14

Conclusions

Taking Stock and Looking Ahead

ALEX G. OUDE ELFERINK, TORE HENRIKSEN, AND SIGNE VEIERUD BUSCH*

14.1 Introduction

This concluding chapter is intended to look at a number of common themes that emerge from the preceding chapters. Its purpose is not to repeat the findings of these individual chapters in full. The focus of this volume has been on the case law on the delimitation of the continental shelf and the exclusive economic zone. As is set out in Section 1.1, this choice is explained by the fact that the majority of the case law has been concerned with the delimitation of these maritime zones, while the territorial sea has been at issue in a much more limited number of cases. In addition, it was observed that the delimitation of the continental shelf and the exclusive economic zone has led to much more controversy and debate as regards the content of the applicable rules and their application to the individual case. At the same time, Chapter 1 submitted that an analysis of the case law on the delimitation of the territorial sea might enhance our understanding of the case law on the delimitation of the continental shelf and the exclusive economic zone. Chapter 2 draws attention to the fact that a major difference between Article 15 of the United Nations Convention on the Law of the Sea (LOSC) on the delimitation of the territorial sea and Articles 74 and 83 of the same on the delimitation of the exclusive economic zone and the continental shelf is that the former contains a clearly stated delimitation provision and the latter do not. As Chapter 2 indicates, this implies that 'aside from [Article 15's] interpretation and application, there is not much room for judicial "development," nor indeed any legal basis for its amendment by means of judicial practice.' However,

* The authors would like to thank Glen Jeffries for his research assistance in the preparation of this chapter.

Article 15, like Article 6 of the Convention on the Continental Shelf,[1] fails to include a mechanism for assessing the relationship between equidistance and special circumstances. This may make the task of the judiciary more similar in both cases than a simple comparison between Articles 15, 74, and 83 of the LOSC would suggest. As Chapter 2 also points out, a main distinction between these Articles concerns the area to which they apply, within the 12-nautical-mile limit of the territorial sea as compared to the 200-nautical-mile limit for the exclusive economic zone and in certain circumstances even beyond that for the continental shelf. This difference has two significant and closely related implications. First, within the territorial sea, factoring in specific circumstances in general will only have a limited impact on the course of the boundary line as compared to the exclusive economic zone and the continental shelf. Second, the limited dimensions of the territorial sea leave less room for shifting a provisional line. The limited scope for adjusting the provisional (equidistance) line also indicates that it will in most instances be in the range of what constitutes an equitable result.

The remainder of this chapter consists of the following sections. Section 14.2 looks at the general rules on delimitation contained in multilateral conventions and customary law and assesses how these rules have been provided further, specific content by the case law. The next two sections consider the consistency and predictability of the case law. Section 14.3 considers how the terms consistency and predictability should be understood and how they relate to each other, while Section 14.4 makes an assessment of the consistency and predictability of the case law. Section 14.5 looks at the normative nature of the process of maritime boundary delimitation. Is this process only characterized by the basic rules contained in the relevant provisions of the LOSC and the Convention on the Continental Shelf or is the three-stage approach as developed by the case law part and parcel of the law? Section 14.6 briefly considers how the case law on the delimitation of maritime boundaries may develop in the future, taking into account the analysis of the existing case law in this volume.

14.2 The General Rules and the Case Law: A Failure to Connect?

The general rules in relation to the delimitation of the continental shelf and the exclusive economic zone are contained in Article 6 of the 1958

[1] For a further discussion of Art. 6 on this point, see below, the text at n. 4.

Convention on the Continental Shelf,[2] Articles 74 and 83 of the LOSC and customary international law. As the analysis of Chapter 4 indicates, these general rules largely are empty shells. As regards Articles 74 and 83 of the LOSC, this conclusion hardly should come as a surprise. The Third United Nations Conference on the Law of the Sea (UNCLOS III) had tried to reach agreement on a substantive rule for the delimitation of the continental shelf and the exclusive economic zone for almost a decade, seeking to reconcile the proponents of equidistance and those of equitable principles.[3] In the end, the matter was settled by including neither of these concepts in the relevant provisions, but instead Articles 74 and 83 refer to delimitation in accordance with international law. In respect of Article 6 of the Convention on the Continental Shelf, the submission that it is an empty shell might seem to be more surprising. Article 6 contains a method of delimitation and specifies when that method should be applied and when it should be varied. However, as Chapter 4 observes:

> [t]he rather opaque formulation of [Article 6] left unclear how the rule was to be applied. Certainly, one could start by looking for agreement, but after that was equidistance the primary rule and 'special circumstances' the exception, or in the absence of agreement did one first test for 'special circumstances' and resort to equidistance as a last resort.[4]

As Chapter 4 further submits, the methodological question whether one should first apply the equidistance method and then check for the presence and significance of special circumstances 'was never resolved and remains at the heart of controversies over the applicable law in delimitation.' This

[2] *Convention on the Continental Shelf* (signed 29 April 1958; entered into force 10 June 1964), 499 UNTS 311.

[3] For the drafting history of Arts. 74 and 83 of the LOSC, see further e.g. S. N. Nandan and S. Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. 2 (Martinus Nijhoff Dordrecht 1993) 796–816 and 948–985.

[4] It may be noted that the Committee that advised the International Law Commission to include the equidistance method in a rule on the delimitation of the continental shelf observed that the equidistance line might not always lead to an equitable solution (see Doc. A/CN.4/61/Add.1, reproduced as an Annex to the Report of the Special Rapporteur (*Yearbook of the International Law Commission* 1953, vol. 2, 75–79, at 79). During the 1958 Geneva United Nations Conference on the Law of the Sea, the notion that the delimitation of the continental shelf had to be either equitable or fair was present in statements of both those states wishing to put greater emphasis on equidistance and those supporting the reference to special circumstances (see the statements of the Venezuelan representative (*United Nations Conference on the Law of the Sea; Official Records*, vol. 6, 92, [19]), the UK representative (ibid., 93, [1]), the Italian representative (ibid., [5]), the US representative (ibid., 95, [21]), and the Iranian representative (ibid., [96])). Although this indicates the existence of an overarching principle against which to assess equidistance and special circumstances, it does not resolve the question concerning the relationship of the two.

may be illustrated by the case law's current approach to the delimitation process. The three-stage approach to delimitation avowedly in principle starts with the determination of an equidistance line and subsequently looks at relevant circumstances that may require an adjustment of the equidistance line. However, as Chapters 4, 8, and 9 set out, the first stage of drawing an equidistance line is permeated by the second stage of considering relevant circumstances. As these chapters observe, the equidistance line in a number of recent cases has not been determined objectively on the basis of the relevant baselines of the parties that are in accordance with the baseline rules contained in the LOSC and customary international law. Instead, in determining the equidistance line, the case law has discarded valid baselines, infusing the first stage of the delimitation with subjective calls concerning the relevance of these baselines.

The observations concerning the indeterminacy of the law as contained in Articles 6, 74, and 83 also apply to customary international law as originally formulated by the International Court of Justice (ICJ) in *North Sea Continental Shelf* as 'delimitation is to be effected by agreement in accordance with equitable principles, and taking account of all the relevant circumstances.'[5] The Court itself in *North Sea Continental Shelf* was not required to apply the law as thus stated in the determination of boundary lines between the parties. As McRae submits in Chapter 4, in subsequent cases there 'has never been a straightforward implementation of what was articulated in *North Sea Continental Shelf*. Rather when "equitable principles" have been invoked it has often been in conjunction with other approaches and principles of delimitation.' The *North Sea Continental Shelf* customary rule subsequently was discarded. Following the entry into force of the LOSC, the ICJ on a number of cases has affirmed that customary international law is reflected in Articles 74 and 83 of the LOSC.[6]

The state of the law as contained in Articles 6 of the Convention on the Continental Shelf and Articles 74 and 83 of the LOSC, which reflect customary law, required its further operationalization.[7] As was observed in

[5] *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/The Netherlands)* (Judgment) [1969] ICJ Rep. 54, [101(C)(1)].

[6] See *Maritime Dispute (Peru v. Chile)* (Judgment), [2014] ICJ Rep. 61, [179], where reference is also made to earlier cases.

[7] That requirement in any case applies to the case law. A mere reference to the law as contained in Arts. 6, 74, and 83 and customary law and the determination of a boundary line would not be in accordance with the requirement that a 'judgment shall state the reasons on which it is based' (Statute of the ICJ, Art. 56; LOSC, Annex VI, Art. 30).

Chapter 1, and this is a generally shared view, that operationalization has been achieved by the case law. Before further commenting on that point, the limited role of state practice in this respect merits some further attention. State practice in this field abounds, raising the question why it did not make its imprint on the law. A short answer may be provided by referring to the drafting history of Articles 74 and 83 of the LOSC. States had (and continue to have) opposing views on what the content of the law should be and, as was also pointed out above, those views were reconciled by a delimitation provision without substance. A look at state practice allows giving this explanation more substance. National legislation on the continental shelf and the exclusive economic zone in general will contain a provision on the delimitation of these zones. However, this legislation witnesses the same divide as the negotiations on Articles 74 and 83 of the LOSC.[8] Moreover, there currently are more than 200 bilateral agreements on the delimitation of maritime boundaries. That treaty practice differs in one important respect from national legislation. It includes treaties concluded between states from both delimitation groups at UNCLOS III and such treaties might perhaps reflect a common understanding of the applicable law. However, a review of some of this practice shows that this is not the case and that this is at least in part explained by the nature of maritime delimitation.[9] Bilateral boundary delimitation does not require the formulation of rules applicable to future conduct, but involves the establishment of a specific line. The latter exercise can be carried out without prior agreement on the applicable rules and may be, and in fact is, achieved through compromise offers, with each state reserving its position on the applicable law.[10]

The relationship between the applicable law as contained in Articles 6 of the Convention on the Continental Shelf and Articles 74 and 83 of the LOSC, which reflect customary law, and specific concepts figuring in the case law occupies a number of the preceding chapters to a lesser or larger extent. Two central themes seem to emerge from this volume. First, notwithstanding the apparent systematization the case law has achieved since *Black Sea*'s cogent formulation of the three-stage approach to

[8] A comprehensive overview of national legislation on this matter is accessible through the page *Maritime Space: Maritime Zones and Maritime Delimitation* (www.un.org/Depts/los/LEGISLATIONANDTREATIES/regionslist.htm) of the website of the Division of Oceans Affairs and Law of the Sea of the Secretariat of the United Nations.

[9] See further A. G. Oude Elferink, *The Law of Maritime Boundary Delimitation: A Case Study of the Russian Federation* (Martinus Nijhoff Dordrecht 1994) 365–373.

[10] Ibid.

delimitation, the case law has failed to provide a coherent explanation how the central concepts employed in the case law are exactly defined and how they are related. For instance, Chapter 4 concludes that 'the three-stage approach does not provide any guidance on the key question in maritime delimitation – what weight is to be given to particular factors that arguably affect the equity of the final result?' Chapter 8, while focusing on the first stage of the delimitation process, observes that the actions of the judiciary in relation to that stage, with its promise of objectivity, do 'not match the language of distinct, successive stages.'[11] Apart from the argument that the first stage not only has to be objective, but also has to be 'appropriate for the geography of the area in which the delimitation is to take place,'[12] a reasoned justification for the judiciary's approach, which fuses the different stages, is lacking. Similarly, as is apparent from the analysis of Delabie in Chapter 6, the case law has failed to come up with an explanation of how equity and equitable principles are related to the three-stage approach. As a matter of fact, as Chapter 6 indicates, equity and equitable principles, seem to have receded to the background in the recent case law.

A second common theme emerging from the volume is what might be called the 'rise and fall' of central concepts of the law on maritime delimitation. While equidistance seemingly has gained in importance, the opposite seems to hold true for relevant circumstances and equity and equitable principles. Relevant circumstances in a number of recent cases seemingly have had a limited impact and equity and equitable principles seem to have been given short shrift in recent judgments. On closer consideration, the current analysis suggests a more complex picture.[13] First, while equidistance seemingly has moved centre-stage, relevant circumstances continue to exercise an influence in the background. As was already observed, the discarding of basepoints at the first stage of the three-stage approach, has introduced relevant circumstances at that stage, although this is not explicitly acknowledged by the judiciary. At times, this implies that the provisional delimitation line differs radically from the strict, and thus objective, equidistance line. Second, the case law's silence in relation to equitable principles does not imply the absence of evaluative assessments in all the three stages of the delimitation process. This is readily apparent from a reading of the recent case law. In that light, it may be questioned

[11] For another example in this respect, see the text after n. 41 below.

[12] *Maritime Delimitation in the Black Sea (Romania v. Ukraine)* (Judgment) [2009] ICJ Rep. 61, 101, [116].

[13] See also the discussion in Section 1.4.2 below.

whether the abandonment of an assessment of the individual case on the basis of equitable principles has contributed to the transparency of the deliberative process.

14.3 Understanding Consistency and Predictability

The common question we asked our contributors to consider was to what extent the case law on the delimitation of the continental shelf and the exclusive economic zone has been consistent and predictable. In order to assess the outcomes of this exercise, it is first of all necessary to have a closer look at these two terms. It would seem that these two terms are two sides of the same coin. Consistency would of necessity seem to imply predictability. A consideration of the dictionary meaning of both terms allows a better understanding of their relationship. The *Oxford English Dictionary* defines the term consistency as 'the quality of achieving a level of performance which does not vary greatly in quality over time.'[14] Predictability is defined as 'the ability to be predicted' while the verb to predict is defined as to 'say or estimate that (a specified thing) will happen in the future or will be a consequence of something.'[15] These dictionary meanings indicate that consistency has to do with the way in which courts and tribunals execute the functions entrusted to them and predictability has to do with what can be said about the outcome of a future case, based on an assessment of how courts and tribunals have executed their functions in the past. Put differently, consistency is concerned with past performance, while predictability is concerned with making projections about the future on the basis of past performance. The former is concerned with an evaluation of performance across different cases, while the latter has to do with an assessment of the individual case. Moreover, while the former has to do with the identification of the applicable law and methodology, the latter is concerned with their application to the individual case. At the same time, both issues have an obvious relationship. Absence of consistency will make it difficult if not impossible to predict the outcome of future cases.

The Court's proviso in its judgment in *Libya/Malta* that there has to be *a degree of* predictability, while it applied no such conditionality in the case of consistency,[16] suggests that an assessment of the possible outcome of a future case, with its individual idiosyncrasies, is fraught with more difficulty than securing consistency in defining the applicable law

[14] A. Stevenson (ed.), *Oxford Dictionary of English*, 3rd ed. (available online). [15] Ibid.
[16] *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (Judgment) [1985] ICJ Rep. 13, [45].

and methodology. The difference between these two aspects may be illustrated by an example from the case law. As discussed in Chapter 8 of this volume, the judiciary in the recent case law has taken the approach that the process of selecting the provisional delimitation line at the same time has to be objective and appropriate in light of the geography of the particular case, i.e., certain basepoints may be disregarded in drawing a provisional equidistance line. While this implies consistency, it does not necessarily imply that the implications of this approach may be readily predictable for future cases. On the basis of the Court's explanation in *Black Sea* as to why Serpents' Island should be disregarded as a basepoint, it would have been difficult to predict that the ITLOS in its judgment in *Bangladesh/Myanmar* would disregard the much larger and inhabited St. Martin's Island, which was also differently placed in relation to the mainland coasts.

14.4 The Consistency and Predictability of the Case Law

14.4.1 Introduction

In view of the distinction that can be made between the issues of consistency and predictability they will be addressed separately in respectively Sections 14.4.2 and 14.4.3. In this connection, particular attention will be paid to the three-stage approach to maritime delimitation, which is at the heart of the current maritime delimitation case law. Before embarking on this exercise, this introductory section will briefly consider some of the recent literature that submits that the recent case law displays consistency and predictability, in order to get a better idea on what basis such claims are made.

Churchill, in a commentary on the judgment of the ITLOS in *Bangladesh/Myanmar*, concludes that it 'is notable for maintaining what appears now to be the settled case law of international courts and tribunals regarding delimitation of single maritime boundaries' and that the Tribunal 'followed the now well-established case law.'[17] This conclusion primarily seems to be based on the fact that the Tribunal applied the three-stage approach. Churchill's review of the judgment among others indicates that he does not question the Tribunal's approach to the first

[17] R. R. Churchill, 'The Bangladesh/Myanmar Case: Continuity and Novelty in the Law of Maritime Boundary Delimitation,' (2012) 1 *Cambridge Journal of International and Comparative Law* 137, 138, and 151.

stage of the delimitation process, which included the selection of basepoints, instead of using valid basepoints of the parties to arrive at an objectively determined equidistance line.[18] Degan submits that the predictability of the case law was initiated with the 1993 judgment in *Jan Mayen* and that there has been 'a tendency in the judicial and arbitral practice to define some simple and general rules leading to predictable results in their application.'[19] His analysis of the four cases subsequent to *Jan Mayen – Eritrea/Yemen*, *Qatar/Bahrain*, *Cameroon v. Nigeria* and *Barbados v. Trinidad and Tobago* – is largely descriptive in nature and does not question the approach to the law in these cases.[20] Shi, who focusses on the case law of the ICJ, concludes that 'the jurisprudence of the Court has evolved. It now establishes a set of unified principal steps for maritime delimitation.'[21] Shi identifies six steps the Court will normally follow. These steps include the three stages of the three-stage approach.[22] Shi indicates that the Court may vary its approach under the three stages of the three-stage approach, but Shi does not question whether this has any implications for the conclusion that the Court has a 'set of unified principal steps for maritime delimitation.'[23] Tanaka in his discussion of the judgment in *Black Sea* observes that the Court's incorporation of the equidistance method, being an objective method, in the delimitation provisions of the LOSC 'will enhance predictability in the application of those provisions.'[24] Tanaka does discuss the leeway courts and tribunals have afforded themselves in selecting the basepoints of the provisional equidistance line.[25] He commends the judiciary for taking this approach as it avoids an inequitable outcome of the delimitation process.[26] While it may be true that the use of certain basepoints might lead to an inequitable result, the pertinent question rather would seem to be how the selection

[18] Ibid., 143. It may be noted that Churchill does question the fact that the Tribunal again considered St. Martin's Island, which was disregarded at the first stage, at the second stage of the process, but he does not consider that the relevance of the island should only have been considered at the second stage (ibid., 144).

[19] V. Degan, 'Consolidation of Legal Principles on Maritime Delimitation: Implications for the Dispute between Slovenia and Croatia in the North Adriatic,' (2007) 6 *Chinese Journal of International Law* 601, 609.

[20] See e.g. ibid., 614–619, which largely consists of quotations from the award in *Barbados v. Trinidad and Tobago*.

[21] J. Shi, 'Maritime Delimitation in the Jurisprudence of the International Court of Justice,' (2010) 9 *Chinese Journal of International Law* 271, 290.

[22] Ibid., 290–291. [23] Ibid.

[24] Y. Tanaka, 'Reflections on Maritime Delimitation in the Romania/Ukraine Case before the ICJ,' (2009) 56 *Netherlands International Law Review* 397, 426.

[25] Ibid., 420–422. [26] Ibid., 422.

of basepoints in determining the provisional equidistance line affects the use of the objective method of equidistance at the first stage of the delimitation process and why the (in)equitability of the objectively determined equidistance line is not rather considered at the second stage of the three-stage approach.

This brief review allows making a number of observations. First, as long as the three-stage approach is considered at face value, it conveys the image of consistency. However, to get a clear understanding of the consistency of the case law, it is necessary to probe the veil of the three-stage approach and to check what is actually going on in the execution of each of the stages of the three-stage approach. Second, three of the articles concerned, by Churchill, Shi and Tanaka, seem to raise questions about the consistency of the case law on specific points. However, this does not lead to questioning the conclusion that the law displays or is moving towards consistency. Again, this may be explained by the fact that the focus is more on the overall approach and outcomes of the delimitation process than its constitutive elements. In addition, as will also become apparent from the following discussion, to some extent consistency and predictability are in the eye of the beholder, or, to put in in modern-day idiom, it is a matter of framing.

14.4.2 Consistency

As was concluded in Section 14.3, consistency as understood in the present chapter has to do with the approach to the law across cases. The individual chapters of this volume do not all point in the same direction as far as consistency is concerned. In part, this is explained by the paucity of the case law on specific topics. For instance, the issue of provisional arrangements, which is discussed in Chapter 5, has only been considered in *Guyana v. Suriname*. However, the comparison of the case law on provisional arrangements and provisional measures does suggest some emerging patterns and commonalties. For instance, Chapter 5 observes that the recent provisional measures order of the ITLOS in *Ghana/Côte d'Ivoire*[27] may inform certain aspects of the interpretation and application of Articles 74(3) and 83(3) of the LOSC dealing with provisional arrangements. The chapter also posits that it is possible to draw a number of more general connections between provisional arrangements and provisional measures.

[27] *Dispute concerning Delimitation of the Maritime Boundary between Ghana and Côte d'Ivoire in the Atlantic Ocean (Ghana/Côte d'Ivoire)* [2015].

The delimitation of the continental shelf beyond 200 nautical miles, which is discussed in Chapter 13, is another matter that has a limited track record in the case law. This notwithstanding, it raises an interesting question concerning the consistency of the case law. In *Bangladesh/Myanmar*, the ITLOS had to consider whether the three-stage approach that was developed in the context of the delimitation of 200-nautical-mile zones was also applicable beyond that distance. The Tribunal found this to be the case, but in doing so reformulated the case law justifying this approach, which is concerned with the relationship between entitlement to maritime zones and delimitation methodology, beyond recognition.[28] Apparently, consistency at the level of methodology (i.e., using equidistance/relevant circumstances within and beyond 200 nautical miles) was considered to be more important than consistency at the level of principle (i.e., the relationship between entitlement and delimitation). A possible explanation may be the recent case law's focus on process and methodology and the more limited attention to matters of principle. That may make it more appealing to muddle the waters at the level of principle than to propose an altogether new methodology.

Other chapters of the current volume also do not indicate that the different basis of entitlement beyond 200 nautical miles has had an impact on the delimitation process. The approach to relevant coasts and relevant area, relevant circumstances and the disproportionality test thus far does not display any differences within and beyond 200 nautical miles.

The other chapter on the delimitation of the continental shelf beyond 200 nautical miles, Chapter 12, deals with procedural issues, in particular the relationship between the establishment of the outer limits of the continental shelf involving the coastal state and the Commission on the Limits of the Continental Shelf (CLCS) and the delimitation of the continental shelf beyond 200 nautical miles between neighbouring states. There is a larger body of case law on this matter, which is mostly of the last decade. The question that has faced the judiciary in a number of cases is whether a court or tribunal may proceed with delimitation in the absence of

[28] In *Libya/Malta*, the Court observed that there is a logical connection between the distance-based entitlement to the 200-nautical-mile zone and the distance-based equidistance method (*Libya/Malta*, n. 16, [61]). In *Bangladesh/Myanmar* the Tribunal submitted that there was such a connection between the combined equidistance/relevant circumstances method and 'the recognition that sovereignty over the land territory is the basis for the sovereign rights and jurisdiction of the coastal State with respect to both the exclusive economic zone and the continental shelf' (*Bangladesh/Myanmar*, Judgment of 14 March 2012, [455]).

certainty about the outer limits of the continental shelf.[29] The most recent case law of the International Tribunal of the Law Of the Sea (ITLOS) and the ICJ suggests that they have worked out a common approach, but this has only been accomplished after a tortuous journey that does not indicate consistency. This may in part be explained by the fact that the Court first addressed this matter in a *dictum* in *Nicaragua v. Honduras* without the benefit of pleadings of the parties, which had not raised this issue. Moreover, it seems that, generally speaking, the judiciary has shown hesitance in cases in which the states concerned had not yet made a full submission to the CLCS.

The remaining chapters all deal with topics that have been part and parcel of the case law since its inception with *North Sea Continental Shelf*, such as the relationship between entitlement to maritime zones and their delimitation, that between equidistance and relevant circumstances, and the concept of relevant coasts. All of these chapters thus have considered a period in which the applicable law changed both as regards the basis of entitlement and the delimitation rules. As was set out in Chapter 1, continental shelf entitlement according to the Court's interpretation of Article 1 of the Convention on the Continental Shelf was based on natural prolongation from the land, not distance. Subsequently, distance became the dominant criterion within 200 nautical miles even prior to the adoption of the LOSC in 1982 and, until recently, the case law was almost exclusively concerned with the delimitation of 200-nautical-mile zones. The delimitation provision as contained in Article 6 of the Convention of the Continental Shelf went through two permutations. First, the Court defined a different rule of customary law in *North Sea Continental Shelf*, while UNCLOS III resulted in the anodyne delimitation provisions of Articles 74(1) and 83(1) of the LOSC, which according to the Court now reflect customary law.

The changes in the applicable law are most directly relevant to Chapter 3 dealing with the relationship between entitlement and delimitation and Chapter 4 dealing with the applicable law and to a lesser extent Chapter 6

[29] It has been submitted in the literature that the establishment of outer limits is indeed a prerequisite to proceed with delimitation (see B. Kunoy, 'The Admissibility of a Plea to an International Adjudicative Forum to Delimit the Outer Continental Shelf prior to the Adoption of Final Recommendations by the Commission on the Limits of the Continental Shelf,' (2010) 25 *International Journal of Marine and Coastal Law* 23; B. M. Magnusson, 'Is There Really a Temporal Relationship between the Delineation and Delimitation of the Continental Shelf beyond 200 Nautical Miles?,' (2013) 28 *International Journal of Marine and Coastal Law* 465).

dealing with the of role of equity, equitable principles, and the equitable solution and Chapter 8 dealing with the provisional equidistance line.

Chapter 3 submits that the *acquis*of the case law as far as the relationship between entitlement and delimitation is concerned is captured by the principle of 'the land dominates the sea.' At the same time, Chapter 3 points out that the 'conceptual bridge between *entitlement* and *delimitation* has been a far more difficult issue to tackle.' This in particular is the case in relation to the recent case law on the delimitation of the continental shelf beyond 200 nautical miles. As Antunes and Becker-Weinberg observe on the *Bay of Bengal* cases, '"[n]atural prolongation" (*basis of entitlement*) has apparently been given no relevance, either in establishing the provisional line or for purposes of adjustment thereto.' The authors also conclude that the case law has struggled with conceptualizing the relationship between the entitlement of islands and their role in the delimitation process. The treatment of islands 'has not contributed to certainty and predictability [. . .] [and] much can be improved as a matter of legal argumentation and judicial discourse.'

As Chapter 4 points out, the case law, with *North Sea Continental Shelf* being the only exception, has equated the different sources of the applicable law. A clear case of consistency. For anyone even moderately familiar with the delimitation case law this will hardly come as a surprise. However, as is argued by McRae, this equation of the sources of the law is not without problems. The formulation contained in Articles 74 and 83 was intended to overcome the stalemate between the equidistance and equitable principles group. As McRae observes, the case law has 'articulated a process to give effect to the basic rule of Article 74/83 of the LOSC.' This could be said to be a 'considerable development in the applicable law relating to maritime boundary delimitation.' However, under this process 'equidistance has been elevated into an almost mandatory provision – a result that seems at odds with the objectives behind Article 74 and 83.'[30] Second, the ultimate goal of the law at present is achieving an equitable

[30] Initially, the case law took a different approach to the delimitation provision contained in Arts. 74 and 83. The Court in *Tunisia/Libya* concluded:

> Treaty practice, as well as the history of Article 83 of the draft convention on the Law of the Sea, [which is identical to article 83 of the LOSC], leads to the conclusion that equidistance may be applied if it leads to an equitable solution; if not, other methods should be employed (*Case concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* [1982] ICJ Rep. 246, [109]).

solution, as is explicitly stated in Articles 74 and 83. However, according to McRae:

> The jurisprudence has responded to this in ways that are not entirely clear or consistent. Three formulations can be identified. First, by developing a three-stage process for delimitation; second by endorsing the 'equidistance-relevant circumstances' approach; and third by saying that resort to equitable principles may also be appropriate. In doing so, they have blurred any dividing line between delimitation law and delimitation method.

An important theme of Chapter 6 is the shift from equity and equitable principles to the focus on the need to achieve an equitable solution. This development is in line with the explicit reference to the need to achieve an equitable solution in Articles 74 and 83. As the Court observed in *Black Sea*, the second and third stages of the three-stage approach are intended to achieve an equitable solution.[31] As was also observed above, the rebalance of the law in the direction of the three-stage approach and the equitable solution has taken place simultaneously. At the same time, the absence of attention for equitable principles in the more recent case law perhaps is one of the major deficiencies of the current law. As is submitted by McRae, the case law has failed to provide an objective basis for assessing the presence and impact of relevant circumstances, making the three-stage approach a cover for the application of equidistance. Equitable principles as first formulated by the Court in *North Sea Continental Shelf*, which are of a more general nature than relevant circumstances, could have provided the starting point for making the process of assessing the presence and impact of relevant circumstances more objective and as a consequence more consistent.

The advent of the distance-based 200-nautical-mile zone provided an important impetus to the acceptance of equidistance as the starting point for the delimitation of that zone.[32] At present, the equidistance method seems to be at the heart of the delimitation process. However, as the current volume indicates, this may be a pyrrhic victory. First, as detailed in Chapter 8, the determination of the provisional equidistance line in

[31] *Black Sea*, n. 12, [120] and [122].

[32] As a matter of fact, in *North Sea Continental Shelf*, Denmark and the Netherlands had already argued that such a link between entitlement and the equidistance method existed (n. 5, [39] and [44]). However, the Court in its judgment rejected that the notion of adjacency, which was the basis for coastal state entitlement to the continental shelf, implied a title based on proximity. Instead, the Court submitted that this basis of entitlement was the geophysically-based notion of natural prolongation. Ibid., [40–46].

most recent cases has become a subjective process, due to the selection of basepoints the judiciary considers appropriate, instead of using the validly determined basepoints of the coastal states involved.[33] Second, as is argued in Chapter 9, some of the recent case law in the second stage of the delimitation process has abandoned the equidistance line altogether. In the Bay of Bengal cases, the ITLOS and an arbitral tribunal adopted an azimuth as the final boundary instead of the equidistance line. It would not be an exaggeration to say that this constitutes a return to *Tunisia/Libya*, which is considered to be the high point of equity and unpredictability. In *Tunisia/Libya*, the Court submitted that equidistance could be applied if it led to an equitable solution, 'if not, other methods should be employed.'[34] The Court adopted such other methods on the basis of the consideration of the relevant circumstances of the case. In view of its reference to equidistance, it is safe to assume that the Court considered and rejected that equidistance led to an equitable solution. This results in a perfect match with *Bangladesh/Myanmar*. In that case, the ITLOS considered equidistance and concluded that it did not lead to an equitable solution and instead adopted a different method of delimitation on the basis of the relevant circumstances of the case. That different method was in no way linked to the provisional equidistance line, which had been established at the first stage of the three-stage approach.

Strict equidistance has been applied in a number of cases in the process of determining the provisional equidistance line. Chapter 8 discusses *Qatar/Bahrain* in some detail. Other cases in which strict equidistance was applied in determining the provisional delimitation line of the exclusive economic zone and the continental shelf include *Guyana v. Suriname* and *Barbados v. Trinidad and Tobago*. While in the latter case there does not seem to be any reason to discount specific features in determining the equidistance line – basepoints are located on the island of Barbados and a number of small islands that are very close to the island of Tobago – in the former two cases, baseline issues could have well led to the selection of basepoints in order to depart from the strict equidistance line. Chapter 8 discusses this point for *Qatar/Bahrain*. In *Guyana v. Suriname* the parties differed about the validity of newly charted basepoints depicted on Dutch chart NL 2218 and Guyana submitted evidence that the baseline was at a different location.[35] The tribunal concluded on this point that it was:

[33] For possible explanations of this approach, see Section 14.6 below.
[34] *Tunisia/Libya*, n. 30, [109].
[35] *In the Matter of an Arbitration between Guyana and Suriname (Guyana v. Suriname)* [2007] 30 RIAA 1, [395].

> not convinced that the depiction of the low-water line on chart NL 2218, a chart recognised as official by Suriname, is inaccurate. As a result, the Tribunal accepts the basepoint on Vissers Bank, Suriname's basepoint S14.[36]

Recent case law disregarding specific basepoints has failed to explain what distinguishes it from those cases that did apply strict equidistance at the first stage.[37]

Chapter 8 also raises the question whether stricter adherence to equidistance at the first stage of drawing the provisional delimitation line, i.e., using all valid basepoints of the parties, instead of making a subjective selection of some of those basepoints while disregarding others, would have led to different results. Chapter 8 submits that in many cases it probably would not have mattered. As has been argued elsewhere, in some cases a stricter adherence to equidistance at the first stage likely would have led to a different outcome.[38] Stricter adherence to the equidistance line at the first stage of the delimitation process could in some instances also have led to a final boundary that would have been an adjusted equidistance line.[39] This would have avoided the approach of abandoning the equidistance line altogether at the second stage of the delimitation process. As argued above, this approach makes the first stage of the three-stage approach largely irrelevant and implies a return to *Tunisia/Libya*. In conclusion, the approach of the case law to the determination of the provisional equidistance line can only be called consistent in the sense that the judiciary has taken much latitude in selecting base points.

Chapter 7 on the relevant coasts and the relevant area concludes that the case law on these issues has been far from consistent. One problem that was identified is that the general criteria formulated in *Tunisia/Libya*, which have been accepted by a considerable number of cases, do not allow the identification of meaningful relevant coasts and a meaningful relevant area in all geographical situations. Second, these general criteria have not been applied consistently in the context of individual cases. The same applies if different cases are compared. For instance, in some cases seaward projection is understood as a projection that is (approximately) perpendicular to the general direction of the relevant coasts, but in other cases areas well beyond a perpendicular projection from the relevant coasts have been included in the relevant area.

[36] Ibid., [396]. [37] For possible explanations of this approach, see Section 14.6 below.
[38] See A. G. Oude Elferink, 'International Law and Negotiated and Adjudicated Maritime Boundaries: A Complex Relationship,' (2015) 58 *German Yearbook of International Law* 231, 252–255.
[39] Ibid.

Chapter 9 seemingly reaches a positive conclusion on the consistency of the case law as regards the issue of relevant circumstance. After quoting the judgment in *Libya/Malta*, which found that 'justice according to the rule of law [...] looks with particularity to the peculiar circumstances of an instant case, it also looks beyond it to principles of more general application,'[40] the chapter submits that 'the conclusion must be that it is met, since those more general principles concerning relevant circumstances can – and, it is hoped, here have been – identified and presented in a sufficiently coherent and consistent fashion.'[41] However, Chapter 9 also submits that:

> Even after the introduction of the three-stage approach, [relevant circumstances] appear to be as open-textured and as decisive – yet as nebulous – as ever, and continue to operate at all stages of the delimitation process as a means of influencing its outcome, however described or addressed.

As is also argued by Evans, this evinces the consistency of the case law on this point, albeit not in a way that contributes to the transparency and predictability of the process.

Chapter 10 on third states reveals perhaps one of the most fundamental challenges of the case law as far as consistency is concerned. On the one hand, Chapter 10 indicates that the case law has been careful to avoid prejudice to the positions of third states. This has been mostly achieved by not determining maritime boundaries between the parties to a case in an area in which a third state also has claims. On the other hand, the presence of third states and their potential boundaries with the parties to a case continues to be taken into account in determining what constitutes an equitable solution between the parties. Looking beyond the bilateral boundary relationship of the parties may be unavoidable in ensuring an equitable solution to both parties – as only that wider context identifies the extent of their maritime zones – but at the same time implies a pronouncement on the delimitation context involving the parties and the third state.

The focus of Chapter 11 is on the third-stage (dis)proportionality test. Tanaka concludes that the test has not been consistently applied in the recent case law. In most recent cases, the judiciary has presented specific figures for the length of the relevant coasts and the size of the relevant area and compared those figures. However, this has not been done in other

[40] *Libya/Malta*, n. 16, [45].

[41] For a more pessimistic assessment in this respect, see Chapter 4 of this volume. The relevant point is also discussed above in this section.

recent cases such as *Nicaragua v. Honduras* and *Maritime Dispute (Peru v. Chile)*. Tanaka in discussing the latter case submits that 'serious doubts could be expressed with regard to the objectiveness of the broad assessment of disproportionality in this case.' As the analysis in Chapter 7 suggests, this failure to resort to specific calculations may not so much be due to some inherent shortcoming of the third stage, but rather may be explained by the fact that these cases did not allow a meaningful definition of the relevant coasts and relevant area on the basis of the approach to these matters developed in the case law. Tanaka also observes that there is:

> excessive subjectivity with regard to the evaluation of (dis)proportionality [. . .]. On the basis of the jurisprudence in this field, it is difficult to identify an objective standard for determining disproportion between the ratio of the relevant coastal lengths and maritime areas belonging to each party.

A final point to be noted about the disproportionality test is that it has always been met. It is submitted that this can hardly be otherwise. Prior to the third stage, a court or tribunal will have established an appropriate provisional line and assessed all the relevant circumstances that may or may not lead to an adjustment of this line. In other words, these aspects of the process have been fully considered. Not meeting the disproportionality test would imply that a court or tribunal in applying the first two stages did not 'get it right' and has not properly applied the law to the circumstances of the case. Still, this does not mean that the disproportionality test is without purpose. First, it creates the impression of a check on the first two stages. Second, it cannot be excluded that the test is used during the internal deliberations of courts and tribunals to assess the equitability of different possible outcomes. If that were to be the case, it could well be said that this would be the most important function of the disproportionality test.

An overall assessment of the case law's consistency is a daunting task. First, how should clear outlier cases be judged?[42] Are these part of a broader pattern of inconsistency, or should they rather be viewed as anomalies, that may moreover be explained by the peculiarities of that individual case. Second, the development of the law likely has impacted on the approach of the case law to delimitation. Finally, how should consistency be judged? The clearest example in this respect is the first stage

[42] For an example of such an outlier, see the discussion in Chapter 8 of this volume of *Maritime Dispute (Peru v. Chile)*.

of the three-stage approach, that has been infused with subjectivity by the judiciary. Moreover, in taking this approach the judiciary has introduced the second-stage consideration of relevant circumstances, without saying this with so many words, into the first stage of the process. The case law could be said to be consistent in the sense that this is now the standard approach. However, it is not consistent if it measured against the purpose of the three-stage approach of infusing the delimitation process with objectivity. Another example is the three-stage approach itself. It has become the standard for dealing with delimitation cases. However, the adoption of that standard approach has not accomplished consistency in relation to the individual stages of that approach. As the preceding analysis points out, depending on the answers that are given to the above questions, different assessments of the case law's consistency are possible.

14.4.3 Predictability

Predictability is concerned with the ability to predict the outcome of future cases on the basis of the existing case law. Taking the formulation of the Court in *Libya/Malta* again as our starting point, it should be recalled that the Court considered that there only was a need for 'a *degree* of predictability.'[43] No such condition was attached to the requirement of consistency by the Court.[44] This difference is explained by the different purposes of the two concepts.[45] While consistency is concerned with the formulation of the law and the process that needs to be followed in effecting maritime boundary delimitation, predictability refers to the individual future case. That individual case may display characteristics that were not previously considered by the case law and such characteristics may require a different approach to the operationalization or application of the law.

The existence of predictability can be assessed both by looking at a specific past case and trying to determine whether the outcome could have been predicted on the basis of the then existing case law and by looking at cases that are currently pending before the judiciary. To start with the former, in Section 14.3 above it was already argued that the treatment of St. Martin's Island at the first stage in *Bangladesh/Myanmar* would seem to

[43] *Libya/Malta*, n. 16, [45] (emphasis provided). [44] Ibid.

[45] At the same time it has to be acknowledged that both concepts are closely related. Lesser consistency would result in greater unpredictability, and little predictability could be the result from inconsistency.

have been difficult to predict on the basis of the Court's assessment of Serpents' Island in *Black Sea*. Second, in *Bangladesh/Myanmar* the ITLOS had to consider the relationship between entitlement of the continental shelf beyond 200 nautical miles and delimitation methodology. The Tribunal's approach hardly could have been predicted on the basis of the findings of previous cases on the relationship between entitlement to and delimitation of maritime zones.[46] Another example is provided by *Barbados v. Trinidad and Tobago*. The arbitral tribunal considered that the significant disparity between the relevant coasts of the parties constituted a relevant circumstance, but only adjusted the provisional equidistance line to a limited extent to give effect to that circumstance. In particular the judgment in *Jan Mayen* would have led one to predict a different impact of this relevant circumstance on the provisional line.[47] However, it is submitted that these examples do not reflect a broad pattern of unpredictability. For instance, small islands have been routinely disregarded in determining a mainland-to-mainland boundary or have been enclaved in 12-nautical mile territorial sea and specific relevant circumstances introduced by the parties have been routinely dismissed.

Turning to the pending cases of *Ghana/Côte d'Ivoire* and *Somalia v. Kenya*, we will at this point attempt to make a forecast on the basis of the existing case law. First, there is no reason to assume that the Court and the Chamber of the ITLOS will not apply the three-stage approach. Second, the coastal geography of both cases is such that we expect that a strict equidistance line, or an equidistance line very similar to the strict equidistance line, will be adopted as the provisional delimitation line. Third, we do not expect a radical departure from the equidistance line after the second-stage consideration of the relevant circumstances of each case.[48] Hydrocarbon licensing is likely to be considered as a potential relevant circumstance in both cases, but it is not expected that this practice requires a shifting of the provisional line. Fourth, the fact that Kenya's boundary

[46] For a further discussion, see above and Chapter 13 of this volume.

[47] For a further discussion of the comparison between *Barbados v. Trinidad and Tobago* and *Jan Mayen*, see Oude Elferink, n. 38, at 256–259.

[48] One note of caution is, however, necessary. We currently do not have access to the exact location of the continental shelf beyond 200 nautical miles in either case. If the equidistance line would lead to an unequal division of that area, presuming further that the Court and the Chamber will conclude that it is possible to proceed with that delimitation, that circumstance might lead to a shift of the provisional equidistance line beyond 200 nautical miles.

with Tanzania and the equidistance line between the former and Somalia further seaward move closer is unlikely to lead to the conclusion that the latter line leads to a cut-off or otherwise requires an adjustment of the final delimitation line.

Finally, we expect that the Chamber and the Court will have no difficulty in determining the relevant coasts and the relevant area. In the case of Somalia and Kenya it seems likely that the Court will at least select all of the coasts of the parties within 200 nautical miles of their common land boundary and possibly also the coast of Kenya up to its land boundary with Tanzania and for Somalia the coast up to Mogadishu or possible even some distance further north. For this latter definition, it is to be expected that the relevant area would be bounded by the relevant coasts, a perpendicular to the northern terminus of the relevant coasts, the outer limits of the maritime zones of the parties and the maritime boundary between Kenya and Tanzania. Turning to *Ghana/Côte d'Ivoire*, for Ghana, different options to define the relevant coast could be entertained: the coast from its land boundary with Côte d'Ivoire up to Cape Three Point, after which the coast clearly changes direction; the coast up to 200 nautical miles from that land boundary; or the entire coast of Ghana.[49] In the case of Côte d'Ivoire it may be expected that the Chamber will either adopt the coast up to 200 nautical miles from the land boundary with Ghana or the entire coast of Côte d'Ivoire. The relevant area can be expected to be bounded by the relevant coasts and the outer limits of the maritime zones of the parties. Depending on the definition of the relevant coasts, the lateral limits of the relevant area will be either perpendiculars to the general direction of these coast, lines of longitude (meridians) or the (potential) maritime boundaries with neighbouring states. We are confident that the third-stage test will point out that an equidistance boundary does not lead to disproportionality in either case.

Our assessment of *Ghana/Côte d'Ivoire* and *Somalia v. Kenya* strongly suggests that the law and methodology as developed by the case law result in a degree of predictability. It would not even seem unreasonable to submit that these cases suggest a high degree of predictability. At the same time, a word of caution is needed. *Ghana/Côte d'Ivoire* and *Somalia v. Kenya* are two cases with an uncomplicated coastal geography. In that respect, confidently predicting the approach and outcome in *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v.*

[49] These different definitions are unlikely to have an impact on the outcome of the case, as they do not seem to lead to significantly different outcomes of the disproportionality test.

Nicaragua) that is currently pending before the Court would seem to be a much more difficult task.[50]

14.5 The Normativity of the Current Delimitation Process[51]

The corpus of the law as contained in the Convention on the Continental Shelf and the LOSC is limited to the statement of general rules. These general rules required further operationalization to allow application to the individual case. This raises the question whether this operationalization involves the development of these general rules into more specific rules, or the exercise of wide discretionary powers, without necessarily specifying the general rules.

As a point of departure, the judgment in *Black Sea*, which provided a cogent formulation of the three-stage approach, may be considered. In the section discussing the applicable law, the Court refers to Articles 74 and 83 of the LOSC, but adds that 'the principles of maritime delimitation to be applied by the Court in this case are determined' by these articles.[52] The Court does not further elaborate on the nature of these principles.

The discussion of the three-stage approach in the judgment in *Black Sea* is contained in a section entitled 'Delimitation Methodology.'[53] The

[50] This assessment calls to mind the observation that:

> the oscillation between predictability and flexibility seems set to remain a feature of the jurisprudence, with relatively 'easy' cases (such as [*Black Sea*]) being used to flagship the merits of the fairly formal application of objective criteria whereas the more complex (such as [*Territorial and Maritime Dispute (Nicaragua v. Colombia)*]) will continue to pull in the direction of a more results-oriented approach.

(M. D. Evans, 'Maritime Boundary Delimitation,' in D. R. Rothwell, A. G. Oude Elferink, K. N. Scott, and T. Stephens (eds.), *The Oxford Handbook of the Law of the Sea* (Oxford University Press Oxford 2015) 254, 278).

The authors consider that further comment on *Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua)* would not be proper in view of the fact that one of them is acting as counsel for Nicaragua in that case.

[51] For a more detailed, but dated, discussion of this matter, see e.g. P. Weil,*The Law of Maritime Delimitation: Reflections* (Grotius Cambridge 1989) 159–185 and 279–288; N. Marques Antunes, *Towards the Conceptualisation of Maritime Delimitation* (Martinus Nijhoff Leiden 2003) 226–238.

[52] *Black Sea*, n. 12, [41]. The Court's current view on the normative nature of the delimitation process differs from that expressed in the past. Equitable principles were considered to be part of the normative framework to be applied (see e.g. *Libya/Malta*, n. 16, [46]). The demise of the concept of equitable principles, which is linked to a change in the applicable law, as detailed in Chapter 6 of this volume, explains this difference in approach.

[53] *Black Sea*, n. 12, 101.

Court starts out by observing that '[w]hen called upon to delimit the continental shelf or exclusive economic zones, or to draw a single delimitation line, the Court proceeds in defined stages.'[54] This formulation does not suggest an *obligation* to proceed in these defined stages, and the Court subsequently observes that in this respect it is acting 'in keeping with its settled jurisprudence on maritime delimitation.' Again, the Court is not indicating that there is a requirement to do so – the doctrine of *stare decisis* is not applicable to the Court – but it does suggest that it may at least be expected that the Court will act in accordance with the three-stage approach.[55]

The award in *Bangladesh v. India* is a clear departure from the Court's view on the delimitation methodology involving the three-stage approach as expressed in *Black Sea* and other recent decision of the Court. As the tribunal observed:

> [t]he ensuing – and still developing – international case law constitutes, in the view of the Tribunal, an *acquis judiciaire*, a source of international law under article 38(1)(d) of the Statute of the International Court of Justice, and should be read into articles 74 and 83 of the [LOSC].[56]

To determine the implications of this position, it is first of all required to consider Article 38(1)(d) of the Statute, which provides that:

[54] Ibid., [115].

[55] In another recent case, the Court again distinguished between the applicable law as reflected in Arts. 74 and 83 of the LOSC and the delimitation methodology as reflected by the three-stage approach (see *Maritime Dispute (Peru v. Chile)*, n. 6, [179]–[180]). In referring to this methodology, the Court repeatedly qualified it by the word 'usual' (see e.g. ibid., [180] and [184]). A similar reference is contained in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment) [2012] ICJ Rep. 624, [198].

[56] *In the Matter of the Bay of Bengal Maritime Boundary (Bangladesh v. India)* PCA Case 2010-16, [339]. The idea of *acquis judiciaire* had previously be formulated by Judge Wolfrum in a declaration appended to the judgment in *Bangladesh/Myanmar (Delimitation of the Maritime Boundary in the Bay of Bengal (Bangladesh/Myanmar)* [2012] ITLOS Rep. 4, Declaration Judge Wolfrum, 137). In *Bangladesh v. India*, Wolfrum acted as president of the five-member tribunal. The term *acquis judiciaire* is reminiscent of the term *acquis communautaire*, which is used in European Union law. This acquis has been summarized as:

> the collective legal term for European Union law. It stands for the whole body of written and unwritten EU laws, the EU's political aims, and the obligations, rights, and remedies the Member States share and must adhere to with regard to the EU. It is thus not a source of law itself, but a heterogeneous and amorphous blend of politics and laws of different hierarchical order, setting the benchmark for the current state of European integration. (M. Hilf, 'Acquis communautaire,' in *Max Planck Encyclopedia of Public International Law*, online ed.; last updated July 2009, [1])

The *acquis communautaire* as thus defined would seem to be closer to the settled practice to which the ICJ refers then to the tribunal's definition of the *acquis judiciaire* as a source of law.

> subject to the provisions of Article 59 of the Statute], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Article 38(1)(d) of the Statute does not refer to judicial decisions as sources of international law, as the award does, but 'as subsidiary means for the determination of rules of law.' Reading the case law on maritime boundary delimitation into Articles 74 and 83 of the LOSC is not using that case law as a subsidiary means for the determination of rules of law, but instead is replacing Articles 74 and 83 by other rules of law. Still, it can be argued that there is a normative basis for the three-stage approach. Following the methodology that is usually applied in the delimitation of maritime boundaries would be in accordance with the general principle of proper administration of justice, without that methodology in itself in its totality acquiring normative force.[57]

The analysis and conclusions of some of the chapters of this volume do suggest that normativity in the delimitation process extends beyond the basic rule as contained in Articles 74 and 83 of the LOSC as reflected in customary international law. For instance, Chapter 9 concludes that 'it may be going too far to claim that particular matters or issues *will be* relevant circumstances as a matter of customary international law,' but 'recourse to relevant circumstances within the delimitation process represents a principle of customary law,' while McRae in Chapter 4 observes that 'it may be suggested that the applicable law today consists of a requirement to utilize a particular methodology and to engage in a particular process of assessment within that methodology in order to delimit a boundary.' Other chapters confirm that, whatever way the normativity of the law is defined, the rules are impressionistic rather than objective and precise. This leads Tanaka to conclude that '[i]t seems questionable whether the disproportionality test developed through the jurisprudence is adequately objective and scientific as a norm of international law.' Coming up with such rigid rules would in any case not seem to be appropriate in this field of the law. As was written almost thirty years ago by Weil:

> none of the concepts making up the delimitation process has so far been the subject of any scientific, or even reasonably rigorous, definition; all depend, in various degrees, on the qualitative and therefore intuitive assessment of the judge: 'I know it when I see it.'[58]

[57] For the Court's view that the proper administration of justice is a general principle of law it is required to apply, see e.g. *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, [2002] Judgment, ICJ Rep. 240, [69].

[58] P. Weil, n. 51, 287 (footnote omitted).

Even though the law has evolved much since that time and we conclude that the case law has perhaps displayed too little consistency on certain points, these words still hold true today. A good judgment will involve translating intuition into an elegant legal argument.

14.6 The Future of the Case Law

The maritime delimitation case law has a history of almost fifty years. In light of the number of currently pending delimitations and the slow pace at which they are being resolved, it seems likely that its future will span at least a couple of decades. What does this future hold in store? Central to this question would seem to be the fate of the three-stage approach.

As a number of chapters in this volume suggest, the transparency and objectiveness of the process of maritime delimitation could be reinforced by avoiding subjectivity at the first stage.[59] If it is possible to determine an equidistance line, which almost invariably will be the case, that line should be determined objectively on the basis of the relevant basepoints.[60] Only after this equidistance line has been determined, it should be assessed at the second stage of the process whether certain of these basepoints or the features on which they are located constitute relevant circumstances that would require a shift of the provisional equidistance line. This would allow (and require) a more detailed assessment of such basepoints than is now often the case at the first stage of the delimitation process. How likely is it that the judiciary might adopt this approach in the future?

The past case law perhaps would seem to be the best starting point for answering the question whether there will be a sharper distinction between the first two stages of the delimitation process in the future. As is set out in Chapter 8 and Section 14.4.2 above, that case law has already taken this approach in a number of instances, showing that it is almost always perfectly feasible. So, why not do so always? A possible answer to

[59] The same point has been made by S. Fietta and R. Cleverly, *A Practitioner's Guide to Maritime Boundary Delimitation* (Oxford University Press Oxford 2015) 579 *et seq*. The importance of this point is forcefully made by Lathrop in Chapter 8 of this volume:

> When a sound procedural methodology has been developed and a court or tribunal claims to apply it, that application should be faithful to the process as described. Courts and tribunals that ignore or distort their own process undermine the legitimacy of their decisions unnecessarily.

[60] As Chapter 8 explains, this does require a prior determination as to whether the basepoints concerned have been established in accordance with the relevant rules as contained in Parts II and VIII of the LOSC.

this question is provided by Chapters 4, 8, and 9 of this volume. First, as McRae points out, it avoids the need for a fuller explanation, as would be required at the second stage of the process. Second, as Lathrop observes 'by cloaking subjective considerations of equity and appropriateness in the language of objectivity [at the first stage], judges [may be] attempting to avoid the critique of arbitrariness and imprecision often leveled at the second stage consideration of relevant circumstances.' Finally, Evans suggests that judges may favor making judgment calls at the first stage, because it has been much less open to scrutiny than the second stage. The recent attention to this aspect of the case law might suggest that these considerations, to the extent they play a role, might perhaps have somewhat less traction in future cases.

Other chapters in this volume also have made suggestions concerning the approach of the case law to delimitation methodology. For instance, Chapter 7 suggested that a preferable approach to the concepts of relevant coasts and relevant area 'might have been to solely rely on more general precepts underlying maritime delimitation law. That approach would have provided the flexibility to deal with the particularities of the individual case and avoids relying on general criteria that cannot be applied (equally) to all individual cases' as is currently the case. Another example is provided by Chapter 11 in which it is suggested that the disproportionality test either 'should be limited to the situations where a provisional equidistance line would create the cut-off effect by a markedly concave or convex coastline' or otherwise, if the test continued to be applied to all situations, its objectiveness should be enhanced.

If the past of the case law is taken as the point of reference, we submit that it is unlikely that the future case law will be characterized by new approaches. It seems more likely that courts and tribunals will gloss over the difficulties they encounter in dealing with factual circumstances that are difficult to fit into the existing general concepts and approaches. In that connection, it seems likely that they will either seek to square their own solution with the existing general concepts and approaches or instead look for a different approach without being very explicit that this implies a departure from the existing standard. Both Chapters 7 and 11 are a case in point in this respect. This point may be further illustrated by the delimitation of the continental shelf beyond 200 nautical miles. As Chapter 13 indicates, in certain cases a provisional equidistance line may not provide an appropriate starting point because that line is located beyond the area of overlapping entitlements that need to be delimited. This lack of a direct relationship between the equidistance method of delimitation and the

basis of continental shelf entitlement would seem to make equidistance an inappropriate starting point as a matter of principle. This notwithstanding, we would expect that a court or tribunal that would be faced with this situation would not opt to openly reject the approach of the ITLOS and the arbitral tribunal in the Bay of Bengal cases, but would rather refer to the judgment in *Black Sea* where the Court noted that a provisional delimitation line has to be determined 'using methods that are geometrically objective and also appropriate for the geography of the area in which the delimitation is to take place,'[61] i.e., it could apply a line different from equidistance without the need for an open departure from the Bay of Bengal cases.

In light of these thoughts on the future of the maritime delimitation case law and the preceding analysis, it should be clear that research into the consistency and predictability of the case law on maritime delimitation is likely to remain relevant in the years to come.

[61] *Black Sea*, n. 12, 101, [116].