

The International Court of Justice and tacit conventionality

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1. *The 'written' and the 'non-written' in international law*

The 'written' is the traditional domain of lawyers, for written materials provides a tangible soil from which legal contents can be extracted and converted into binding evaluative standards (ie legal normativity) on the basis of which the behaviour of addressees is appraised. The 'written' is thus the primary receptacle of all binding evaluative standards at which lawyers direct their interpretive activities. This is not to say that 'the written' enjoys an exclusive monopoly on the production of legal normativity. Most legal systems somehow accommodate the creation of binding evaluative standards through non-written materials. International law, however, distinguishes itself from other legal systems by virtue of the generous room it reserves for legal normativity generated through non-written materials. Indeed, when it comes to the production of binding evaluative standards, the 'non-written' has always enjoyed a privileged position in international law. For instance, the doctrine of customary international law famously allows the behavioural generation of rules, that is the creation of legal normativity through the general, uniform and consistent conduct of states (and possibly other actors) and its congruence with the corresponding anthropomorphic opinions of those actors about their own obligations. The same holds for general principles which are also commonly recognised – albeit reluctantly resorted to by international courts – as permitting the generation of legal normativity through a comparative and synthesizing account of domestic practices. It is true that the designation of non-written materials as sources of legal normativity by virtue of customary law and general principles is not specific to international law. Yet, international law

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stands out, not only because customary law and – to a lesser extent – general principles enjoy a prominent role, but also because it allows the extraction of a great deal of legal materials from other non-written materials like oral promises as well as tacit agreements between states.

As is well-known, oral promises came to be accepted as a possible source of legal contents by the Permanent Court of International Justice in its decision in the famous *Eastern Greenland* case.¹ This position was subsequently endorsed by the International Court of Justice.² The recognition of the possibility to generate legal normativity through tacit agreements – understood here as bilateral or multilateral legal agreements not explicitly confirmed in a written document – dates back to the classical doctrine of the sources of international law.³ They were originally invoked to provide a conventional foundation to customary international law.⁴ It is only once customary international law grew alien to conventionality that tacit agreements came to be elevated into a source of binding evaluative standards on its own. They nowadays constitute a widely accepted mode of creation of legal normativity in contemporary international legal scholarship.⁵ In this respect, it is well-

¹ PCIJ, *The Eastern Greenland Case*, Series A/B, No 53, at 71.

² See ICJ, *Nuclear Tests Case (Australia v France)* (Judgment) [1974] ICJ Rep 267, para 43.

³ See GF De Martens, *Droit des gens* (Aillaud 1831) 541. See also the mention of Grotius by P Gautier, *Essai sur la définition des traités entre Etats* (Bruylant 1993) 85.

⁴ On the conventional foundations of customary law, see H Triepel, *Völkerrecht und Landesrecht* (Scientia Verlag 1899); K Strupp, *Elements du droit international public* (Rousseau 1927); T Lawrence, *The Principles of International Law* 95 (7th edn, Macmillan 1915); J Westlake, *International Law* (CUP 1904) 14; D Anzilotti, *Scritti di diritto internazionale pubblico*, vol 1 (Cedam 1957) 38; see also 95 ff. GI Tunkin, *Theory of International Law* (Harvard UP 1974) 24. C Chaumont, 'Cours général de droit international public' (1970) 129 *Recueil des Cours de l'Académie de Droit International* 333, 440. For an attempt to modernize the consensual conception of customary international law, see A Orakhelashvili, *The Interpretation of Acts and Rules in Public International Law* (OUP 2008) 70-107; A D'Amato, 'Treaties As a Source of General Rules of International Law' (1962) 3 *Harvard Intl L J* 1-43. For some classic criticisms of such a convention-based approach to customary law, see H Lauterpacht, 'Decisions of Municipal Courts as a Source of International Law' (1929) 10 *British YB Intl L* 65, 83; J Brierly, *The Law of Nations* (5th edn, Clarendon Press 1955) 52; J Kunz, 'The Nature of Customary International Law' (1953) 47 *AJIL* 662, 664.

⁵ A Aust, *Modern Treaty Law and Practice* (2nd edn, CUP 2007) 9; P Gautier, *Essai sur la définition des traités entre Etats* (Bruylant 1993) 85-88. See also P Gautier, 'Article 2', in P Klein, O Corten (eds), *Les Conventions de Vienne sur le Droit des Traités. Commentaire article par article* (Bruylant 2006) 45, 55-56. See also Y Bouthillier, J-F Bonin,



known that the Vienna Convention on the Law of Treaties acknowledges the possibility to create binding evaluative standards through tacit agreements.⁶

Because the resort to oral promises is rather limited in practice,⁷ it seems more germane, to zero in in the following sections on the possibility of extracting binding standards from tacit agreements. Although their practical importance should not be exaggerated,⁸ tacit agreements have more commonly been relied on by international actors as a possible soil from which legal contents can be unearthed than oral promises. Moreover, tacit agreements have recently been the object of new judicial developments that offer new glimpses on how international lawyers value the ‘written’ and the ‘non-written’. Following these introductory remarks (1), and after sketching out the strict evidentiary regime to which the identification of tacit agreements has traditionally been subjected (2), the following paragraphs shed light on recent judicial developments pertaining to tacit conventionality (3). A few critical remarks on such judicial treatment of tacit conventionality are subsequently formulated (4). This paper ends with a few observations on the value of the ‘written’ and the ‘non-written’ in international legal argumentation (5).

2. *The traditional suspicion towards tacit conventionality and the need for a stringent evidentiary regime*

Despite the abovementioned generosity of international law towards the ‘non-written’, it should not come as a surprise that such source of legal normativity has always been frowned upon and approached by in-

‘Article 3’, in P Klein, O Corten (eds), *Les Conventions de Vienne sur le Droit des Traités. Commentaire article par article* (Bruylant 2006) 97, 103-105.

⁶ See arts 2 and 3 of the Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

⁷ See however the United Nations, Secretary-General’s ‘Bulletin on the Observance by United Nations Forces of International Humanitarian Law’ (6 August 1999) UN Doc ST/SGB/1999/13. On the idea that this Bulletin constitutes a unilateral act, see J d’Aspremont, J de Hemptinne, *Droit International Humanitaire* (Pedone 2012) ch 7.

⁸ See Aust (n 5) 9. F Capotorti, ‘Cours général de droit international public’ (1994-IV) 248 9-343, 153.



ternational lawyers with some veiled suspicion.⁹ Such wariness has commonly been informed by the impossibility to ascertain oral agreements by virtue of an explicit (written) manifestation of the *animus contrahendi* (legal intent) and the correlative necessity to ‘discover’ it elsewhere.¹⁰ Indeed, in the absence of any written container, the identification of such agreements as legal instruments and the determination of their contents inevitably constitute interpretive exercises bound to be carried out on a very instable soil. This is why, international lawyers have always been fearful that their interpretive activities in connection to tacit conventionality and, more specifically, their extraction of normativity from tacit agreement could look overly speculative, if not arbitrary.¹¹

⁹ As far back as 1889, in the case of the Island of Lamu, Arbitrator Baron Lambermont indicated that oral agreements were deemed odd as not reflecting international usages. See Arbitral sentence of Baron Lambermont in the Island of Lamu dispute (1890) 22 *Revue de droit international et de législation comparée* 349-360. The Harvard Research, for instance, voiced strong misgivings towards oral agreements. See the 1935 codification of the law of treaty by the Harvard Law School, Draft Convention on the Law of Treaties (1935) 29 *AJIL* supp 691 (‘Without the instrument, there is no evidence of an agreement, there is nothing to be interpreted or applied; in short there is no treaty apart from the instrument which records its stipulations’). This was already bemoaned by C Rousseau, *Principes généraux du droit international public*, vol 1 (Pedone 1944) 143. During the debates at the International Law Commission, several members voiced the support for the idea that there cannot be a binding agreement without an instrument. See ILC, ‘Summary Records of the Second Session’ (5 June – 29 July 1950) YB ILC 1950, vol 1, UN Doc A/CN.4/SER.A/1950, 64 ff. See also the remarks by P Reuter, *Introduction au Droit des Traités* (3rd edn, Presses Universitaires de France 1995) 27.

¹⁰ Aust (n 5) 9; Gautier (n 5) 85-88.

¹¹ It should be noted that similar misgivings have been witnessed with respect to *oral promises*, prompting scholars to seek some formal indicators elsewhere, like in the ‘publicity’ of the promise. See ICJ, *Nuclear Tests Case* (n 2) para 43: ‘An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding’. See also V Rodríguez Cedeño, ‘Second report on Unilateral Acts of States’ (14 April and 10 May 1999) UN Doc A/CN.4/500, para 55. On this question, see C Goodman, ‘Acta Sunt Servanda? A Regime for Regulating the Unilateral Acts of States at International Law’ (2006) 25 *Australian YB Intl L* 43, 58-59. It should be noted that the International Law Commission eventually decided not to elevate publicity in a promise-ascertainment criterion. See the recommendation n 1 of the ILC, ‘Report of the International Law Commission on the work of its fifty-fifth Session’ (5 May – 6 June and 7 July – 8 August 2003) UN Doc A/58/10, para 306. On that point, see E Suy, *Les actes juridiques unilatéraux en droit international public* (LGDJ 1962) 28 ff; Harvard Law School, Draft Convention on the Law of Treaties (n 9); See also J d’Aspremont, ‘Les travaux de la Commission du droit



These suspicions – and fear – explain the omission of oral agreements from the enterprises of codification of the law of treaties. For instance, the 1928 Havana Convention on Treaties,¹² the codification undertaken by the Harvard Research in International Law in the 1930s¹³ and that undertaken by the International Law Commission¹⁴ in the 1960s have all excluded oral agreements from the ambit of the rules laid down therein.¹⁵ It is noteworthy, however, that such wariness never led international lawyers to completely rule out the possibility of generating legal normativity through tacit conventionality. Only a handful of international lawyers have categorically refused the possibility of tacit agreements.¹⁶ Even the commentary to the abovementioned Harvard Draft, while manifesting a clear scepticism as to the practice of oral agreements, did not deny the legal value of tacit conventionality.¹⁷ For its part, the International Law Commission made clear that, despite the exclusion of tacit agreements from the scope of its codification of the

international relatifs aux actes unilatéraux' (2005) 109 *Revue Générale de Droit International Public* 163-189.

¹² Cited in Harvard Draft (n 9).

¹³ The comments of the Harvard Draft reads as follows: 'most writers on international law lay it down as an essential condition that the stipulations of a treaty must be recorded in writing, and with rare exceptions this has been the practice'. See the Harvard Draft (n 9) 689.

¹⁴ On the reasons why the ILC decided not to include oral agreements in the scope of application of its articles, see ILC, 'Report of the International Law Commission covering the work of its eleventh session' (20 April – 26 June 1959) UN Doc A/4169 (F) (A/14/9) ch II, 94-96, paras 8-20; ILC, 'Report of the International Law Commission on the work of its fifteenth session' (24 April – 29 June 1962) UN Doc A/5209 (F) (A/17/9) ch II, 178, paras 11-23.

¹⁵ Art 2(1) VCLT: 'For the purposes of the present Convention: (a) "treaty" means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.

¹⁶ AD McNair, *The Law of Treaties* (Clarendon Press 1961) 2.

¹⁷ The commentary reads as follows: 'while a treaty, as the term is used in this Convention, must be in the form of an instrument, it is not intended to deny that oral agreements between states may not be as binding upon the parties as those recorded in writing, it is meant only that, for the reasons explained in the comment on Article 5, it is not deemed advisable to include such agreements in the category of treaties as the term is used in the Convention'. See the Harvard Draft (n 9) 689.



law of treaties, it 'ha[d] no intentions of denying the legal force of oral agreements being in conformity with international law'.¹⁸

The general acceptance of the possibility to generate legal normativity through tacit conventionality did however not do away with the abovementioned suspicions. While accepting the possibility of generating obligations through tacit agreements, international lawyers consciously made the 'discovery' of tacit conventionality more painstaking. It is not really that they subjected the ascertainment of such agreements to a stricter regime of law-identification. In fact, the ascertainment criterion of tacit agreements remains the same as the one used for the identification of treaties: the intent of the parties to anchor the meeting of their individual wills in the language of legal obligations provided by international law (ie the *animus contrahendi*). Yet, what was made more stringent by international lawyers in the case of tacit conventionality is the evidence of such *animus contrahendi*, the absence of written materials justifying a higher evidentiary threshold.¹⁹ This higher and stricter evidentiary regime of the *animus contrahendi* necessary for the ascertainment of tacit agreements was confirmed by the International Court of Justice in the context of maritime delimitations in its 2007 judgment in the case concerning territorial and maritime dispute between Nicaragua and Honduras in the Caribbean Sea (*Nicaragua v Honduras*) where the Court, in a famous short-cut formula, contended that '[e]vidence of a tacit agreement must be compelling'.²⁰

It is true that the Court, while setting a high evidentiary regime of tacit conventionality in the case *Nicaragua v Honduras*, simultaneously remained rather cryptic as to the exact scope thereof, leaving room for a variety of interpretations. For instance, its 'compelling evidence' threshold for tacit conventional could be read as being restricted to

¹⁸ ILC, 'Report of the International Law Commission on the work of its fourteenth session' (24 April – 29 June 1962) YB ILC 1962, vol 2, UN Doc A/CN.4/SER.A/1962 V.I, 23; 'Summary records of the plenary meetings and of the meetings of the Committee of the Whole' (26 March – 24 May 1968 and 9 April – 22 May 1969) UN Doc A/CONF.39/11/Add.2, 10.

¹⁹ See more recently, H Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, vol 2 (OUP 2013) 1223–1225; Q Xiaocheng, 'Oral International Agreement and China's Relevant Practice' (2005) 4 Chinese J Intl L 465–479, 471–472.

²⁰ ICJ, *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v Honduras)* [2007] ICJ Rep 735, para 253.



questions of ‘establishment of a permanent maritime boundary’, the latter being for the Court ‘a matter of grave importance’.²¹ Yet, such an interpretation is not self-evident and an interpretation allowing a much wider scope of application could be vindicated. None of the opinion appended to the judgment provides any inkling whatsoever. What is more, it can be contended that it is probably no accident that the Court remained so elliptical as to the scope of its ‘compelling evidence’ threshold, thereby preserving its room of manoeuvre for future cases and allowing itself to adjust, if need be, the threshold of evidence for tacit agreements on other matters. In any case, the 2014 judgment of the Court in the case concerning the maritime dispute between Peru and Chile – which is discussed below – did not dispel this equivocation. Against this backdrop, it seems of no avail to speculate about what the Court could possibly have had in mind in *Nicaragua v Honduras* regarding the scope of its high evidentiary threshold for tacit conventionality.

It is more important to stress that, irrespective of whether the high evidentiary regime of tacit conventionality set in *Nicaragua v Honduras* applies is restricted to questions of establishment of maritime boundary, one can hardly dispute that the Court’s imposition of a higher evidentiary threshold regarding the *animus contrahendi* in tacit conventionality was informed by the fact that, in want of a written instrument, reconstructing the intent of the parties to anchor their oral agreements into the international legal order is made dependent on less tangible indicators. Such a position epitomises the fact that, for international lawyers, it is only by requiring stronger evidences of the *animus contrahendi* that the finding of tacit agreements can prevent – or at least rein in – criticisms of arbitrariness, especially in adjudicatory processes. The possibility of adjusting this higher evidentiary regime for agreements on other matters does not put into question the rationale thereof, that is the need for stronger evidences when the *animus contrahendi* is impalpable.

It should be noted that the high evidentiary threshold imposed on the discovery of tacit conventionality – as the abovementioned requirement of ‘compelling’ evidence set by the Court – often calls for an incidental return to written manifestations of the *animus contrahendi*. Said differently, the stricter evidentiary regime imposed on the ascertainment of tacit agreements very regularly allows ‘the written’ to return to evi-

²¹ *ibid* para 253.

dence the ‘non-written’. The *animus contrahendi* in tacit conventionality will often be demonstrated by the resort to written materials like exchanges of notes between the parties.²² Yet, it matters to realize that, in the traditional regime of tacit conventionality, such supporting written materials ought not to be legal materials properly so-called – that is they do not need to present any formal membership to the international legal order – to perform their evidentiary functions in relation to tacit conventionality. This is however where recent judicial practice has brought new insights to which the attention must now turn.

3. *Sophisticating the evidence of tacit conventionality: from ‘compelling’ evidence to legal ‘cementing’ of tacit agreements*

It is submitted here that the scope of application of the higher evidentiary threshold reserved to the ascertainment of tacit agreement did not remain in limbo but was further elucidated in a recent judgment of the International Court of Justice. While not indicating whether the high evidentiary regime set in *Nicaragua v Honduras* is meant to be restricted to maritime boundary matters, the Court clarified the scope of the strict evidentiary regime of tacit conventionality by excluding its application in cases where tacit conventionality is ascertained on the basis of a written instrument. It will be argued in the following paragraphs that, in doing so, the Court boosted the role of the ‘written’ when the latter presents some formal membership to the international legal order.

The decision that ought to draw our attention in this respect is the Court’s judgment of 27 January 2014 in the case concerning the maritime dispute between Peru and Chile.²³ The case did not boil down to one of these tradition (territorial or maritime) boundary disputes that

²² See eg *Territorial and Maritime Dispute Between Nicaragua and Honduras* (n 20) paras 252 and 257.

²³ See ICJ, *Maritime Dispute (Peru v Chile)* (Judgement of 27 January 2014) available at <www.icj-cij.org/>. For a summary of the decision, see US Burney, ‘International Court of Justice Defines Maritime Boundary Between Peru and Chile’ (February 2014) *ASIL Insights*, vol 18, issue 3, <www.asil.org/insights/>. For a scholarly commentary, see MT Infante Caffi, ‘Peru v. Chile: The International Court of Justice Decides on the Status of the Maritime Boundary’ (2014) 13 *Chinese J Intl L* 741-762.



pits arguments based on *effectivés* against arguments based on titles.²⁴ It primarily revolved around a debate on the existence against the non-existence of a prior agreement on the maritime boundary between the two countries.²⁵ It is in this context, that the judgment came to offer new insights on the regime of tacit conventionality in international law. In fact, the positions of the parties requested the Court to appraise whether the respective maritime zones entitlements of Peru and Chile had been fully delimited by agreement – a position rejected by Peru. The Court found that the 1952 Santiago Declaration was of a legal nature²⁶ but, as far as its content is concerned, failed short to establish a maritime boundary between Chile and Peru. This is why the Court went on to gauge whether other instruments could enshrine such an agreement on a maritime boundary between the two countries.²⁷ In this respect, it reviewed the nature and contents of four specific agreements, namely the Complementary Convention to the 1952 Santiago Declaration, the Agreement relating to Measures of Supervision and Control of the Maritime Zones of the Signatory Countries, the Agreement relating to a Special Maritime Frontier Zone as well as 1968-1969 arrangements pertaining to the construction of lighthouses.²⁸ The Court came to the conclusion that both the 1954 Special Maritime Frontier Zone Agreement²⁹ and – in a subsequent section of the judgment – the 1968-1969 arrangements pertaining to the construction of lighthouses³⁰ were legal

²⁴ On this point, see Infante Caffi (n 23) 755. See in general on *effectivité* vs titles, M Kohen, 'La relation titres/effectivités dans la jurisprudence récente de la Cour Internationale de Justice' (2004–2012), in D Alland, V Chetail, O de Frouville, JE Viñuales (eds), *Unity and Diversity of International Law. Essays in Honour of Professor Pierre-Marie Dupuy* (Martinus Nijhoff 2014) 599-614.

²⁵ It must be acknowledged that the question of a pre-existing agreement establishing a land or maritime boundary is a recurrent one in the contentious business of the court. See cases such as *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)*(Merits) [2002] ICJ Rep 303, and *Case Concerning Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v Norway)* [1993] ICJ Rep 38. For some critical remarks, see S Jiuyong, 'Maritime Delimitation in the Jurisprudence of the International Court of Justice' (2010) 9 *Chinese J Intl L* 277.

²⁶ *Maritime Dispute* (n 23) para 48.

²⁷ *ibid* para 70.

²⁸ *ibid* paras 31-99.

²⁹ *ibid* paras 90-92.

³⁰ *ibid* paras 96-99.



agreements that acknowledged the existence of a prior tacit agreement between Peru and Chile on their maritime boundary, thereby confirming the existence of such a maritime boundary between the two countries.³¹ As far as the 1954 Special Maritime Frontier Zone Agreement is concerned, the Court even ventured into some unusual linguistic grandiloquence by claiming that the legal binding 1954 Agreement ‘cements the tacit agreement’.³²

It is this possibility of ‘cementing’ tacit agreement through written legally binding agreements that brings about an important nuance to the stringent evidentiary regime of tacit conventionality that was recalled above. Such a judicial treatment of tacit conventionality warrants a few analytical observations. This is the object of the following section.

4. *The ancillary evidentiary virtues of legally binding written materials*

It is fair to say that, on the whole, the legal reasoning of the Court in the above mentioned judgement denoted some unique – or regularly lacking³³ – argumentative rigor. Indeed, this judgement certainly stands out among international judicial decisions for its careful distinction between the criteria required to establish the existence of legal agreements and those used to determine the content of such agreements. In *Peru v Chile*, after observing it had been agreed that the 1952 Santiago Declaration is an international treaty, the Court highlighted that the question was no longer a question of law-identification but one of content-determination and that the Court’s subsequent task was to ‘ascertain whether it established a maritime boundary between the Parties’.³⁴ The Court thus proved very diligent in separating the ascertainment of the treaty and the determination of its content, thereby recalling that criteria to carry out the former are not necessarily the same as those relied

³¹ *ibid* paras 80-99.

³² *ibid* para 91.

³³ For an example of conflation between law-ascertainment and content-determination techniques, see ICJ, *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment of 31 March 2014). See the remarks of J d’Aspremont. ‘The International Court of Justice, the Whales and the Blurring of the Lines between Sources and Interpretation’ (forthcoming).

³⁴ ICJ, *Maritime Dispute* (n 23) para 48.



on to achieve the latter. This is how the Court, after having answered the question of the legal nature of the 1952 Declaration, came to resort to the traditional content-determination techniques provided by the doctrine of interpretation as it is found in Articles 31 and 32 of the Vienna Convention on the Law of Treaties.³⁵ Deploying these traditional techniques of content-determination, the Court went on to find that the 1952 Declaration did not establish an agreement on a maritime boundary between the two countries.³⁶ This finding is what brought the Court to subsequently review the nature and content of the Complementary Convention to the 1952 Santiago Declaration, the Agreement relating to Measures of Supervision and Control of the Maritime Zones of the Signatory Countries, the 1954 Agreement relating to a Special Maritime Frontier Zone as well as 1968-1969 arrangements pertaining to the construction of lighthouses with a view to verifying whether they did enshrine an agreement between the parties on their maritime boundary.³⁷

The Court's argumentative meticulousness and its careful distinction between law-identification and content-determination perpetuated itself in its review of these various instruments. Such rigour is what allows the observer to distil more clearly the Court's treatment of the evidentiary regime of tacit conventionality and grasp how the legal nature of written materials impacts their evidentiary virtues. It is especially when determining the content of the above-mentioned 1954 Agreement that the Court came to elucidate its high evidentiary test for the *animus contrahendi* of tacit conventionality. It must be noted that the Court barely discussed the legal nature of the 1954 Agreement which was not really contested by the parties. It limited itself to say that the Agreement became binding upon the parties once Chile ratified it, albeit belatedly.³⁸ Having presumed the 1954 Agreement as an instrument of a legal nature without much difficulty, the Court engaged in a content-determining exercise with a view to verify the possibly existence of a distinct agreement on the maritime boundary. This is when it went on to recall the requirement to provide 'compelling' evidence for tacit conventionality³⁹ as was set in *Nicaragua v Honduras* and found that the

³⁵ *ibid* 57.

³⁶ *ibid* para 70.

³⁷ *ibid* paras 31-99.

³⁸ *ibid* para 87.

³⁹ *ibid* para 91.

1954 Agreement evidenced the existence of an agreement on the maritime boundary between Peru and Chile. The foregoing means that the examination of the content of the 1954 Agreement is what allowed to Court to ascertain a tacit agreement on maritime boundary to which the 2007 high evidentiary regime was, as matter of principle, applicable. In doing so, the Court let the distinction between law-ascertainment and content-determination collapse temporarily. To the regret of most observers, however, the Court proved very laconic as to its modes of evidencing the *animus contrahendi* of the tacit agreement on the basis of the 1954 Agreement. Its judgment is indeed very terse as to how the tacit agreement is actually inferred from the 1954 Special Maritime Frontier Zone Agreement. The Court confined itself to finding an express acknowledgment of an earlier tacit agreement, claiming that it had before it ‘an agreement which makes clear that the maritime boundary along a parallel already existed between the Parties’.⁴⁰ The rare indications given by the Court as to its modes of evidencing of the tacit agreement hinted at the ‘terms of the 1954 Special Maritime Frontier Zone Agreement, especially Article 1 read with the preambular paragraph’⁴¹ and the 1968-1969 arrangements pertaining to the construction of lighthouses.⁴²

It is noteworthy that the laconism of the Court regarding its finding of evidences of an *animus contrahendi* regarding a tacit agreement on maritime boundary strikingly contrasts with the pains the Court took to determine the very content of such a tacit agreement in the subsequent part of the judgement.⁴³ It is certainly not the place to elaborate on the modes of determination of the content of the tacit agreement which the Court discussed extensively. Nor is it relevant to dwell on the difference between the techniques of ascertainment of agreement – which the Court does not spell out in its judgment – and the techniques of content-determination – which the Court generously deploys in its judgment. For the sake of the argument made here, it matters more to highlight that the Court meticulously distinguish between the establishment of an *animus contrahendi* for the sake of the ascertainment of a tacit

⁴⁰ *ibid* para 91.

⁴¹ *ibid* para 90.

⁴² *ibid* paras 96-99.

⁴³ *ibid* paras 103-151.



agreement and the determination of the content of this agreement, thereby confirming that the techniques to ascertain a tacit agreement differ from that meant to determine its content.

This contrast did not go unnoticed. It is no surprise that the concision of the judgment on the ascertainment of the *animus contrahendi* supporting the tacit agreement spawned some unease among judges, some of which felt that the Court's refuge in the 'cementing' effect of the text of the 1954 Agreement did not meet the 'compelling' evidentiary threshold set by the Court in its earlier case-law.⁴⁴ That criticism seems warranted. Yet, it is argued here that, more than the departure from the traditional requirement of compelling evidence itself, it is the justification for such qualification that requires some attention. In fact, it is actually difficult not to read the laconism of the Court on the high evidentiary value of the 1954 Agreement in terms of tacit conventionality in the light of the legal nature of the latter. In other words, and even if the perception of a causal relation between the legal nature of the 1954 Agreement and the ease with which it is used to evidence a tacit agreement is bound to be somewhat speculative, it is hard for the observer not to relate the alleged 'clarity' of the acknowledgement of an earlier tacit agreement on the maritime boundary to the finding that the 1954 Agreement has the nature of a treaty. It is as if the legal character of the written material which the Court could rely on – ie the 1954 Agreement – allows it to get away with a unsubstantiated claim that the text of the agreement was sufficiently clear to evidence the existence of an earlier tacit agreement on the maritime boundary. Even looking into the practice surrounding the adoption of this written materials no longer seems necessary.⁴⁵

The fact that the 'written' helps extract legal normativity from the 'non-written' is not idiosyncratic. As was already indicated above, written materials have always provided evidentiary support for the 'non-written'. What is remarkable in the judgement of the Court in *Peru v Chile* is that the evidentiary virtues of the 'written' seem to fluctuate according to its legal nature. Whilst the non-written character of an

⁴⁴ See separate opinion of Judge Owada, paras 12-21; Dissenting opinion of Judge Sebutinde, paras 4-10. Contra. Joint dissenting opinion of Judges Xue, Gaja, Bhandari and Judge ad hoc Orrego Vicuna, para 22.

⁴⁵ This triggered the disagreement of Judge Sebutinde. See Dissenting opinion of Judge Sebutinde para 8.



agreement had traditionally justified ‘compelling’ evidentiary support of the *animus contrahendi* on the basis of which such a tacit agreement can be ascertained (at least with respect to maritime boundary matters), the Court, in *Peru v Chile*, indicated that the requirement of a ‘compelling’ evidence of *animus contrahendi* can be waived if the written materials drawn on to evidence tacit conventionality are of a legal nature. In that sense, the Court, even if it did not indicate whether the ‘compelling evidence’ test was limited to maritime boundary matters, clarified its scope of application by introducing an important qualification to the test and excluding its application where the *animus contrahendi* is extracted from an instrument of a legal nature.

It should be made clear that, as a matter of principle, such a waiver does not necessarily boil down to a lowering the whole evidentiary regime of tacit conventionality *in concreto*. Indeed, establishing the legal nature of the written materials on the basis of which tacit conventionality is evidenced nonetheless remains subject to strict ascertainment standards, namely the establishment of an intent by the parties to anchor such supporting written materials in the international legal order. To benefit from a waiver of the ‘compelling’ evidence requirement and from a less stringent evidentiary regime, one must still prove the *animus contrahendi* pertaining to the written materials from which the tacit agreement can be extracted without compelling evidence. In *Peru v Chile*, the Court did not discuss the legal nature of the 1954 Agreement as the Parties, despite the delayed ratification of Chile, had not contested its treaty nature. Yet, ascertaining the written instrument from which tacit conventionality is inferred as a legal instrument may not always be so easy – or approached with so much ease and self-confidence by the law-applying authority. In that sense, irrespective of the waiver of the ‘compelling evidence test’ for evidences of tacit conventionality drawn from legal instruments, evidencing tacit conventionality inextricably remains rather arduous. In the end, this is not surprising, as a different conclusion would be at odds with the common suspicion with which international lawyers approach tacit conventionality.

5. *Concluding remarks: the uninterrupted reign of the 'written'*

In the light of the case law-examined in the previous sections, the International Court of Justice ought to be commended for its rigorous distinction between law-ascertainment and content-determination processes. Such rigorous sequencing allows one to distil the Court's subtle approach to tacit conventionality. Indeed, its reasoning in the case *Peru v Chile* demonstrates the continuous care with which international lawyers take the generation of normativity through unwritten channels. It also shows that, as far as tacit conventionality is concerned, content-determination may come to precede law-ascertainment when law-ascertainment is carried out on the basis of a written instrument, that is when tacit conventionality is inferred from a written instrument whose content must preliminarily be determined.

The lessons drawn from the recent judicial practice that has been examined in the previous section are however not restricted to the generation of normativity through unwritten channel. Insights can be extrapolated beyond the narrow framework of the debate on tacit conventionality in international law. In fact, the discussion above buttresses the idea that the evidentiary weight which international lawyers are ready to attribute to the materials they draw on in their legal reasoning vary according to two fundamental parameters: the written or unwritten character of such materials on the one hand and their legal or non-legal nature on the other hand. In this respect, it seems that, for international lawyers, a material which is both written and legal will present the highest evidentiary value. Conversely, a material that is both unwritten and non-legal – like unrecorded practice – will present almost no evidentiary value and will itself be in need of support by other – legal or non-legal – written materials. In that sense, recent judicial practice in respect of tacit conventionality confirms – rather than contradicts – the privileged position of the 'written' in international legal argumentation and indicates that, when combined, the 'legal' and the 'written' provide the most solid soil on which legal argumentation can be constructed. For all the other materials that do not present such twofold nobility, there will always be room for a wide variety of different evidentiary values and thus argumentative disagreement.