The question:
Legal normativity through tacit agreements: Putting Peru v Chile into a broader perspective

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The Vienna Convention on the Law of Treaties (VCLT) expressly recognizes the admissibility of international agreements which are not concluded in written form, although they are not within the scope of the Convention (Article 2). Tacit agreements, in which obligations and commitments are implied or inferred but not openly declared, are something of an exception in State practice. The International Court of Justice has always been very cautious in determining the existence of tacit agreements (eg North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (Judgment) [1969] ICJ Rep para 28, and Delimitation of the Marine Boundary in the Gulf of Maine (Canada v United States of America) (Judgment) [1984] ICJ Rep paras 144-154). In the specific context of maritime delimitation, the Court clarified that the existence of a tacit agreement must be supported by ‘compelling’ evidence, because ‘the establishment of permanent maritime boundaries is a matter of grave importance’ (Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras) (Judgment) [2007] ICJ Rep 2007 para 253).

Recently, the Court seems to have adopted a more flexible approach. In Maritime Dispute, the Court denied the existence of any written treaty expressly establishing the maritime boundary between Peru and Chile but recognized the existence of a tacit agreement in that respect. Notably, the Court dealt with two specific issues, that is, the existence and the content of that tacit agreement. According to the Court, the text in the 1954 Special Maritime Frontier Zone Agreement
was sufficient to prove the existence of the tacit agreement (*Maritime Dispute (Peru v Chile)* (Judgment of 27 January 2014) para 91). As to the determination of the precise content of that agreement, the Court gave relevance to other treaties concluded by the parties, as well as other pertinent practice between them, such as fishing activities, legislative practice, enforcement activities, and even the developments in the law of the sea (ibid paras 96-151).

The Court’s approach entails several questions with respect to this delicate operation of determining the implied intention of the parties when one of them opposes such a possibility. Is the existence of a written agreement sufficient proof of the existence of a tacit agreement? What are the factual or normative elements that can lead to an affirmation that an agreement has been tacitly concluded? Are those elements different from the factors to be taken into account when ascertaining the precise content of the tacit agreement?

This Zoom-in is intended to tackle those issues by focusing on whether the Court should adopt a rigorous or a rather more flexible approach and in particular whether the criteria adopted by the Court for determining the content of the tacit agreement between Peru and Chile are appropriate.

Jean d’Aspremont and Giovanni Distefano offer two different perspectives on the relationship between written and non-written rules, the criteria according to which tacit agreements are to be established and more generally the role that tacit agreements play in contemporary international law.