Statement by Mario Oyarzábal*

on the Second and Third Reports on Non-Legally Binding International Agreements by Mathias Forteau, Special Rapporteur
(A/CN.4/784, 18 February 2025; A/CN.4/790, 3 February 2026)

International Law Commission – 77th Session
6 May 2026

Original: English

Mr. Chair,

At the outset allow me to thank the Special Rapporteur (SR) Mathias Forteau for his comprehensive Second and Third Reports on Non-Legally Binding International Agreements (NLBIA) and commend him for the cautious yet bold approach taken in advancing this important topic.

Allow me to make two general remarks before turning to the individual Draft Conclusions.

First, as we delve into the substantive part of our work, I am increasingly convinced of what I originally suggested — that we should produce draft guidelines rather than draft conclusions. Although NLBAs are not new, they have gained considerable relevance in recent years, and the added value of the Commission lies in guiding States primarily at the time of their conclusion. The question of interpretation after the fact is a separate matter: disputes over the binding or non-binding nature of an instrument, or its effects, may well be brought before an international tribunal or another dispute settlement mechanism — and in such cases, draft conclusions would indeed make sense. However, if NLBA are properly drafted, such disputes may be avoided. Nevertheless, outside of that context, conclusions create unnecessary complications in our work, whereas guidelines would simplify it. This is evident, for example, as we deal with indicators to determine the intention of the parties in the absence of express indication. If intention is to be determined on a case-by-case basis, drawing conclusions after the fact becomes complicated. It is the function of a tribunal or interpreter to determine that intention and to distinguish treaties from NLBA. The same goes when addressing the direct and indirect effects of NLBA.

Second, I am generally in agreement with the thrust of the Draft Conclusions, which derive largely from and are well founded in the SR's Reports, even though I have several substantive comments regarding their drafting. However, and I will return to this, I am discouraged at the lack of ambition and the very slow pace at which this work may progress if the approach suggested by the SR is adopted. I am puzzled in particular as to why the SR has not provided a list of indicators of the intention of the parties to a NLBIA, despite the extensive comments by States and the SR's own research on the matter. I submit that a draft list of indicators may be provided by the SR in advance of the Drafting Committee's meeting with a view to its adoption if time allows. This would, in turn, allow enough time to address other issues at the next session of the Commission in 2027.

* I thank Paulo Glowacki, Raadmehr Maleki and Wei Xing for their research assistance.

Mr. Chair,

Regarding **draft conclusion** 1, I think it should be composed in principle of one paragraph, its current paragraph 1, and should be retitled accordingly with the single word "Scope".[1] The remaining paragraphs are matters that will be best addressed in the commentaries.[2] This is especially the case for paragraph 2 as it deals with the non-prescriptive nature of the Draft Conclusions. Moving the remaining paragraphs to the commentary also aligns with States' positions expressed in the Sixth Committee to streamline the draft conclusion[3] and will keep this project in line with previous work of the Commission. Moreover, I am uncertain as to what paragraph 3 actually means. And paragraph 4, despite its importance, is nonetheless axiomatic, as it is self-evident that NLBA, let alone Draft Conclusions that the ILC may adopt on the matter, do not and cannot affect the binding force of treaties under the principle *pacta sunt servanda* or their regime.

If we do as proposed, it may make sense to move up draft conclusion 3 as paragraph 2 of draft conclusion 1 to make it clear from the outset what kind of NLBIA the Draft Conclusions address. I will come back to the substance of draft conclusion 3 in due course.

Mr. Chair,

Let me turn to **draft conclusion 2** on the "Use of Terms".

Like in my previous statement, I agree with the SR on the use of the term "agreement" since it is widely used in practice and was supported by several States in the Sixth Committee. More substantially, "agreement" refers to the existence of some mutual commitment at the international level even when not legally binding. The term "instrument" would encompass, for example, a joint communiqué which encompasses purely political declarations and would not amount to a NLBIA which, despite its non-bindingness, may have some low degree of *soft law* normativity.

More incomprehensible, in my view, is the reluctance to state in so many words that a NLBIA does not create any rights or obligations and has no binding legal effect "under international law", when this is exactly what we are talking about here. In not saying so, the current definition errs by going too far and by not going far enough. On the one hand, it gives the impression that NLBIA may not be binding or produce binding effect under the domestic laws of the countries involved. That may not be necessarily the case; and in any event, that is not an issue for the ILC to decide. On the other hand, it does not say what it means and what we are all saying here: that NLBIA are not binding or produce binding effect under international law. I believe that the reference to the fact that NLBIA are not governed by international law is indispensable here.

[1] See DC1: Settlement of Disputes to which International Organizations are parties, Conclusion 1: Identification of customary international law, General principles of law, Subsidiary means, Peremptory norms of general international law (jus cogens)

[2] As has been already suggested in the past, see Third Report on non-legally binding international agreements, para. 45.

[3] Ibid.

Mr. Chair,

On **draft conclusion 3**, I recommend adding the word "and" between numerals (b) and (c) of paragraph 1, as I understand that being in writing, of international nature and concluded between subjects of international law are cumulative and not disjunctive conditions for the Draft Conclusions to apply.

Furthermore, on paragraph 2, I can support the current formulation subject to a robust commentary which clarifies what is meant by sub-State authorities. However, I do not concur with the SR that agreements signed by ministries fall automatically under paragraph 1, and that paragraph 2 should cover State authorities other than ministries. That is so because oftentimes ministries or other governmental agencies conclude NLBIA within the ambit of their own competence and not on behalf of the government of which they are a part as a whole, or without the knowledge of the organ charged with the foreign relations of the State. In this case, which may amount to a significant number of NLBIA in practice, considering them as included in paragraph 1 can be misleading. In addition to inter-ministerial agreements, I recommend that the commentary to paragraph 2 addresses other governmental agencies at the national level and sub-national level when a State has two or more territorial units, but also cities, and whether agreements signed by public companies other than contracts are or not included in this category. More fundamentally, the approach taken in paragraph 2 requires caution. Introducing sub-State authorities into this draft conclusion — which I support in principle — creates a possible ambiguity that risks inadvertently enlarging our discussion into the highly complex realm of legal effects and attribution; and we must be careful not to adopt language that could blur the established parameters of international legal personality.

Mr. Chair,

At the outset, regarding **draft conclusion 4**, I am not yet persuaded that a standalone provision on this matter is necessary; and its current placement risks creating interpretative rigidity, rather than providing useful guidance. One possibility would be to merge it with draft conclusion 1 which deals with the "scope".

I am also concerned that the present formulation appears unduly restrictive in its scope. By focusing exclusively on States, it does not adequately reflect the diversity of actors involved in the practice of non-legally binding international agreements. In particular, it overlooks the internal rules, decision-making procedures, and mandates of international organizations, which often play a central role in the negotiation and implementation of such agreements. I believe that broadening the scope would improve both the clarity and the practical utility of the Draft Conclusions.

Mr. Chair,

Draft conclusions 5 and **6** are crucial, if we want these Draft Conclusions to have any practical utility.

I strongly agree with the thrust of draft conclusion 6 that the fact that the parties to an agreement expressly indicate that it is not legally binding under international law is sufficient to identify their intention. More and more NLBIA contain such a proviso, and there is no reason to doubt the intention of the parties when it has been expressly stated, without needing to resort to indicators. It may be worth considering moving up draft conclusion 6 before current draft

conclusion 5. This would assist in showing a clear workflow. First, one aims for a clear expression of intention, and only if this is not possible resort may be had to indicators.

I also agree that whether a NLBIA is binding or not binding depends on the intention of the parties, which in turn varies from agreement to agreement, hence the "case-by-case" analysis proposed by the SR in paragraph 1 of **draft conclusion 5** appears unavoidable. That does not preclude providing for indicators of the parties' intention in the absence of express indication in that respect. I submit that such indicators should be sufficient, non-exhaustive, stated in a non-prescriptive manner and be written with the view to assist States in drafting international agreements not to be legally binding, regardless of the formal final format of the product that the work of the ILC may take. A list following loosely the one at paragraph 105 of the Third Report of the SR, in my view, would do the necessary work, complemented with more detailed commentaries regarding each indicator pursuant to the practice followed by States in that regard or best practices that the Commission could consider putting forward.

Conversely, I do not favor classifying the indicators by reference to the approach followed by the International Court of Justice in its 2025 Gabon/Equatorial Guinea judgment, namely by reference to the terms of the agreement, its context, and the subsequent practice of its parties. As the SR states in paragraph 106 of his Third Report, it is not certain that reducing the relevant indicators to three broad categories would sufficiently highlight the particular role of each of them, nor would it avoid leaving out indicators which are relevant for this type of agreements. Indeed, the classification in Article 31 of the Vienna Convention on the Law of Treaties (VCLT) may not be suitable for NLBIA and, I for one am not yet persuaded that the subsequent practice of the parties to a NLBIA is susceptible of turning a non-legally binding agreement into a legally binding one, that is, a treaty. The negotiation history of Articles 31 and 32 of the VCLT may also warrant considerations of the relative "weight" to be accorded to the various indicators — a question that may ultimately depend on which indicators and/or categories the ILC elects to adopt.

That is not to say that by subsequent practice States may not assume obligations which are aligned with commitments contained in a previously agreed NLBIA. But I am not certain whether such subsequent practice would transform the nature of the agreement or rather give rise to an international obligation which is independent of the agreement. I am also aware of the constitutional problems that this may pose in certain countries where treaties need congressional approval, as the conclusion of NLBIA could be the vehicle used to circumvent internal procedures required to internationally express the consent of the State to be bound by a treaty. I suggest that this category of indicators requires further analysis and a very cautious approach.

Other than that, and whichever structural approach the Commission adopts for this reformulation, we must insert a clear provision stating that these indicators are "without prejudice to the evolving practice of States." This could be done under draft conclusion 1 if it is merged with draft conclusion 4.

On the text of **draft conclusion 6**, I will only say that there appears to be a tension between, on the one hand, the sufficiency and priority accorded to express intent, and on the other, the proposal to qualify the provision with the adverb "generally". Allowing objective indicators to be considered even in the presence of clear express intent risks undermining the very primacy that the draft conclusion seeks to recognize. Therefore, I do not support adding it.

Mr. Chair,

While I do not oppose the Commission addressing the possible legal effects of NLBIA, I urge the SR to address the issue with utmost caution as in the pursuit of legal clarity we may run the risk of depriving States of a type of instrument that is being increasingly used in their mutual interaction in a fast-moving, highly specialized, globalized world. Having advocated in the past for the benefits of Coke Zero, after having listened to the extensive debates in the Sixth Committee, I have come to realize that even unsweetened beverages can make you gain weight. If that is the case, and NLBIA can indeed produce some legal effects, albeit indirect, there is no point — and it may in fact be unwise — to sweep the issue under the rug, and we should instead address it squarely. But in doing so, we should, again, do it cautiously and focus on established law rather than promoting the progressive development of an area of the law that is still evolving. I submit that we can do so in general terms, by stating what are the possible indirect implications that NLBIA may have without addressing those possible implications in detail in the Draft Conclusions, since these effects are related to other areas of international law. The same goes for other issues that the SR is suggesting addressing, namely to the extent that good faith must be observed in the conclusion of NLBIA and that States and other actors shall not in so doing violate or derogate from peremptory norms of international law.

Conversely, I am reluctant to deal with the issues that the SR alludes to in paragraph 196 of his Third Report, namely to examine whether, or to what extent, the rules applicable to the sources of international law and in particular to treaties (rules on adoption, amendment, interpretation, suspension or termination) could potentially apply in certain cases, by analogy, to NLBIA, as these are issues that risk blurring the distinction between legally and non-legally binding agreements.

Mr. Chair,

If we manage to address the indicators this year, I suggest that the SR addresses all remaining issues in his next Report with the view to completing the first reading of these Draft Conclusions in the current quinquennium with the current composition of the Commission.

To conclude, I would like to once again acknowledge and encourage SR Forteau to keep up his excellent work.

Thank you, Mr. Chair.