CHAPTER 5

The Role of International Courts and Tribunals in Outer Continental Shelf Disputes

5.1 Introduction

A footnote attached to the Evensen group's 1975 proposal on the Continental Shelf Boundary Commission states that 'the questions of possible appeal procedures … and of the relationship with the proposed dispute settlement procedures under the new Convention, remain to be discussed'.

These questions were never answered at the Third Conference because of a lack of consensus concerning the relationship between the dispute settlement system and the establishment of the outer limits of the continental shelf. Consequently, there are no provisions in UNCLOS addressing the relationship between the CLCS and the Convention's dispute settlement system. Oude Elferink points out that 'this raises the question of how a court or tribunal has to deal with the existence of the procedure involving the CLCS in a litigation between States parties to the LOS Convention concerning the interpretation or application of article 76 of the Convention'.

This chapter focuses on the settlement of outer continental shelf disputes by international courts and tribunals. Jurisdictional and procedural issues are the focal point. The main goal of the chapter is to answer the following two questions:

- What is the role of international courts and tribunals in disputes regarding the establishment of the outer limits of the extended continental shelf?
- Are there any special factors concerning the outer continental shelf that limit the jurisdiction of international courts and tribunals?

This chapter does not address in detail the role of courts and tribunals under UNCLOS. Neither does it deal with every jurisdictional and procedural aspect of dispute settlement regarding the outer continental shelf. The subjects discussed are either controversial issues or problems of practical nature. It must be emphasised that the chapter does, in many instances, not make clear distinction between delineation and delimitation disputes for the reason that the settlement of these two types of disputes have much in common.

The discussion below is divided into three parts. The first addresses the settlement of disputes in general. It looks into the dispute settlement mechanism of UNCLOS, the law-making role of international courts and tribunals and questions concerning the optional exception clause, standing, entitlement disputes between States prior to the adoption of CLCS recommendations and whether States are obliged to wait for recommendations from the Commission before seeking to delimit their outer continental shelf. The second addresses the evaluation of scientific and technical evidence in cases regarding the outer continental shelf. The third briefly discusses the consequences of a judgement for the CLCS.

### 5.2 The Settlement of Disputes

#### 5.2.1 Introduction

The creation of the dispute settlement part of UNCLOS is one of the more progressive steps that international law has seen in recent decades. It has been argued that the entry into force of the Convention ‘is probably the most important development in the settlement of international disputes since the adoption of the UN Charter and the Statute of the International Court of Justice’.\(^4\)

Part XV of UNCLOS is dedicated to the settlement of disputes, containing ‘a complex dispute settlement system that entails both traditional consent-based processes as well as mandatory procedures’.\(^5\) Flexibility, comprehensiveness and the binding nature of the system has been described as its main benefits.\(^6\) Boyle has noted:

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6 Ibid., at 25.