed, the additional criterion being that the previous proceedings must have been conducted before a court or tribunal in the international legal order. However, it is suggested that the judgment of a domestic court will only rarely have *res judicata* effect before an international court due to the parties having different identity: Ian Brownlie, *Principles of Public International Law* (6th ed, 2003) 50.

[12] 3 RIAA 1938, 1952 (US–Canada, 1941) (references omitted).

[13] See, e.g., *Pious Fund of the Californias*, above n 9, 12–13; *Factory at Chorzów (Interpretation)*, above n 10, 20; see especially 23, 24, 27 (Diss Op Anzilotti); *Fabiani*, 10 RIAA 83, 109–10, 136–9 (French-Venezuelan CC, 1903); *Company General of the Orinoco*, above n 8, 276–80; *Land and Maritime Boundary between Cameroon and Nigeria (Interpretation)* (ICJ Judgment of 25 March 1999), para 12; *Continental Shelf (Revision and Interpretation)* [1985] ICJ Rep 192, 218–19; *Effect of Awards of Compensation of the UN Administrative Tribunal* [1954] ICJ Rep 47, 53; *Reynier v Commission* [1964] ECR 259, 266; *Amco v Indonesia* (Resubmitted Case), above n 10, 549–50; *CME Czech Republic BV v Czech Republic* (Final Award of 14 March 2003), para 435; see further August Reinisch, 'The Use and Limits of *Res Judicata* and *Lis Pendens* as Procedural Tools to Avoid Conflicting Dispute Settlement Outcomes' (2004) 3 *Law and Practice of International Courts and Tribunals* 37; Shany, above n 1, 248–53; Cheng, above n 7, 348–9. For a possible exception, see also *Argentina—Poultry*, WT/DS241/R (PR), paras 7.28–7.41 where a WTO panel rejected an argument by a third party intervening (Paraguay) that the decision of a Mercosur tribunal in a dispute between Argentina and Brazil was *res judicata*.

[14] For example, Shany, above n 1, 245–6; John Collier and Vaughan Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (1999) 261; D W Bowett, '*Res Judicata* and the Limits of Rectification of Decisions by International Tribunals' (1996) 8 *African Journal of International and Comparative Law* 577, 577–9; Lowe, above n 8, 38–41; Herman Mosler, 'General Principles of Law' in Rudolf Bernhardt (ed), *Encyclopedia of Public International Law* (1995) vol II, 511, 522; Cheng, above n 7, 336; Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals* (1986) vol IV, 660–1; J L Simpson and Hazel Fox, *International Arbitration* (1959) 228–36. *Statute of the Permanent Court of International Justice*, PCIJ Publications, Ser D (No 1), 7 ('PCIJ Statute').

[15] PCIJ/Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee of Jurists* (1920) 335.

rule of customary international law.[16] For present purposes, it is not necessary to assess the strength of this claim; it is apparent that *res judicata* is a rule of international law, be it a general principle of law or a rule of customary international law.

B. Limits to the Principle of Finality

The rule concerning finality of litigation is, however, not absolute in domestic legal systems or in international adjudication.[17] Courts, like other human institutions, can make mistakes, and it is generally in the interests of international justice for the party aggrieved by an erroneous decision to have the means of correcting it.[18] Otherwise, the finality of proceedings might lead to 'perpetuating judicial errors' and may in fact hinder the proper administration of justice.[19] Early writers such as Pufendorf and Vattel also recognized the need for exceptions to the finality of litigation.[20] Accordingly, in most developed legal systems, procedures have evolved for challenging judicial decisions.[21] These procedures include 'appeal', which allows parties to bring a decision from a lower court, which the party believes has erred in law, before a higher court, which has the power to decide not only that the lower court has erred, but also to replace the lower court's decision with its own;[22] 'cassation', which refers to the procedure commonplace in civilian legal systems whereby a decision can be referred to a superior court, which then has the power to either let the decision stand, or *caser* (cancel, or void) the decision, and remand it to a lower court for a decision on the merits;[23] 'rehearing *de novo*', in which proceedings are completely recommenced in the original tribunal or a newly constituted tribunal, and none of the findings on fact or law from the first trial are relevant or binding on the second proceedings;[24] 'rectification', which involves the original tribunal correcting any clerical or arithmetical errors;[25] 'interpretation', in which the original tribunal clarifies obscurities in the judgment;[26] and 'revision', which involves a reopening of the case for the purpose of considering any newly discovered evidence which, had it been known to the court at the time of judgment, would have had a decisive effect on the award or

[16] Shany, above n 1, 245.

[17] Georges Scelle, 'Arbitral Procedure' [1950] *YbILC*, vol II, 114, 142, UN Doc A/CN.4/18.

[18] Herzog and Karlen, above n 1, 4. [19] Shany, above n 1, 164.

[20] For example, Samuel von Pufendorf, *De modo litigandi in libertate naturali*, (W Evans Darby trans), in W Evans Darby, *International Tribunals* (1899) 56, 60–1; Emmerich de Vattel, 'The Law of Nations or the Principles of Natural Justice' in James Brown Scott (ed), *Classics of International Law* (1916) 224–5. [21] Herzog and Karlen, above n 1, 69.

[22] Ibid, 58–60. [23] Ibid, 63–4. [24] Ibid, 28–9.

[25] Edward Tuttle (ed), *A Treatise on the Law of Judgments by A C Freeman* (5th ed, 1925) 281–303; in the context of international courts, see also Alan Redfern and Martin Hunter, *Law and Practice of International Commercial Arbitration* (3rd ed, 1999) 420; Stewart Baker and Mark Davis, *The UNCITRAL Arbitration Rules in Practice* (1992) 194–6; Reisman, above n 7, 186–92; Simpson and Fox, above n 14, 241–2.

[26] Tuttle, ibid, 303–4; in the context of international courts, see also Baker and Davis, ibid, 192–4; Reisman, ibid, 192–208; Simpson and Fox, ibid, 245–7.

judgment.[27] Other post-adjudication procedures, which appear to be less commonly found in domestic legal systems, include requests for a 'supplementary' or 'additional' award, in which the tribunal is asked to decide any issues which were presented in the proceedings but which were omitted from the award;[28] and the 'annulment' or 'nullification' of an arbitral award, which generally involves a challenge to the award before a different tribunal.[29] There is some disagreement about the proper terminological classification of many of these post-adjudication proceedings.[30] Professor Reisman has commented that the powers of rectification, interpretation and revision 'share a startling number of procedural and material similarities'.[31] In addition, the term 'revision' is not understood uniformly in municipal legal systems; the terms 'revision', 'rehearing', 'cassation' and 'appeal' are sometimes used interchangeably, although they refer to quite different procedures.[32]

Some of these post-adjudication procedures have also been developed before international courts.[33] The question of whether international courts adopt a common approach to the exercise of all of these powers merits examination, but this task is beyond the scope of the present chapter.[34] Rather, this chapter considers two post-adjudication powers of international courts, being the powers of interpretation and revision, and examines whether these are applied consistently by international courts.

The purpose of the powers of interpretation and revision is to resolve disputes that arise after the rendering of the judgment by an international court. In the case of the power of interpretation, one or both parties to a judgment may consider the

[27] Herzog and Karlen, above n 1, 19–25; in the context of international courts, see also Reisman, ibid, 208–12; Simpson and Fox, ibid, 242–5; J C Witenberg, 'La théorie des preuves devant les juridictions internationales' (1936) 56 *Recueil des cours* 53, 71–8.

[28] For example PCA Optional Rules for Arbitrating Disputes between Two States, art 37; ICSID Convention, above n 4, art 49(2); UNCITRAL Arbitration Rules, art 37; Institut de Droit International, 'Projet de règlement pour la procédure arbitrale internationale' (1877) 1 *Annuaire de l'Institut de Droit International* 126, art 24.

[29] For example, Collier and Lowe, above n 14, 257; Reisman, above n 7, 265–634; Simpson and Fox, above n 14, 250–9; A Balasko, *Causes de nullité de la sentence arbitrale en droit international public* (1938); Witenberg, above n 27, 367–71.

[30] For example, J G Wetter, *The International Arbitral Process: Public and Private* (1979) vol II, 539.

[31] Reisman, above n 7, 188–9, 196; see, e.g., *Dewhurst v German Government*, 4 TAM 1 (Anglo-German MAT, 1924), which Reisman contends might have been considered as an application for the exercise of all three powers.

[32] Wetter, above n 30, vol II, 539; Durward Sandifer, *Evidence before International Tribunals* (2nd ed, 1975) 404, 407–8, 446–7; Reisman, above n 7, 212, 217–20; Simpson and Fox, above n 14, 242; Georges Scelle, 'Draft on Arbitral Procedure Adopted by the Commission at its Fifth Session, Report by Georges Scelle, Special Rapporteur' [1958] *YbILC*, vol II, 1, 12, UN Doc A/CN.4/113; ILC 'Memorandum Prepared by the Secretariat' [1950] *YbILC*, vol II, 157, UN Doc A/CN. 4/35, 177.

[33] For the history of these procedures, see Santiago Torres Bernárdez, 'A propos de l'interprétation et de la revision des arrêts de la Cour internationale de justice' in *Le Droit International à l'Heure de sa Codification: Etudes en l'honneur de Roberto Ago* (1987) vol III, 443, 444; Reisman, above n 7, 3–74.

[34] For in-depth studies, see Reisman, above n 7; Balasko, above n 29.

judgment obscure or contradictory in its reasons and operative provisions.[35] Such obscurities and inconsistencies might otherwise act as a bar to its execution, and the existence of the power of interpretation permits parties to seek clarification of the judgment in order to avoid the continuation of the dispute.[36] The purpose of an application for revision is to alter a judgment or award to take account of a decisive new fact which was unknown to the party and the court at the time of the judgment. Having discussed the limits to the principle of *res judicata* and the purpose of the powers of interpretation and revision, this chapter now turns to an examination of the source of those powers.

II. Source of the Powers of Interpretation and Revision

A. Constitutive Instruments of International Courts

1. Power of Interpretation

An express power to interpret awards or judgments is commonly conferred on international courts. The 1899 Convention did not provide for a general power of interpretation, but the power was included in article 82 of the 1907 Convention.[37] Under this provision, tribunals have the express power to interpret their awards, unless the parties agree otherwise.[38] Another early international court which was granted the power to interpret its judgments was the Central American Court of Justice.[39] The PCIJ was also conferred the power to interpret its judgments in article 60 of the PCIJ Statute.[40] The ICJ has retained this power in article 60 of the ICJ Statute, which provides in part that '[i]n the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party'.[41]

Other international tribunals having an express power to interpret their judgments include the ITLOS, whose power was modelled on article 60 of the ICJ Statute,[42] UNCLOS tribunals,[43] ICSID tribunals,[44] the IACHR,[45] the Iran–US

[35] Schwarzenberger, above n 14, 680.

[36] Torres Bernárdez, above n 33, 445; Louis Cavaré, 'Les recours en interprétation et en appréciation de la légalité devant les tribunaux internationaux' (1953–4) 15 *ZaöRV* 482, 497–8; Witenberg, above n 27, 362.

[37] 1907 Convention, above n 4, art 82.

[38] See also Baron Schenk von Stauffenberg, *Le statut et règlement de la Cour Permanente De Justice Internationale* (1934) 424.

[39] *Convention for the Establishment of the Central American Court of Justice*, [1907] 2 *US Foreign Relations* 697, art 24; von Stauffenberg, ibid, 424.

[40] For the drafting history, see PCIJ/Advisory Committee of Jurists, above n 15, 744–5; Andreas Zimmermann and Tobias Thienel, 'Article 60', in Andreas Zimmermann, Christian Tomuschat, and Karin Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (2006) 1275, 1280–2; and Torres Bernardez, above n 33, 451.

[41] ICJ Statute, above n 4, art 60.

[42] ITLOS Statute, above n 4, art 33(3); Myron Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary* (1989) vol V, 396–7.

[43] *United Nations Convention on the Law of the Sea*, opened for signature 10 December 1982, 21 ILM 1261 (entered into force 16 November 1994) Annex VII, art 12; Nordquist (ed), ibid, vol V, 435–6.

[44] ICSID Convention, above n 4, art 50(1); Christoph Schreuer, *The ICSID Convention: A Commentary* (2001) 857.

[45] American Convention, above n 4, art 67.

Claims Tribunal,[46] and the ECJ.[47] Unlike these international courts, WTO panels and the Appellate Body do not have an express power under the DSU to interpret their reports.

2. Power of Revision

As for the power of revision, its history can be traced back at least to the late nineteenth century.[48] During the drafting of the 1899 Convention, the inclusion of the power of revision proved controversial, as the desire for finality in international arbitration was a significant factor for many delegates.[49] As a compromise, article 55 was included, which empowered arbitral tribunals to revise their awards, but only if the parties to the dispute reserved this power to the tribunal in the *compromis*. This provision was retained as article 83 of the 1907 Convention. In 1920, the power to revise judgments was specifically provided for in article 61 of the PCIJ Statute. The report of the Advisory Committee of Jurists reveals that the power of revision was considered an important power:

> Le droit de révision est un droit très grave, qui heurte, avec l'autorité des sentences rendues, ce qui, pour la paix des nations, doit être considerée comme acquis, mais la justice a cependant ses légitimes revendications. Tout bien pesé, le Comité a estimé que la révision devait être de droit.[50]

[46] Iran–US Claims Tribunal Rules of Procedure, 1 Ir–USCTR 57, art 30.

[47] *Protocol on the Statute of the Court of Justice, Consolidated Version of the Treaty establishing the European Economic Community*, OJ C 325/33, 167 (24 December 2002) ('ECJ Statute'), art 37; Daniel Bethlehem, 'Interpretation of Judgments' in Richard Plender (ed), *European Courts: Practice and Precedents* (1997) 743; Louis Cavaré, 'Quelques remarques sur les recours en interprétation des arrêts rendus par les Cours de justice internationales à propos de l'arrêt No 5–55 du 28 juin 1955 de la Cour de justice de la CECA' in *Hommage d'une génération de juristes au Président Basdevant* (1960) 96.

[48] For the suggestion that there were precedents of revision in ancient arbitration, see Robin Geiss, 'Revision Proceedings before the International Court of Justice' (2003) 63 *ZaöRV* 167, 167, fn 4. For Professor Corsi's *Projet de règlement pour les arbitrages internationaux* for the ILA, which included a power of revision, see A Corsi, 'Projet de règlement pour les arbitrages internationaux' (1896) 3 *Revue Générale de Droit International Public* 460, 465; W Evans Darby, *International Tribunals: A Collection of the Various Schemes Which Have Been Propounded; and of Instances Since 1815* (1900) 318–21; Balasko, above n 29, 14. For an early precedent, see *Traité d'Arbitrage général et permanent*, signed 23 July 1898 (Italy–Argentina), (1898) 5 *Revue Générale de Droit International Public* 868, art 13; and *General Treaty of Arbitration*, signed 18 September 1907 (Italy–Argentina), *Traités Généraux d'Arbitrage communiqués au Bureau International de la Cour Permanente d'Arbitrage* (2e Série, 1914), art 6 (entered into force 21 March 1910).

[49] For the debate between Mr Holls, the American delegate, and Dr Martens of Russia, see *Conférence internationale de la paix*, 4e partie, 3e commission, 5e séance, (1899) 36ff; Werner, above n 30, vol II, 543–52; Geiss, above n 48, 171; Daniel Bardonnet, 'De l'équivoque des categories juridiques: la revision des sentences arbitrales pour "erreur de fait" ou "fait nouveau" dans la pratique latino-américaine', in *Liber Amicorum in Memoriam of Judge José María Ruda* (2000) 189, 193–4; Reisman, above n 7, 34–43; Scelle, 'Draft on Arbitral Procedure', above n 32, 12; Scelle, 'Arbitral Procedure', above n 17, 143; von Stauffenberg, above n 38, 431.

[50] PCIJ/Advisory Committee of Jurists, above n 15, 744; see also Torres Bernárdez, above n 33, 453; von Stauffenberg, ibid, 431–3. Another early precedent can be found in the *Convention for the Establishment of a Central American Court* of 1923: Louis Le Fur and Georges Chklaver, *Recueil de textes de Droit International Public* (1928) 626, art 1(4); Bardonnet, above n 49, 197; although this court was never established: Manley Hudson, *International Tribunals: Past and Future* (1944) 173.

The provision conferring the power of revision on the PCIJ was retained in 1945 in the ICJ Statute. In addition, several other international courts also have an express power to revise their judgments and awards under the terms of their constitutive instruments. These include the ECJ,[51] ICSID tribunals,[52] the ICTR,[53] the ICTY,[54] the International Criminal Court,[55] and the Cartagena Court of Justice.[56] The Pact of Bogotá of 1948 also provides for the power of revision.[57] Yet not all international courts are expressly granted the power of revision. As with the power of interpretation, for instance, WTO panels and the Appellate Body do not have an express power.

B. Rules of Procedure of International Courts

1. Power of Interpretation

Most of the post-First World War MATs included a power of interpretation in their rules of procedure,[58] as did the Mexican MCCs of the 1920s.[59] The ECHR is another international court which has included the power to interpret judgments in its rules of procedure.[60] This power was first invoked in *Ringeisen (Interpretation)* in 1972.[61] In this case, the ECHR held that article 52 of the Convention, which provides that 'the judgment of the Court shall be final' was solely aimed at preventing the ECHR's judgments from being subject to any appeal to another authority. The ECHR observed that in considering a request for interpretation, it was exercising 'inherent jurisdiction',[62]

[51] ECJ Statute, above n 47, art 41; *Protocol of the Statute of Justice of the European Atomic Energy Community, Treaty establishing the European Atomic Energy Community*, signed 25 March 1957, 298 UNTS 167, art 42 (entered into force 1 January 1958); *Protocol of the Statute of Justice of the European Coal and Steel Community, Treaty establishing the European Coal and Steel Community*, opened for signature 18 April 1951, 26 UNTS 140, art 38 (entered into force 25 July 1952).

[52] ICSID Convention, above n 4, art 51(1).

[53] *International Tribunal for the Prosecution of Persons Responsible for Genocide in Rwanda*, adopted by SC Res 955 (1994), UN Doc S/RES/955 (1994) ('ICTR Statute'), art 25; Andrea Carcano, 'Requests for Review in the Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2004) 17 *Leiden Journal of International Law* 103, 103–4.

[54] *International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in Yugoslavia*, adopted by SC Res 827 (1993), UN Doc S/RES/827 (1993) ('ICTY Statute'), art 26; Carcano, ibid, 103–4.

[55] *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002), art 84; Carcano, ibid, 110.

[56] See Decision 184 of the Commission of the Cartagena Agreement of 19 August 1983 concerning the Statute of the Court of Justice, cited in Bardonnet, above n 49, 198.

[57] Opened for signature 30 April 1948, 30 UNTS 55, art 48 (entered into force 6 May 1949).

[58] See, e.g., Franco-German MAT Rules of Procedure, 1 TAM 44, art 78.

[59] See, e.g., Rules of Procedure of the US–Mexican GCC, art XI(6), in A H Feller, *The Mexican Claims Commissions: 1923–34* (1935) 351.

[60] European Court of Human Rights, Rules of Court, Rule 79.

[61] *Ringeisen v Austria*, Ser A, (No 16), (ECHR, 1973).

[62] Ibid; see also 10 (Sep Op Verdross), 12 (Sep Op Zeiler); approved in *Allenet de Ribemont v France*, ECHR Rep 1996–III, 903, 910; see also 912 (Sep Op Pettiti).

The rules of procedure of other international courts also provide for a power of interpretation. Some of these rules of procedure were prepared or selected by the states parties to the constitutive instrument, such as those of the Iran-US Claims Tribunal.[63] In addition, PCA tribunals operating under the Optional Rules of 1992 have the power to give an interpretation of their awards,[64] although those constituted under the 1907 Convention have the power by virtue of article 82 of that convention.

2. Power of Revision

The inclusion of the power of revision in rules of procedure of international tribunals can also be traced back to many of the MATs.[65] In addition, the Arbitral Commission and the Mixed Commission for the Agreement on German External Debts included the power in its Rules of Procedure,[66] as did the Arbitral Commission on Property, Rights and Interests in Germany.[67] The ECHR has also granted itself the power to revise its judgments in its Rules of Court',[68] as has the ITLOS;[69] Judge Eiriksson of the ITLOS has observed extrajudicially that the ITLOS regarded the power of revision as 'implicit in its judicial function',[70] and that 'this view was apparently shared by representatives in the Preparatory Commission', referring to the inclusion of the power in the draft rules prepared by that body.[71]

III. Powers of Interpretation and Revision as Inherent Powers

A. Possible Objections to the Powers as Inherent Powers

The fact that not all international courts have the express power to interpret or revise their judgments raises the question as to whether these bodies nonetheless have an inherent power to do so. Three chief objections may be made to the suggestion that these post-adjudication powers are inherent powers, which will now be examined.

The first objection is that the exercise of these powers possibly contravenes the principle of *res judicata* and the rule of finality. This, however, can be rejected. It is incorrect to say that the power of interpretation violates the principle of finality or

[63] Ir–USCT Rules, above n 46, art 35.

[64] PCA Optional Rules, above n 28, art 35(1).

[65] See, e.g., Rules of Procedure of the Franco-German MAT, above n 58, arts 79–82.

[66] Arbitral Tribunal and the Mixed Commission for the Agreement on German External Debts Rules of Procedure, art 48(a), (1958) 19 *ZaöRV* 728, also reprinted in Karin Oellers-Frahm and Norbert Wühler, *Dispute Settlement in Public International Law* (1984) 772, 779–80.

[67] Arbitral Commission on Property, Rights and Interests in Germany Rules, Rule 68 [1957] *Bundesgesetzblatt*, vol II, 230, 249–50.

[68] ECHR Rules, Rule 80.

[69] ITLOS Rules of the Tribunal, art 179.

[70] Gudmundur Eiriksson, *The International Tribunal for the Law of the Sea* (2000) 275.

[71] Ibid.

res judicata, for this position misconceives the role of the request for interpretation: it is not a method of attacking a judgment, but a way of confirming it.[72] The power of interpretation can only be exercised to explain obscurities in a judgment, and not to replace it with a new judgment. In the case of the power of revision, this objection has more validity, as the power of revision does some violence to the principle of *res judicata*.[73] This might lead some international tribunals to be reticent in exercising the power. Nonetheless, both domestic and international judicial bodies exercise many post-adjudication powers, and the risk that the dispute might persist if this power is not available lends weight to its possible status as an inherent power. In this sense, it is suggested that some exceptions to finality are necessary in the interests of justice, as long as there are strict conditions on their use.[74] Indeed, there is much force in the proposition advanced by Mr Holls at the First Hague Peace Conference that 'nothing is settled until it is settled right'.[75] While this phrase might lend itself to subjective results—who, for example, is to decide whether a dispute has been 'settled right'?—it is nonetheless suggested that the rule of *res judicata* should not be permitted to protect a judgment which does not reflect the decision that the international court would have made had it been apprised of all the relevant facts.

The second objection is found in the argument that once an international tribunal has rendered its decision, the powers which were conferred on the arbitrators have expired; that is, the tribunal is *functus officio*.[76] In addition, as a practical matter, ad hoc arbitral tribunals are generally dissolved after the rendering of the decision.[77] Yet it is suggested that this objection is only applicable to ad hoc tribunals which are constituted for an individual dispute, and not to permanent bodies such as the ICJ or the ITLOS, or even semi-permanent bodies such as the Iran-US Claims Tribunal. But even the inability of ad hoc tribunals to interpret or revise an award is questionable. Tribunals can be reconstituted, and requests for interpretation or revision need not necessarily involve further oral proceedings. In effect, whether a tribunal is *functus officio* will depend on its terms of reference. If its terms of reference are to render an award in order to 'settle the dispute', it is suggested that this encompasses considering requests for interpretation or revision of that award. In any event, if the tribunal is unable to be reconstituted, then it might be possible to constitute another tribunal for the purposes of the request.

[72] Scelle, 'Arbitral Procedure', above n 17, 143; J C Witenberg, *L'Organisation Judiciaire: La Procédure et la Sentence Internationales* (1937) 362–3.

[73] Reisman, above n 7, 219–20; Witenberg, *L'Organisation Judiciaire*, ibid, 371–2; see also the unpersuasive view of Scelle, who argues that the power of revision does not affect the authority of *res judicata*: Scelle, 'Draft on Arbitral Procedure', above n 32, 12; Scelle, 'Arbitral Procedure', above n 17, 144; see also Elizabeth Zoller, 'Observations sur la révision et l'interpretation des sentences arbitrales' (1978) 24 *Annuaire Français du Droit International* 327, 345–6.

[74] Herzog and Karlen, above n 1, 4, 19; Zoller, ibid, 351.

[75] This mantra is attributed to Abraham Lincoln: *Conférence internationale de la paix*, above n 49, 36; see also Geiss, above n 48, 171; Scelle, 'Draft on Arbitral Procedure', above n 32, 12; Scelle, 'Arbitral Procedure', above n 17, 143.

[76] For example, Witenberg, *L'Organisation Judiciaire*, above n 72, 361. [77] Ibid.

The third objection to the existence of inherent powers of interpretation and revision lies in the argument that international courts can only exercise powers expressly conferred on them.[78] This argument has been considered—and rejected—in chapter 2.[79] In the case of post-adjudication powers, however, there is some specific judicial authority for this proposition. This appears to be based on an early arbitral decision, the *Portendick*,[80] and on a dictum of the PCIJ in *Jaworzina Frontier*.[81]

The *Portendick* case concerned a dispute between the UK and France which was submitted to the King of Prussia as arbitrator.[82] The UK requested the King of Prussia to give an official interpretation of his award. He professed to be unable to interpret his award unless an interpretation was requested by both parties, but he nonetheless managed to satisfy the UK request for interpretation by stating how he had understood his terms of reference.[83] Accordingly, while this decision seems to support the proposition that the power to interpret decisions must be given expressly, the outcome actually tends to support the opposite conclusion.[84]

The PCIJ's advisory opinion in *Jaworzina Frontier* did not concern the court's power to interpret its judgments—this being expressly provided for in the PCIJ Statute—but rather, it concerned the finality of a decision of a body known as the Conference of Ambassadors, which had been entrusted with the task of delimiting certain frontiers. The Polish Government was dissatisfied with the location of a frontier, and sought a modification of the Conference's decision. The question whether the delimitation of the frontier was still open came before the PCIJ in the form of a request for an advisory opinion. In order to answer this question, the PCIJ considered that it had to decide whether the Conference had rendered a final and binding decision. It held that it was intended that the decision be final and have immediate effect.[85] Although the Conference was not established as a court or tribunal, the PCIJ considered that it filled a similar function to an adjudicative body. The PCIJ then turned to the issue of whether this decision was still open, and found that it was not, observing that the language of the Conference's decision was 'perfectly clear'.[86] Again likening the duties of the Conference to those of an Arbitrator, the PCIJ held that '[i]n the absence of an express agreement between the parties, the Arbitrator is not competent to interpret, still less to modify his

[78] Pieter Sanders, 'Arbitration' in IALS, *International Encyclopedia of Comparative Law*, above n 1, vol XVI, ch 12, 134; Schwarzenberger, above n 14, vol IV, 681; Simpson and Fox, above n 14, 245; Kenneth Carlston, *Process of International Arbitration* (1946) 241–2; Norman Hill, 'The Interpretation of the Decisions of International Courts' (1934) 22 *Georgetown Law Journal* 535, 535–6; see also Institut de Droit International, above n 28, art 24.

[79] See also Chester Brown, 'The Inherent Powers of International Courts and Tribunals' (2005) 76 *British Yearbook of International Law* 195, 210–11.

[80] Lapradelle and Politis, vol I, 512 (UK–France, 1843). [81] Ser B, (No 8) (PCIJ, 1923).

[82] Above n 80. [83] Ibid, 530–1.

[84] See also Reisman, above n 7, 193; Witenberg, *L'Organisation Judiciaire*, above n 72, 365.

[85] Above n 81, 29. [86] Ibid, 36.

award by revising it'.[87] This statement has been referred to as denying international courts an inherent power of interpretation and revision.[88]

However, it is important not to read too much into this dictum,[89] for immediately after determining that the decision was no longer open, the PCIJ noted that the body entrusted with the task of implementing the decision, the Delimitation Commission, had 'a considerable amount of discretion' in fixing the boundary,[90] suggesting that the decision of the Conference of Ambassadors was in fact subject to some changes. In addition, support for the proposition that a restrictive view should be taken of the dictum of the PCIJ in *Jaworzina Frontier* can be found in the PCIJ's very next advisory opinion, *Monastery at Saint-Naoum*.

In this case, the PCIJ was asked to decide whether another decision of the Conference of Ambassadors, concerning the location of a monastery, was final.[91] The decision of the Conference was criticised, *inter alia*, on the grounds that 'it was based on erroneous information or adopted without regard to certain essential facts'.[92] The PCIJ held, however, that it was not called upon 'to give an opinion on the question whether such decisions can—except when an express reservation to that effect has been made—be revised in the event of the existence of an essential error being provided, or of new facts being relied on'.[93] The PCIJ went on to state that even if a power of revision could be implied, the necessary conditions were not present in *Monastery at Saint-Naoum*. The PCIJ then detailed the conditions which would need to be satisfied. These included whether:

> there existed new facts or facts unknown at the time when the decision was taken; in other words, as alleged by the Serbo-Croat-Slovene State and Greece, the Conference of Ambassadors allocated the Monastery to Albania simply because it was unacquainted with new facts, or unaware of facts already in existence, which, if taken into consideration, would have led to a contrary decision.[94]

The PCIJ held that in the absence of such new facts, there was no ground for the revision of the Conference's decision.[95] It is suggested that the dicta of the PCIJ in *Monastery at Saint-Naoum* can be interpreted as meaning that the power to interpret or revise a judgment or award might be implied from the terms of the constitutive instrument or *compromis*.[96] Had the PCIJ been clearly of the opinion—as it appeared to have been in *Jaworzina Frontier*—that the Conference of Ambassadors, or an arbitrator, retained no powers to interpret or revise its decision unless those powers had been expressly conferred on it, then the PCIJ had a clear opportunity to restate this view. However, it did not do so, and the PCIJ presented a more nuanced understanding of the post-adjudication powers of international adjudicatory

[87] Above n 81, 38.
[88] For example, see Bowett, above n 14, 590–1; Schwarzenberger, above n 14, vol IV, 683; Simpson and Fox, above n 14, 245.
[89] Shabtai Rosenne, *The Law and Practice of the International Court, 1920–2005* (2006) vol III, 1612; Reisman, above n 7, 199, 210.
[90] Above n 81, 38–9.
[91] Ser B, (No 9), 7 (PCIJ, 1924).
[92] Ibid, 21.
[93] Ibid, 21–2.
[94] Ibid, 22.
[95] Ibid, 22.
[96] See, e.g., Simpson and Fox, above n 14, 242.

bodies. By leaving the question open, the PCIJ clearly contemplated that situations may arise in which such powers might be implied, or that an international court might have an inherent power to interpret or revise decisions.

B. Practice of International Courts supporting the Existence of the Powers

There is also some practice of international courts exercising the powers of interpretation and revision as inherent powers. This practice can be found in situations where international courts have included these powers in their rules of procedure, which has already been referred to above; most international courts and tribunals frame their own rules of procedure, and can be understood to include in their rules provisions which they consider necessary for the performance of their functions. In addition, instances can be found where international courts have exercised the powers without any textual basis.

1. Power of Interpretation

Several early arbitral tribunals have exercised the power to interpret their awards where they had no express power. The King of Prussia's decision in the *Portendick* case, which has been referred to above, arguably provides one such example.[97] Another early instance of interpretation of an award can be found in the *Eliza* case, in which Peru made a claim against the United States for payment in gold of a sum owed under an award rendered by the Mixed Commission of Lima in 1863.[98] The US refused, arguing that it only had to pay in money, rather than gold; this difficulty of interpretation was submitted to a second Mixed Commission in 1870.[99] This body held that the claimant had the right to payment in gold, with interest.[100] The second Commission did not have an express power to interpret the earlier award, and its interpretation of it does not necessarily demonstrate a belief on its part that it had an inherent power to do so, for the request for interpretation of the first award appears effectively to have been submitted as a new dispute.[101] Nevertheless, it evinces the second body's recognition that it had a power to clarify the earlier award, despite the operation of the principle of *res judicata*.

The UNAT has also exercised the power in the absence of a provision in its Statute. In *Crawford*, it observed that although the UNAT Statute did not confer such a power, 'both Parties agreed during the oral proceedings to admit that competence to interpret was inherent in the judicial function which the International Court of Justice, in its advisory opinion of 13 July 1954, declared the Tribunal to possess'.[102]

[97] See above nn 80–84 and accompanying text.
[98] Lapradelle and Politis, vol II, 271 (Peru–US, 1863).
[99] *E G Montano*, Lapradelle and Politis, vol II, 583, 601 (Peru–US, 1870).
[100] Ibid; see also Witenberg, *L'Organisation judiciaire*, above n 72, 365.
[101] *Montano*, ibid.
[102] (1955) 1 UNAT Rep 331, 335; *Statute of the Administrative Tribunal of the United Nations* UNGA Res 315–A(IV), 24 November 1949 ('UNAT Statute').

Finally, an example can be found in an award rendered by an ICC arbitral tribunal. *Case No 6233* of 1992 was heard under the pre-1998 ICC Arbitration Rules, which did not contain a provision on the interpretation of awards. The claimant made a request to the tribunal for the establishment of a new tribunal to give an interpretation of two awards which had been rendered. The tribunal agreed that it had the power of interpretation, holding that '[t]his power is based on the arbitral clause itself'.[103]

Considered together with the justifications for the existence of inherent powers, being the need of international courts to carry out their functions, it is suggested that this practice constitutes authority for the proposition that international courts have an inherent power to interpret their judgments.

2. *Power of Revision*

In addition to some international courts including the power of revision in their rules of procedure, some have made judicial pronouncements supporting the inherent nature of the power, with some even exercising the power in the absence of any textual basis. This arbitral practice can be confused by the characterization of the cases variously as applications for a 'rehearing' or for 'revision', and these are often made on several bases, including the discovery of new factual evidence or evidence that the award had been procured by fraud, and sometimes parties simply sought a rehearing *de novo*.[104] It is difficult to draw any general conclusions, in particular from the earlier practice. This will be considered first, before turning to the more recent jurisprudence of international courts.

The practice of the US-Mexican CC is quite inconsistent.[105] In 1876, it rejected a request for a rehearing, 'accompanied with some new evidence, and a reexamination of the old' in the *Weil* and *La Abra Silver Mining Co* cases.[106] The umpire, Sir Edward Thornton, refused the motion on a number of grounds; these included his understanding that he had no right to consider any evidence besides 'that which had already been before the commissioners, had been examined by them, and transmitted to the umpire'.[107] Notwithstanding Sir Edward's rejection of this and other applications for revision,[108] other decisions of the US-Mexican CC indicate the existence of a power to reopen cases for new evidence, such as *George Moore*,[109] *Shreck*,[110] and *Green*.[111]

[103] *Case No 6233* (1992), in Jean-Jacques Arnaldez, Yves Derains and Dominique Hascher (eds), *Collection of ICC Arbitral Awards 1991–1995* (1997) 332, 334.
[104] See, e.g., Sandifer, above n 32, 403–56, who describes the cases variously under the heading of 'rehearing' and 'revision'.
[105] See also Ibid, 414–16.
[106] Moore, vol II, 1324, 1329 (US–Mexican CC, 1876) (both cases).
[107] Ibid.
[108] See the cases listed in Moore, vol II, 1357, fn 2.
[109] Moore, vol II, 1357, 1357 (US–Mexican CC, 1871).
[110] Moore, vol II, 1357, 1358 (US–Mexican CC).
[111] Moore, vol II, 1358 (US–Mexican CC).

Decisions in two other early arbitrations, however, militate against the existence of an inherent power of revision. In the US–Spain arbitration in 1881, Umpire Loewenhaupt refused an application by the US arbitrator for a rehearing.[112] In the *Lazare* claim between the US and Haiti in 1886, the arbitrator, Judge Strong, refused a rehearing on the basis of newly discovered evidence, even though he acknowledged that 'the newly discovered evidence was of such a character that it would "materially have affected" his decision had it been presented to him pending the hearing of the case'.[113]

In 1933, the question of an inherent power of revision arose in the *Sabotage Claims* before the US–German MCC.[114] Here, the Commission was asked by the US to reopen a case on the basis that Germany had produced fraudulent evidence during the trial. The umpire, Justice Roberts, noted that the provision in article VI of the Agreement of 10 August 1922 stipulating that the decision of the Commission would be 'final and binding' did not prevent it from reopening any case.[115] Justice Roberts held that:

> [W]here the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in any other respect the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has the power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules.[116]

But he held that this did not empower the commission to reopen a case for the presentation of 'after-discovered' evidence. He held that 'in cases where a retrial is granted or a reopening and rehearing indulged for the submission of so-called after-discovered evidence, this is usually by a court', and that it was in the public interest 'that litigation be terminated'.[117] With respect to allegations that an award was founded on fraudulent evidence, however, the umpire held that:

> No tribunal worthy its name or of any respect may allow its decision to stand if such allegations are well-founded. Every tribunal has inherent power to reopen and to revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion.[118]

In contrast to Justice Roberts' holding in the *Sabotage Claims*, the arbitral tribunal constituted to hear the *Trail Smelter* arbitration held, after reviewing the relevant arbitral practice, that the Convention of 15 April 1935 between the United States and Canada did not deny it the power to grant a revision for new facts, although it found that this did not extend to revision for error of law.[119]

[112] Moore, vol III, 2190 (US–Spain, 1881).
[113] Moore, vol II, 1749, 1801 (US–Haiti, 1886).
[114] *Lehigh Valley Railroad Company*, 8 RIAA 160 (US–German MCC, 1933) ('*Sabotage Claims*').
[115] Ibid, 187.
[116] Ibid, 188.
[117] Ibid, 188.
[118] Ibid, 190; see also Alfred Verdross and Bruno Simma, *Universelles Völkerrecht* (3rd ed, 1984) 898.
[119] Above n 12, 1953–6, 1957.

More recent international judicial practice supports the existence of the power of revision more consistently, but it is inconclusive as to the scope of the power. In *Effect of Awards of Compensation*, the ICJ gave a clear indication that it considers international courts to have an inherent power of revision.[120] In this advisory opinion, the ICJ considered the nature and powers of the UNAT,[121] and concluded that the UNAT was established as 'an independent and truly judicial body pronouncing final judgments without appeal within the limited field of its functions', and that its decisions were *res judicata*.[122] The ICJ noted the absence of a specific power of revision in the UNAT Statute, and also took note of evidence of the Supervisory Commission of the LNAT, on whose Statute the Statute was based, which indicated that the non-inclusion of a power of revision was a deliberate decision.[123] In spite of this evidence, the ICJ nonetheless essentially recognized that despite the finality of its judgments, the UNAT had an inherent power of revision:

> The rule contained in article 10, paragraph 2, cannot however be considered as excluding the Tribunal from itself revising a judgment in special circumstances when new facts of decisive importance have been discovered; and the Tribunal has already exercised this power. Such a strictly limited revision by the Tribunal itself cannot be considered an 'appeal' within the meaning of that Article and would conform with rules generally provided in statutes or laws issued for courts of justice, such as article 61 of the Statute of the International Court of Justice.[124]

Another international tribunal which has considered this question is the Iran-US Claims Tribunal.[125] In *Morris v Iran*, it held that:

> Whether a Chamber or the Full Tribunal, despite the absence of any express provision, has inherent power to review and revise an Award under exceptional circumstances—e.g., when an Award was based on forged documents or perjury—is a question which the Tribunal does not need to reach in this decision.[126]

The Iran–US Claims Tribunal did not specify what it meant by 'exceptional circumstances', such as whether it thought it was limited to evidence of fraud, or whether it also extended to any newly discovered evidence, irrespective of any evidence of fraud.[127] In two subsequent awards, *Dames and Moore v Iran*,[128] and

[120] *Effect of Awards*, above n 13. See also Bowett, above n 14, 590–1, fn 45. While the ICJ has never made similar statements with respect to its own power of revision, the power has certainly been characterized as an inherent power in oral argument before the ICJ: e.g., *Continental Shelf (Revision and Interpretation)* [1985] ICJ Pleadings 172, 174 (Professor Dupuy): the power of international courts to revise their judgments was 'une pièce inhérente de la fonction juridictionnelle', and 'un élément inhérent du système de l'arbitrage'. [121] Above n 13, 51–3.
[122] Ibid, 53. [123] Ibid, 54. [124] Ibid, 55.
[125] David Caron, Lee Caplan and Matti Pellonpää, *The UNCITRAL Arbitration Rules: A Commentary* (2006) 914–26; Charles Brower and Jason Brueschke, *The Iran–United States Claims Tribunal* (1998) 242–60; Baker and Davis, above n 25, 200–5; Jacomijn van Hof, *Commentary on the UNCITRAL Arbitration Rules* (1991) 279–83.
[126] 3 Ir–USCTR 364, 365 (1983); see also *Dallal v Iran*, 5 Ir–USCTR 74, 75 (1984).
[127] Van Hof, above n 125, 281–2. [128] 8 Ir–USCTR 107, 114, 117–18 (1985).

International Schools Services v Iran,[129] the Iran–US Claims Tribunal avoided ruling on the issue.

The most significant decision on the question of the power of the Iran–US Claims Tribunal to reopen and reconsider awards is *Ram International Industries, Inc v Air Force of Iran*.[130] In this case, Iran requested that the original award be reopened on grounds of fraud and perjury. In addressing the question of whether it had an inherent power to reopen the award, the Tribunal thoroughly reviewed how this question has been addressed in the constitutive instruments of other international courts,[131] and discussed the instances in which arbitral tribunals had exercised the power of revision, even though they had not been conferred an express power to do so, and concluded that these decisions had 'been accepted as sound in legal studies and writings discussing the circumstances under which revision can be sought'.[132] The Iran–US Claims Tribunal then expressed the view that:

> it might possibly be concluded that a tribunal ... which is to adjudicate a large group of cases for a protracted period of time would by implication, until the adjournment and dissolution of the tribunal, have the authority to revise decisions induced by fraud.[133]

The Iran–US Claims Tribunal did not conclusively determine the question, as it considered that on the facts of the case, the allegations of fraud were not sufficient, even if proved, to have been a decisive factor.[134] Yet this is, nonetheless, persuasive authority for the proposition that international courts have the power, while they are still in operation, to revise judgments, albeit not for any newly discovered evidence, but solely for evidence of fraud.

A more definite result was reached by the UNCITRAL Tribunal in *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*.[135] In its Award on Damages and Costs, it dealt with an argument by the respondents that aspects of its Award on Jurisdiction and Liability should be reconsidered. The Tribunal held that:

> [A] court or tribunal, including this international arbitral tribunal, has an inherent power to take cognizance of credible evidence, timely placed before it, that its previous determinations were the product of false testimony, forged documents, or other egregious 'fraud on the tribunal'.... Certainly if such corruption or fraud in the evidence would justify an international or a national court in voiding or refusing to enforce the award, this Tribunal also, so long as it still has jurisdiction over the dispute, can take necessary corrective action.[136]

[129] 14 Ir–USCTR 65, 70–1 (1987); van Hof, above n 125, 282.
[130] 29 Ir–USCTR 383 (1993); Brower and Brueschke, above n 125, 254–9.
[131] Ibid, 387–9.
[132] Ibid, 389. The Tribunal referred to the writings of Sir Elihu Lauterpacht, *Aspects of the Administration of International Justice* (1991) 100; Sandifer, above n 32, 426; Carlston, above n 78, 57–8, 224–8, 231–41; Reisman, above n 7, 208–12; Simpson and Fox, above n 14, 242.
[133] Above n 130, 390. [134] Ibid, 390–1. [135] 95 ILR 184 (1990).
[136] Ibid, 222, referring to the *Sabotage Claims* (see above n 114 and accompanying text), and also the ICJ Statute, above n 4, art 61, the ICSID Convention, above n 4, art 51, and the US Arbitration Act, 9 USC § 10; see also Caron, Caplan and Pellonpää, above n 125, 915–16.

In the arbitration concerning the *Heathrow Airport User Charges*, the US argued that international tribunals had 'inherent powers to revisit certain areas of an award', and that the principle of finality did not preclude the exercise of such powers.[137] The UK objected to the US requests, arguing that the US was effectively seeking to reopen a question on the merits.[138] The Tribunal noted that it could not 'exercise any power to the existence of which is inconsistent with the terms of the parties' agreement as a result of which alone the Tribunal has any being'.[139] It accepted that it had an inherent power to rectify clerical errors,[140] and further held that under Rule 22(2) of its Rules, it could reopen the proceedings *before* the award had been rendered 'on the ground that new evidence [was] forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain points'.[141] As it had an express power under its Rules to reopen a decision *before* the rendering of the award, the tribunal held that it was extremely doubtful that its inherent powers included 'the much wider and less qualified power to "revisit" its awards ... in circumstances such as have led the *other* Tribunals, to which [the US] refers, to revise awards that they had rendered'.[142] This award does not, therefore, militate generally against the inherent nature of the power of revision, as the tribunal was restricted from exercising the power by virtue of its rules of procedure.

By far the clearest pronouncement from an international court that the power of revision is an inherent power is that of the IACHR in *Genie Lacayo (Judicial Review)*.[143] In this case, the I-ACommHR requested the 'judicial review' of an earlier judgment. The IACHR recognized that it did not have the power of revision under the American Convention, the IACHR Statute or its Rules.[144] Referring to the practice of the ICJ and the ECHR, the IACHR discussed the power using the language of inherent powers, holding that:

> As stipulated in the Statute of the International Court of Justice and the Rules of the European Court, pursuant to the general principles of both domestic and international procedural law, and, in accordance with the criterion of generally accepted doctrine, the decisive or unappealable character of a judgment is not incompatible with the existence of the remedy of revision in some special cases.[145]

The IACHR thus made a finding that it could, in special cases, exercise the power to revise its judgments.[146]

While the early arbitral practice is inconclusive, the judicial pronouncements in the later case law are much more consistent with the existence of the power of revision as an inherent power. But the case law does not yet allow one to state confidently that every international court has accepted the existence of the power,

[137] *Heathrow Airport User Charges* (Supplemental Decisions and Clarifications) 102 ILR 564, 570 (US–UK, 1993). [138] Ibid, 568
[139] Ibid, 579. [140] Ibid, 571, 579. [141] Ibid, 580. [142] Ibid.
[143] Ser C, (No 45) (IACHR, 1997). [144] Ibid para 6. [145] Ibid, para 9.
[146] Ibid, para 12.

despite the relatively abundant practice on this issue. There is also inconsistent practice regarding the scope of the power; some international courts have confined its scope to discovery of evidence of fraud, rather than discovery of any new evidence. It is, therefore, difficult to conclude that there is a 'common law' with respect to the existence of a general power to revise judgments in light of newly discovered evidence. However, the arguments for the existence of the power as an inherent power are quite compelling. It might be suggested, for instance, that the functions of an international court in the settlement of the dispute and the proper administration of international justice are not carried out if there is no recourse against a judgment made in the absence of decisive evidence, or judgments procured by fraud; indeed, the procedural device of revision was introduced in order 'to avoid arbitral miscarriages of justice' which could be brought about by the exclusion of new facts.[147] Furthermore, if a state, after agreeing to submit a dispute to international adjudication, later discovers that evidence was hidden from it or that evidence was fraudulently submitted to the court, it is likely to be reluctant to comply with any judgment made against it. The proper administration of international justice, then, militates in favour of the admission of a procedure to take account of new evidence, subject to certain conditions discussed below, so long as the exercise of the power is not inconsistent with the terms of the constitutive instrument of each international court. It cannot yet be demonstrated, however, that there is universal acceptance of such a procedure; this is *a fortiori* the case with regard to the WTO dispute settlement system, which will now be considered.

C. Exercise of Post-Adjudication Powers in WTO Dispute Settlement

It has been observed above that WTO panels and the Appellate Body do not have an express power to interpret or revise their reports. In considering whether these post-adjudication procedures are available in WTO dispute settlement, it should be observed that several differences exist between the operation of WTO dispute settlement and other international courts. First, WTO dispute settlement reports are not binding on parties until they have been adopted by the DSB; it can be said that WTO reports are, at least in this respect, dissimilar to judgments or awards of other international courts which have the sole power to interpret their own pronouncements.[148] Second, under the DSU, the DSB is the body having authority, *inter alia*, to establish panels, adopt panel and Appellate Body reports, maintain surveillance of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.[149] Given these differences, the question of whether these bodies can exercise post-adjudicatory powers is examined in a separate section. At the outset it is noted that the question

[147] Reisman, above n 7, 210. [148] DSU, above n 6, arts 2(1), 16(4), 17(14).
[149] Ibid, art 2(1).

relating to the power of revision is really limited to the power of WTO panels; the Appellate Body does not determine questions of fact, but only questions of law,[150] therefore, it is more likely that a panel would be asked to revise its report for discovery of a new fact. This does not exclude the possibility that an application might be made to the Appellate Body for the revision of a report; depending on the timing of the discovery of the new fact; if the Appellate Body has already rendered its report and the report has been adopted, the initial request might be directed to that body.

The DSB's role in establishing panels, adopting reports, and maintaining surveillance of rulings and recommendations might suggest that it is the body with the power to interpret or revise panel and Appellate Body reports; or that it is the body with the power to reconstitute a panel (or constitute a new panel) to consider requests for the interpretation and revision of reports.[151] It might also be suggested that the power of interpretation is included in the scope of the implementation panels which may be constituted under article 21(5). Under this provision, if there is a disagreement regarding the consistency with a covered agreement of measures taken to comply with the recommendations of the DSB, it shall be decided through recourse to the WTO dispute settlement procedures, and, where possible, by the original panel.[152] Finally, in contrast to most other international courts, the WTO dispute settlement system has an appellate structure. It is not suggested that the power of interpretation or revision can be likened to the process of appeal, but merely that the availability of appeal ensures that a dissatisfied party to dispute settlement proceedings is not barred from further recourse. In these circumstances, it might be suggested that the WTO panels and the Appellate Body do not have powers of interpretation or revision.

Yet these considerations should not preclude the possibility that WTO panels and the Appellate Body might nonetheless have these powers. Although the DSB has considerable responsibility under the DSU, this does not necessarily deprive panels and the Appellate Body of post-adjudication competences. WTO panels have certainly exercised post-adjudication powers before; on numerous occasions they have exercised a power—which is not expressly provided for in the DSU—to rectify errors in their reports.[153] As for the procedure of implementation, this is distinct from that of interpretation; article 21(5) does not address disputes concerning the interpretation of panel or Appellate Body reports. Finally, the existence of an appellate structure has little bearing on the question of whether panels should be able to interpret or revise their reports. In particular, the Appellate

[150] Ibid, art 17(6).

[151] Such an approach was adopted on at least one occasion by the contracting parties to GATT 1947: Report of the Members of the Original Oilseeds Panel, *Follow-Up on the Panel Report 'EEC—Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins'* (BISD 39S/91) paras 3–4 (GATT, 1992).

[152] DSU, art 21(5).

[153] For example, *US—Corrosion-Resistant Carbon Steel*, WT/DS213/R/Corr.1 (PR); *Australia—Salmon*, WT/DS18/R/Corr.1 (PR).

Body's role in determining appeals cannot extend to deciding the decisive nature of new factual evidence. To admit of the powers of interpretation and revision would not undermine the role of the Appellate Body, and would be a more efficient and economical way of resolving such disputes.[154] It is suggested that WTO panels and the Appellate Body might possess the powers of interpretation and revision, and that these powers are not necessarily inconsistent with their functions or with the terms of the DSU.

D. Conclusion

Many international courts have the power to interpret and revise judgments and awards, regardless of whether this power is expressly conferred by the terms of their constitutive instruments. This is because these powers can be exercised as inherent powers, provided that they are not exercised in a fashion that is inconsistent with the functions or the terms of the constitutive instruments of international courts. The attention of this chapter now turns to whether international courts exercise these powers consistently.

IV. Issues relevant to the Exercise of the Powers of Interpretation and Revision

Judicial and arbitral practice on the exercise of the power of interpretation is somewhat limited, although instances of applications for the interpretation of judgments and awards can be found before most international courts, including the MATs,[155] the PCIJ,[156] the ICJ,[157] ICSID tribunals and tribunals constituted under bilateral investment treaties,[158] the ECHR,[159] the IACHR,[160] and PCA

[154] In *Canada—Aircraft*, DSR 1999–III, 1377, 1434–5, the Appellate Body appeared to suggest that Brazil could bring another claim should it discover a new fact concerning the consistency of Canada's measures with the SCM Agreement. Joost Pauwelyn, *Conflict of Norms in Public International Law* (2003) 111, regards this as similar to the procedure of revision, but it is suggested that it should be regarded more accurately as the submission of a new claim.

[155] For example, *Deville c État allemand*, 2 TAM 429 (Franco-German MAT, 1922); *Office allemand c Office français*, 4 TAM 441 (Franco-German MAT, 1924).

[156] *Factory at Chorzów (Interpretation)*, above n 10; *Treaty of Neuilly (Interpretation)*, Ser A, (No 4) (PCIJ, 1925).

[157] *Land and Maritime Boundary between Cameroon and Nigeria (Interpretation)*, above n 13; *Continental Shelf (Revision and Interpretation)*, above n 13; *Asylum (Interpretation)* [1950] ICJ Rep 395.

[158] *Marvin Feldman v Mexico* (ICSID Case No ARB(AF)/99/1, Decision on Correction and Interpretation of 13 June 2003) (NAFTA); *CCL v Kazakhstan* (SCC Case No 122/2001, Supplemental Award and Interpretation of 2004); and *Wena Hotels v Egypt* (ICSID Case No ARB/98/4, Decision on Application for Interpretation of Award of 31 October 2005), all available at <http://ita.law.uvic.edu> (last visited 25 November 2006).

[159] *Hentrich v France*, ECHR Rep 1997–IV, 1285; *Allenet de Ribemont v France*, above n 62; *Ringeisen v Austria*, above n 61.

[160] *Juan Humberto Sanchez (Interpretation)*, Ser C, (No 102) (IACHR, 2003); *Castí Hurtado (Interpretation)*, Ser C, (No 86) (IACHR, 2001); *Ivcher Bronstein (Interpretation)*, Ser C, (No 84)

tribunals.[161] It appears that there have, to date, been no applications for the interpretation of a WTO report, an ITLOS judgment or an UNCLOS tribunal award.[162]

As with the power of interpretation, there is relatively little international judicial practice concerning the power of revision. No applications for revision were made before the PCIJ, but there is substantial practice from the MATs,[163] and the power has also been invoked before PCA tribunals,[164] the ICJ,[165] the IACHR,[166] and the ECHR.[167] There is, however, no practice emanating from the ITLOS, UNCLOS tribunals, the WTO dispute settlement system, or ICSID tribunals.[168]

In the available practice of international courts, two issues have emerged as being common to applications for interpretation and revision: the question of the jurisdiction of the international court to accede to such a request, and the composition

(IACHR, 2001); *Barrios Altos (Interpretation)*, Ser C, (No 83) (IACHR, 2001); *Cesti Hurtado (Interpretation)*, Ser C, (No 65) (IACHR, 2000); *Cesti Hurtado (Interpretation)*, Ser C, (No 62) (IACHR, 1999); *Blake (Interpretation)*, Ser C, (No 57) (IACHR, 1999); *Loayza Tamayo (Interpretation)*, Ser C, (No 53), (IACHR, 1999); *Suárez Rosero (Interpretation)*, Ser C, (No 51) (IACHR, 1999); *Loayza Tamayo (Interpretation)*, Ser C, (No 47) (IACHR, 1998); *El Amparo (Interpretation)*, Ser C, (No 46) (IACHR, 1997); *Godínez-Cruz (Interpretation)*, Ser C, (No 10) (IACHR, 1990); *Velásquez Rodríguez (Interpretation)*, Ser C, (No 9) (IACHR, 1990).

[161] *Iron Rhine Railway* (Interpretation of Award of 20 September 2005); (see also *Iron Rhine Railway* (Correction of the Award of 20 September 2005)); Eritrea–Ethiopia Boundary Commission (Decision on Interpretation of 24 June 2002), available at <http://www.pca-cpa.org> (last visited 25 November 2006).

[162] However, Saint Vincent and the Grenadines apparently contemplated requesting the ITLOS for an interpretation of the judgment in *MV 'Saiga'*: Eiriksson, above n 70, 213, 276.

[163] For example, *Heim et Chamant v Germany*, 3 TAM 50 (Franco-German MAT, 1922); *La Suddoise v Roller*, 4 TAM 315 (German-Belgian MAT, 1924); *Jules Crénge v Paul Busch*, 5 TAM 114 (Franco-German MAT, 1924); *Baron de Neufflize v Diskontogesellschaft*, 7 TAM 629 (Franco-German MAT, 1927); *Epoux Ventenat v State SHS*, 7 TAM 79 (German-Yugoslavian MAT, 1923); *Krichel v France* and *Krichel v Germany*, 8 TAM 757 (Franco-German MAT, 1928); *Office allemand v Office français*, 8 TAM 766 (Franco-German MAT, 1928); *Betz v Germany*, 9 TAM 654 (German-Belgian MAT, 1929); *Ottenberger v Germany*, 9 TAM 272 (Franco-German MAT, 1929); *Bastu v Bulgaria*, 9 TAM 284 (Franco-Bulgarian MAT, 1929); *De Taymac v Schmitz*, 9 TAM 492 (Franco-German MAT, 1929).

[164] *Pious Fund of the Californias*, above n 9; *North Atlantic Coast Fisheries*, 11 RIAA 167 (GB–US, 1910); *Orinoco Steamship Co*, 11 RIAA 227 (US–Venezuela, 1910). It should be noted that the application for revision in *Orinoco Steamship Co* centred on whether the umpire in that case had exceeded his jurisdiction or had made 'essential errors' involving errors of law. This is not the same as 'revision' on the grounds of a new fact. See discussion in *Klöckner v Cameroon* (Annulment), 114 ILR 243, 118–19 (1985).

[165] *Continental Shelf (Revision and Interpretation)*, above n 13; *Application of the Genocide Convention (Revision)* (ICJ Judgment of 3 February 2003); *Land Island and Maritime Frontier Dispute (Revision)* (ICJ Judgment of 18 December 2003), available at <http://www.icj-cij.org> (last visited 30 November 2006).

[166] *Genie Lacayo (Judicial Review)*, above n 143.

[167] For example, *Epple v Germany (Revision—Admissibility)*, Judgment of 15 December 2005, available at <http://www.echr.coe.int> (last visited 25 November 2006); *McGinley and Egan v United Kingdom (Revision—Admissibility)*, ECHR Rep 2000-I, 321; *Gustafson v Sweden (Revision—Admissibility)*, ECHR Rep 1997-VI, 2152; *Gustafson v Sweden (Revision—Merits)*, ECHR Rep 1998-V, 2085; *Pardo v France (Revision—Admissibility)*, ECHR Rep 1996-III, 860; *Pardo v France (Revision—Merits)*, ECHR Rep 1997-III, 735.

[168] But see the application for revision made in *American Manufacturing & Trading v DRC* (ICSID Case No ARB/93/1), which was discontinued by agreement of the parties on 26 July 2000: <http://www.worldbank.org/icsid> (last visited 25 November 2006).

of the international court hearing the request. These two issues will be considered before turning to the specific criteria for applications for interpretation and revision.

A. Jurisdiction of the International Court hearing the Request

Under the Institut de Droit International's *Projet de règlement* of 1875, any request for interpretation of an award had to be submitted jointly, in effect requiring both parties to consent to the jurisdiction of the international tribunal to give an interpretation.[169] But this position has not been maintained; international courts can give an interpretation or revision of their judgments without a separate act conferring jurisdiction. Article 60 of the ICJ Statute, for instance, does not expressly require a separate act of consent.[170] In 1926, when the PCIJ judges were revising the Rules of Court, this question engendered some debate. Several members of the PCIJ were of the opinion that the jurisdiction of the court over a request for interpretation was compulsory even if the original dispute had been referred to the PCIJ by special agreement.[171] This was finally clarified in the 1978 revision of the Rules; article 98(1) arguably makes it clear that no further act of consent is required of the parties.[172] The ICJ's power to consider a request for interpretation without the need for consent of both parties was confirmed by the ICJ in *Continental Shelf (Revision and Interpretation)*.[173] Likewise, it appears that its power of revision derives from article 61 of the ICJ Statute, and not from any separate basis of jurisdiction.[174]

As regards applications for the interpretation of PCA tribunal awards, article 82 of the 1907 Convention does not require that the dispute over the interpretation of the award be submitted by joint application.[175] The case is different for applications for revision; article 55 of the 1899 Convention and article 83 of the 1907 Convention require parties to include the power of revision to be consented to by the parties in the *compromis*.[176] Under the ITLOS Statute, article 33(3) merely provides that '[i]n the event of dispute as to the meaning or scope of the decision, the Tribunal shall construe it upon the request of any party';[177] the statement that 'any party' can request an interpretation suggests that a unilateral application will suffice. Likewise, article 12(1) of UNCLOS Annex VII, which confers the power of interpretation, does not require a new jurisdictional link.[178] Article 127 of the ITLOS Rules, which contains the power of revision, makes similar provision to article 61 of the ICJ Statute.[179] The provisions of the ICSID Convention conferring

[169] Institut de Droit International, above n 28, art 24.
[170] ICJ Statute, above n 4, art 60.
[171] Ser D, No 2, Add, 174–80.
[172] ICJ Rules of Court, art 98(1).
[173] Above n 13, 216.
[174] See, e.g., *Land, Island and Maritime Frontier Dispute (Revision)*, above n 165, paras 17–20; and *Application of the Genocide Convention (Revision)*, above n 165, para 14.
[175] 1907 Convention, above n 4, art 82.
[176] 1899 Convention, art 55; 1907 Convention, art 83 (both, above n 4).
[177] ITLOS Statute, above n 4, art 33(3); ITLOS Rules, art 126.
[178] UNCLOS, above n 43, Annex VII, art 12.
[179] ITLOS Rules, art 127.

the power to interpret or revise awards similarly do not require separate bases of jurisdiction.[180]

This brief review of the statutory provisions and jurisprudence suggests that the jurisdiction of international courts over requests for interpretation or revision generally derives directly from the jurisdictional clause, and that no further act of consent is needed, unless there is agreement to the contrary.

B. Composition of the International Court hearing the Request

A second issue common to applications for interpretation and revision relates to the composition of the international court considering the request. Problems might arise particularly given that some ad hoc tribunals may be *functus officio* and disbanded after the rendering of the award. This issue is less significant in the procedure of standing courts such as the ICJ; the ICJ Statute and Rules do not contain any provisions concerning its composition for such requests. Under article 100(1) of the ICJ Rules, if the application for revision or interpretation concerns a judgment of the full Court, 'the request ... shall be dealt with by the Court'; if a Chamber has been formed to hear the dispute, the request for interpretation or revision 'shall be dealt with by that chamber'.[181] This is consistent with the ICJ's approach to the question of third-party intervention which arose in *Land, Island and Maritime Frontier Dispute*; there, the ICJ decided that it was the Chamber formed in that case, rather than the full ICJ, which should determine Nicaragua's application to intervene.[182] This approach was followed by the ICJ Chamber when an application for revision was made in *Land, Island and Maritime Frontier Dispute* in 2002.[183]

The ITLOS Rules similarly provide that if the judgment to be interpreted or revised was given by the ITLOS, the request for interpretation or revision is to be heard by the ITLOS.[184] If the judgment was given by a Chamber, the request for interpretation or revision is, if possible, to be dealt with by that Chamber.[185] If it is not possible for the same ITLOS Chamber to be formed, the request is to be dealt with by another Chamber, and if this cannot be constituted, it is to be dealt with by the ITLOS.[186] The ICSID Arbitration Rules and the IACHR Rules make similar provision.[187]

[180] ICSID Convention, above n 4, art 50(1); ICSID Arbitration Rules, Rule 56(1).
[181] ICJ Rules, art 100(1). [182] [1990] ICJ Rep 3, 5–6.
[183] *Land, Island and Maritime Frontier Dispute (Revision)*, above n 165, paras 3–5. Shabtai Rosenne has observed that 'not one of the members of the 2002 Chamber had been members of the 1992 Chamber', even though article 100(1) of the ICJ Rules requires that 'if the judgment ... was given by a chamber, the request for its revision shall be dealt with by *that* chamber' (emphasis added): Rosenne, *Law and Practice*, above n 89, vol III, 1630. [184] ITLOS Rules, art 129(1).
[185] Ibid, art 129(2). [186] Ibid, art 129(2).
[187] ICSID Arbitration Rules, Rule 51; IACHR Rules of Court, article 59(3). On the IACHR Rules, see especially *Godínez- Cruz (Interpretation)*, above n 160, paras 12–13; and *Velásquez Rodríguez (Interpretation)*, above n 160, paras 12–13, where the IACHR interprets the provisions in light of ICJ and ECHR practice.

Where constitutive instruments and rules of procedure are silent on the question of composition, it is suggested that requests for interpretation and revision should be considered by the tribunal as originally composed, unless this is impossible, in which case a new tribunal should be constituted.

C. Scope of the Powers

International courts have made it clear that the power of interpretation is narrowly restricted to clarifying the terms of a judgment. This involves precisely defining the terms of the operative parts of the judgment, and specifying its scope, meaning and purpose. The confines of an interpretation were clearly spelled out by the PCIJ Chamber of Summary Procedure in *Treaty of Neuilly (Interpretation)*:

> [A]n interpretation—given in accordance with article 60 of the Statute—of the Judgment of September 12th, 1924, cannot go beyond the limits of that judgment itself, which are fixed by the special agreement.[188]

This has been accepted in the jurisprudence of many international courts, including the ICJ,[189] the ECHR,[190] the IACHR,[191] the Iran-US Claims Tribunal,[192] a NAFTA tribunal,[193] ad hoc arbitral tribunals,[194] and tribunals operating under institutional rules of commercial arbitration.[195] Importantly, interpretation cannot be used to seek a revision or rehearing of the original decision, and an interpretation cannot violate the principle of *res judicata*.[196] International courts are wary of parties who seek to achieve modification, revision or annulment of the judgment by means of interpretation; parties who have sought to do so have received mild judicial rebukes.[197]

[188] Above n 156, 7; see also *Factory at Chorzów (Interpretation)*, above n 10, 21; von Stauffenberg, above n 38, 426.
[189] *Continental Shelf (Revision and Interpretation)*, above n 13, 217; *Asylum (Interpretation)*, above n 157, 402. [190] *Ringeisen v Austria*, above n 61, para 13.
[191] *Velásquez Rodríguez*, above n 160, para 26.
[192] *PepsiCo Inc, v Iran*, 13 Ir–US CTR 328, 329 (1986); Baker and Davis, above n 25, 193–4; van Hof, above n 125, 278–84. [193] *Feldman v Mexico*, above n 158, paras 9–11.
[194] *Dispute concerning the Course of the Frontier between Boundary Post 62 and Mount Fitzroy (Revision and Interpretation)*, 113 ILR 194, 229–31 (Argentina–Chile, 1995); *Delimitation of the Continental Shelf between the UK and the French Republic (Interpretation)*, 18 UNRIAA 271, 295–6 (UK–France, 1978).
[195] See, e.g., Yves Derains and Eric Schwartz, *A Guide to the New ICC Rules of Arbitration* (1998) 300–1; Baker and Davis, above n 25, 194.
[196] For example, *Land and Maritime Boundary (Interpretation)*, [1999] ICJ Rep 31, para 12; Rosenne, *Law and Practice*, above n 89, vol III, 1612; van Hof, above n 125, 280–3.
[197] For example, *Feldman v Mexico*, above n 158, para 10; *Loayza Tamayo (Interpretation)*, above n 160, paras 15–16; *Henrich v France*, above n 159, 1290; *Ford Aerospace and Communications Corporation v Air Force of Iran*, 12 Ir–USCTR 304, 304–5 (1986); *Ambatielos* [1953] ICJ Rep 10, 16–17; *Asylum (Interpretation)*, above n 157, 403; *Factory at Chorzów (Interpretation)*, above n 10, 21; *Treaty of Neuilly (Interpretation)*, above n 156, 7.

A further consideration surrounding the interpretation of judgments is that international courts are not 'bound by the formulae chosen by the parties', but will take an 'unhampered decision'.[198] Finally, a request for interpretation need not relate to the operative part of the judgment, but might extend to the reasoning in the judgment.[199]

International courts have also consistently construed the power of revision narrowly. As the power constitutes an exception to the principle of finality and *res judicata*, international tribunals are wary of applications for revision which are in reality attempts to appeal the decision or have it reviewed *de novo*.[200] As the Franco-Bulgarian MAT stated in *Battus v Bulgaria*, 'la procédure de révision instituée par le tribunal constitue une voie de recours extraordinaire... elle ne peut être considerée comme une voie indirecte, permettant de revenir par une nouvelle instance sur des décisions déclarées définitives'.[201]

D. Conditions for the Exercise of the Powers

1. *Power of Interpretation*

In *Factory at Chorzów (Interpretation)*, the PCIJ held that there were essentially two conditions for an application for interpretation under article 60. First, there had to be a dispute 'as to the meaning and scope of a judgment of the Court'.[202] The PCIJ observed that 'the manifestation of the existence of the dispute in a specific manner, as for instance by diplomatic negotiations, [was] not required',[203] but it was sufficient that 'the two Governments have in fact shown themselves as holding opposite views in regard to the meaning or scope of a judgment of the Court'.[204] Thus, a difference of opinion has to exist between the parties as to those points in the judgment in question which have been decided with binding force.[205] The PCIJ also accepted the possibility that a dispute regarding whether a particular point has or has not been decided with binding force might also constitute a case which comes within the terms of article 60.[206]

The second condition observed by the PCIJ was that 'the request should have for its object an interpretation of the judgment'.[207] The PCIJ held that its task of interpretation should be understood as meaning 'to give a precise definition of the meaning and scope which the Court intended to give to the judgment in question'.[208]

[198] *Factory at Chorzów (Interpretation)*, ibid, 15–16; Manley Hudson, *The Permanent Court of International Justice 1920–1942* (1943) 591.
[199] *Factory at Chorzów (Interpretation)*, ibid, 14; see also 23, 24 (Diss Op Anzilotti); see generally *Delimitation of the Continental Shelf*, above n 194, 295.
[200] See, e.g., Vittorio di Bucci, 'Revision' in Plender (ed), above n 47, 699, 702; *Eposx Venteuse v State SHS*, above n 163, 82–3.
[201] Above n 163, 285.
[202] Above n 10, 10.
[203] Ibid.
[204] Ibid, 11; *Continental Shelf (Revision and Interpretation)* above n 13, 218; von Stauffenberg, above n 38, 425.
[205] *Factory at Chorzów*, above n 10.
[206] Ibid, 11–12.
[207] Ibid, 10.
[208] Ibid, 10; von Stauffenberg, above n 38, 426.

These conditions have been accepted by the ICJ, and by other international tribunals.[209]

An additional criterion which appears to differ among different international courts is the question of applicable time limits for making a request for interpretation. Before the ICJ, the ITLOS, ICSID tribunals, and the ECJ, there is no time limit. As regards PCA tribunals, article 82 of the 1907 Convention does not specify a time limit for requests for interpretation, but if the parties choose to adopt the PCA Optional Rules, article 35 of those Rules would require such requests to be submitted within 60 days of the receipt of the award. Before the ECHR, a request for interpretation must be made within one year of the judgment.[210] Under article 67 of the American Convention, a request for the interpretation of an IACHR judgment must be made within 90 days from the date of judgment.[211] Before the various Mexican MCCs, parties were able to request an interpretation within a period of between 15 and 60 days of the award being rendered.[212] Time limits also apply to requests for interpretation of awards made under the UNCITRAL Rules (30 days),[213] the ICC Rules (30 days),[214] the Iran–US Claims Tribunal Rules (30 days),[215] and the AAA Rules (30 days).[216] It is difficult to find any common ground on this question; the most that can be said is possibly that institutions having a permanent framework do not impose strict time limits on requests for interpretation, while ad hoc tribunals have much stricter time limits.

2. *Power of Revision*

Before addressing the necessary criteria for the power of revision, something must be said about the procedure for revision proceedings. Generally, revision proceedings are opened by a judgment of the international court, which expressly records the existence of the new fact, and recognizes that it has such a character as to lay the case open to revision, and declares the application admissible on this ground. Accordingly, applications for revision usually follow a two-stage procedure. First, the international court declares the application admissible. Second, the merits of the revision application are heard. This procedure is followed before the ICJ,[217] the ITLOS,[218] PCA tribunals,[219] the ECHR,[220] and the ECJ.[221] The ICSID

[209] *Continental Shelf (Revision and Interpretation)*, above n 13, 217, 223; *Asylum (Interpretation)*, above n 157, 402; see also *Hentrich v France*, above n 159, 1290; *Allenet de Ribemont v France*, above n 62, 911; *Ringeisen v Austria*, above n 61, para 13.
[210] ECHR Rules, art 79(1).
[211] American Convention, above n 4, art 67.
[212] For example, Franco-Mexican CC Rules of Procedure, art 46, in Feller, above n 59, 432 (15 days); US-Mexican GCC Rules, above n 59, art XI(6), in Feller, ibid, 351 (60 days).
[213] UNCITRAL Rules, art 35(1).
[214] ICC Rules of Arbitration, art 29(2).
[215] Ir–USCT Rules, above n 46, art 35(1).
[216] American Arbitration Association/ICDR Arbitration Rules, available at <http://www.adr.org>, art 30.
[217] ICJ Statute, above n 4, art 61(2); see, e.g., *Land, Island and Maritime Frontier Dispute (Revision)*, above n 165, para 18.
[218] ITLOS Rules, art 127(2).
[219] 1899 Convention, art 55, 1907 Convention, art 83 (both, above n 4).
[220] ECHR Rules, Rule 80(1).
[221] ECJ Statute, above n 47, art 41.

Convention does not state whether revision proceedings are to be heard in two stages, although it is suggested that it is likely that ICSID tribunals would also adopt this procedure.

There appear to be five conditions which are relevant to an application for revision. First, an application for revision of a judgment may be made only when it is based upon the 'discovery of a fact'.[222] The question of what constitutes a 'fact' is, however, one which is fraught with difficulty.[223] The absence of a clear distinction between legal and factual matters is a problem common to many legal systems.[224] This was recognized by the Franco-German MAT, which stated that:

> la notion de *fait* ne doit pas être mise en opposition absolue avec celle de droit, dont il n'est pas toujours facile de la distinguer, mais... elle doit s'entendre d'une façon plus large.[225]

There is further difficulty in defining what can be considered a 'new fact'. This was apparent to one delegate during the drafting of the 1899 Convention.[226] and examples suggested included new maps, or a new document of uncontested authenticity.[227] For instance, a document relating to the location of boundaries, being a Resolution of the Libyan Council of Ministers which determined the 'real course' of a boundary of a petroleum concession, known as 'Concession No 137', was put forward as a new 'fact' in *Continental Shelf (Revision and Interpretation)*.[228] In *Land, Island and Maritime Frontier Dispute (Revision)*, the new fact was scientific evidence, the discovery of a map, and the report of an expedition.[229] But the discovery of a new document or new evidence is not always sufficient. As the PCIJ observed in *Monastery at Saint-Naoum*, 'fresh documents do not in themselves amount to fresh facts'.[230] If the content of the document or evidence is already known, this does not constitute a new fact.[231] In *Application of the Genocide Convention (Revision)*, the Federal Republic of Yugoslavia ('FRY') argued that there were two new facts: that the FRY was not a state party to the ICJ Statute at

[222] For example, ICJ Statute, above n 4, art 61(1); ITLOS Rules, art 127(1); 1899 Convention, above n 4, art 55; 1907 Convention, above n 4, art 83; ICSID Convention, above n 4, art 51(1); ECHR Rules, Rule 80; ECJ Statute, above n 47, art 41; *Genie Lacayo (Judicial Review)*, above n 143, para 12.

[223] Bardonnet, above n 49, 198–200; Richard Bikler, 'The Fact/Law Distinction in International Adjudication' in Richard Lillich (ed), *Fact-Finding before International Tribunals* (1992) 95, 95–6; Jean Salmon, 'Le fait dans l'application du droit international' (1982) 175 *Recueil des cours* 257; Zoller, above n 73, 341–2; Reisman, above n 7, 426, fn 15; James Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898) 189–92, 201–4; Herzog and Karlen, above n 1, 46–7; Torres Bernárdez, above n 33, 473–9.

[224] Geiss, above n 48, 176; see especially *Application of the Genocide Convention (Revision)*, above n 165, 1–3 (Diss Op Dimitrijevic), 4–7 (Diss Op Vereshchetin).

[225] *Heim and Chamant v Germany*, above n 163, 55.

[226] 'On parle de fait nouveau, mais rien n'est plus difficile à definer': *Conférence Internationale de la Paix 1899*, above n 49, 40 (M le Jonkheer van Karnebeek); Geiss, above n 48, 176.

[227] *Conférence Internationale de la Paix 1899*, ibid, 37 (M Holls); Geiss, ibid, 174.

[228] Above n 13, 198. [229] Above n 165, para 25. [230] Above n 91, 22

[231] *Land, Island and Maritime Frontier Dispute (Revision)*, CR/CR 2003/2, 38–41 (Maurice Mendelson).

the time of the judgment, and that the FRY was not bound by the Genocide Convention at the time of the judgment.[232] The FRY argued that these facts were revealed by its admission to the UN on 1 November 2000.[233] The ICJ held that Yugoslavia's admission to the UN occurred well after the original judgment of 1996, and that this could not be regarded as a new fact within the meaning of article 61 of the ICJ Statute.[234] In response to the FRY's argument that its admission to the UN had simply 'revealed' two facts that existed at the time of the 1996 judgment,[235] the ICJ disagreed, holding that:

> In advancing this argument, the FRY does not rely on facts that existed in 1996. In reality, it bases its Application on the legal consequences which it seeks to draw from facts subsequent to the Judgment which it is asking to have revised. Those consequences, even supposing them to be established, cannot be regarded as facts within the meaning of article 61. The FRY's argument cannot accordingly be upheld.[236]

The second universally accepted condition of an application for revision is that the new fact must be of such a nature that it would have been a 'decisive' factor, had it been known at the time of the judgment.[237] Implicitly, this requires that the 'new fact' must have been in existence at the time of the judgment; if the fact was not in existence at the time of the judgment, there is no way that it could have influenced the outcome.[238]

The 'decisive' nature of a new fact has been interpreted in a consistent fashion. In *Continental Shelf (Revision and Interpretation)*, Tunisia submitted that a Resolution of the Libyan Council of Ministers determining the 'real course' of the boundary of a petroleum concession constituted a new fact which would have had a decisive influence on the ICJ's judgment.[239] The ICJ rejected the Tunisian application, and it held that its reasoning in the 1982 Judgment was 'wholly unaffected by the evidence now produced as to the boundaries of Concession No 137'.[240] In *Land, Island and Maritime Frontier Dispute (Revision)*, the ICJ held that the scientific evidence relating to the avulsion of a river 'would provide no basis for calling into question the decision taken by the Chamber in 1992 on wholly different grounds. The facts asserted in this connection by El Salvador are not "decisive factors" in respect of the judgment which it seeks to have revised.'[241] With regard to the second alleged new 'fact', the ICJ concluded that the new map only differed in minor details from the map which the ICJ had considered at the time of the

[232] *Application of the Genocide Convention (Revision)*, above n 165, para 66.

[233] Ibid, paras 18, 66. [234] Ibid, paras 66–8. [235] Ibid, paras 19, 69.

[236] Ibid, para 69.

[237] ICJ Statute, above n 4, art 61(1); ITLOS Rules, art 127; ICSID Convention, above n 4, art 51(1); 1899 Convention, above n 4, art 55; 1907 Convention, above n 4, art 83; ECHR Rules, Rule 80; *Genie Lacayo (Judicial Review)*, above n 143, paras 12, 15; *Rann International Industries v Air Force of Iran*, above n 130, 390; Franco-German MAT Rules, above n 98, art 79.

[238] See, e.g., *Jules Crénge v Paul Busch*, above n 163, 116; *Battus v Bulgaria*, above n 163, 286.

[239] Above n 13, 201–2. [240] Ibid, 213. [241] Above n 165, para 40.

original judgment, as did the report of the expedition; the ICJ therefore held that these were not 'decisive factors' in respect of the 1992 judgment.[242]

The third condition relevant to revision proceedings is that the fact must have been unknown to the international court and also to the party claiming revision at a relevant point in time.[243] There is, however, some variation among international courts with regard to the timing of the discovery of the new fact. In applications for revision before the ICJ, the ITLOS, the ECHR, the IACHR and ICSID tribunals, the new fact must have been unknown at the time of the rendering of the judgment or award.[244] In contrast, in revision proceedings before PCA tribunals and the MATs, the new fact must have been unknown at the time of the end of the oral proceedings.[245]

The fourth condition is that the lack of knowledge of the new fact must not have been due to the negligence of the party requesting revision. This condition was not included in the Hague Conventions, but was first introduced by the Advisory Committee of Jurists into the PCIJ Statute in 1920, and is today recognized in the constitutive instruments and jurisprudence of most international tribunals.[246] In *Continental Shelf (Revision and Interpretation)*, the relevant fact, being the location of a Libyan concession, had been published in the Libyan Official Gazette. The ICJ held that 'the reasonable and appropriate course of action to be taken by Tunisia . . . would have been to seek to know the co-ordinates of the Concession', and that Tunisia had failed to prove why it had been impossible for it to do so, nor had it shown that it had in fact attempted to obtain this information.[247] Similarly, the ECHR rejected a request for revision in *McGinley v UK*, holding that the claimants had been 'manifestly on notice' of the existence of the relevant documents.[248]

The fifth condition relevant in revision proceedings before international courts is the time limit on such applications. This time limit is usually prescribed in the constitutive instruments, and differs somewhat between different tribunals. Applications for revision before the ICJ and the ITLOS must be made at the latest within six months of the discovery of the new fact, and no later than ten years from the date of judgment.[249] The Hague Conventions do not specify a time limit

[242] Ibid, paras 51–5.

[243] ICJ Statute, above n 4, article 61(1); ITLOS Rules, article 127; ICSID Convention, above n 4, article 51(1); 1899 Convention, above n 4, article 54; 1907 Convention, above n 143, article 83; ECHR Rules, Rule 80(1); *Genie Lacayo (Judicial Review)*, above n 143, para 12; *De Taynac v Schmitz*, above n 163, 493–4.

[244] ICJ Statute, article 61(1); ITLOS Rules, article 127; ECHR Rules, Rule 80(1); *Genie Lacayo (Judicial Review)*, para 12; ICSID Convention, article 51(1).

[245] 1899 Convention, art 55; 1907 Convention, art 83; Franco-German MAT Rules, above n 58, art 79; see, e.g., *Baron de Neuflize v Diskontogesellschaft*, above n 163, 632.

[246] ICJ Statute, above n 4, art 61; ITLOS Rules, art 127; ICSID Convention, above n 4, art 51(1); see, e.g., *Ram International Industries v Air Force of Iran*, above n 130, 391.

[247] Above n 13, 205–7. [248] Above n 167, 324, 338.

[249] ICJ Statute, above n 4, art 61(4)-(5); ITLOS Rules, art 127(1); but see Rosenne, *Law and Practice*, above n 89, vol III, 1630, who is critical of the ten-year period, and suggests that 'from the

on requests for revision; this will depend on the terms agreed by the parties in the *compromis*.[250] Applications to the ECHR for revision must be made within six months of the discovery of the new fact, but no overall time limit is put on such applications.[251] Before arbitral tribunals, the time limits tend to be shorter; applications for revision before ICSID tribunals must be made within 90 days after the discovery of the fact, and within three years after the date on which the award was rendered.[252] Under the rules of the Franco-German MAT, no request for revision could be made more than one year after the rendering of the award.[253] In the absence of guidance from those tribunals which have considered the inherent nature of the power, it is suggested that an appropriate test might involve considering what a reasonable time would be in the circumstances. Before standing courts, it appears that it might be considered reasonable that a longer period should be allowed for applications for revision, such as within five to ten years of the date of the judgment. However, it is suggested that in disputes before ad hoc arbitral tribunals, a shorter time frame will be applicable, such as within one or two years of the judgment, due to the desire for greater speed in the settlement of the dispute, and the added practical problem of the disbanding of the tribunal. No firm conclusions can be drawn here, but it is suggested that there should be some temporal limitation on the power of revision; the *res judicata* of judgments cannot be subject to eternal suspense and uncertainty.[254]

There appears to be broad agreement among international courts that all five conditions must be met for a request for revision to be admissible; as the ICJ has stated, 'once it is established that the request for revision fails to meet one of the conditions for admissibility, the Court is not required to go further and investigate whether the other conditions are fulfilled'.[255]

Conclusion

This chapter has considered the power of international courts to interpret and revise their judgments. In the case of the power of interpretation, it is suggested that all international courts can exercise this power; if not conferred as an express

experience that has now been gained of revision cases, a shorter period, something between six and twelve months, would appear to be reasonable for the introduction of revision proceedings'.

[250] 1899 Convention, art 55; 1907 Convention, art 83 (both, above n 4).

[251] ECHR Rules, Rule 80(1).

[252] ICSID Convention, above n 4, art 51(2). The ICC, UNCITRAL and LCIA Rules make no provision for a power of revision. [253] Above n 58, art 80.

[254] See especially comments of Rosenne, *Law and Practice*, above n 89, vol III, 1630.

[255] *Land, Island and Maritime Frontier Dispute (Revision)*, above n 165, paras 20, 59; *Application of the Genocide Convention (Revision)*, above n 165, paras 17, 73; *Continental Shelf (Revision and Interpretation)* above n 13, 207; see, e.g., also ICSID Convention, above n 4, art 51; *McGinley v UK*, above n 167, 324, 338.

power, it can be exercised as an inherent power. This is because the power is necessary for international courts to be able to carry out their function in the settlement of international disputes by adjudication, for if a judgment or award is rendered which is ambiguous or contradictory, the dispute will not be settled. In addition, the interests of good administration of international justice are not served if courts are unable to assist parties in clarifying obscurities in judicial decisions. As for the power of revision, the case law is less conclusive on the existence of the power as one which can be exercised in the absence of express conferral in the constitutive instrument. But it is suggested that as a matter of principle, the power should be considered inherent, in order to safeguard the administration of international justice from unjust decisions made on the basis of incomplete or fraudulent evidence. This chapter has also suggested that existing international judicial practice on the powers of interpretation and revision demonstrates that they are generally exercised in a consistent manner by international courts. The next chapter turns to the practice of international courts regarding a possible outcome of international dispute settlement proceedings: the awarding of remedies.

6

Remedies in International Adjudication

Introduction

The subject of remedies is not one that fits within the concept of 'procedure'. Remedies are usually understood as the judicial relief which legal systems provide for the enforcement or defence of substantive rights.[1] In addition, unlike procedure, the constitutive instruments and rules of procedure of international courts make little provision for remedies. Most constitutive instruments are silent on the question, with some referring merely to the power of the international court to

[1] For example, Arwed Blomeyer, 'Types of Relief Available (Judicial Remedies)' in International Association of Legal Science, *International Encyclopedia of Comparative Law* (1982) vol XVI, ch 4, 3.