

Statement by Mario Oyarzabal*

**on the First Report on Non-Legally Binding International Agreements
by Mathias Forteau, Special Rapporteur
(A/CN.4/772, 21 June 2024)**

**International Law Commission – 75th Session
10 July 2024**

Original: Spanish

Thank you Mr. Chair, and good morning to everyone.

Mr. Chair,

I am a firm believer that rules — even unwritten ones — must be respected. Hence, never in these two years have my plenary statements gone beyond the recommended 20 minutes. However today, I would seek your indulgence and that of the Commission, to take just a few more minutes to be able to make all the observations that I think are important and may assist the Special Rapporteur (SR) to have a clear understanding on what are my views on this important topic.

Mr. Chair,

Let me start my intervention by sincerely thanking and congratulating the SR on the topic of non-legally binding international agreements, Mathias Forteau, for his excellent first Report. The Report is well-drafted and extremely well-researched, and it provides us with an impressive basis to start our discussion on the topic. Allow me to acknowledge in this respect, the painstaking effort by the SR to reflect and take account of the views of States, doctrine and case law of the different regions and legal systems, which I encourage to continue doing in his future work.

My statement will consist of two parts. First, I will offer some general comments on the topic and the Report. Afterward, I will address the relevant proposals in chapters VI to X.

Mr. Chair,

I will start by making six — mostly short comments — of a general nature.

First, non-legally binding international agreements are not a new phenomenon. The importance of these types of agreements has been discussed extensively in the international arena and they

* I thank Irene Milano and Olivia González for their research assistance.

are widely used in practice. Several learned institutions such as the *Institut de Droit international*, the Inter-American Juridical Committee, and the CAHDI (the Committee of Legal Advisers on Public International Law of the Council of Europe) have done valuable work on the topic, upon which the International Law Commission can build, so as to give further clarity on these agreements' "legal" regime, which has the potential of positively impacting international relations.

Therefore, despite doubts expressed by some countries—notably Argentina—in the Sixth Committee, about the ILC taking up this topic, I agree with the ongoing effort to address in a comprehensive manner what so far has been done inorganically by the Commission in the context of other more or less related topics.

Second, in developing this topic, the ILC must familiarize itself and be acutely aware of the practice of States, more perhaps than in other topics, as the wrong approach and content of the final product runs the risk of prejudging the will of the parties in an international agreement regarding its binding or non-legally binding nature, and of constraining the practice of States who are making increased use of this type of agreement precisely because of the flexibility that they offer.

Third, it follows from the above the need that the Commission "focus[es] on the practical aspects of the present topic, without getting lost in exclusively theoretical considerations — however interesting they may otherwise be", as the SR acknowledges in paragraph 4 of the Report, with which I cannot agree more. I think that the Commission should not lose sight of this objective as we embark on the development of substantive draft provisions and decide on the format of our final product.

Fourth, I also agree with the SR that non-legally binding international agreements are not treaties which are governed by international law. Conversely, non-legally binding international agreements are not governed by international law.

Therefore, extreme caution should be taken by the Commission when borrowing from or drawing parallelisms between the law of treaties and non-legally binding international agreements. I cannot emphasise this enough: treaties are governed by international law and create rights and obligations under that legal system; non-legally binding agreements are not governed by international law and do not create rights and obligations under international law. They are not "non-legally binding" because they are not enforceable, or because a claim could not be brought by one party against the other party to such an agreement. They are non-legally binding under international law, either because they are of a political nature or because they come under the domestic laws of the States or entities which are parties to an agreement.

Hence my reservations with the views expressed by the SR in paragraph 138(d) in which he propounds that consideration should be given to the (potential) legal effect of non-legally binding agreements for the purposes of interpreting other international rules, and in paragraph 140 in which he proposes that "draft conclusions would indeed be the most appropriate

outcome [because] the present topic is a continuation of, or is linked with, the Commission's recent work on the sources of international law, for which the form of draft conclusions was chosen". As non-legally binding agreements are not treaties, let alone a source of international law, I reiterate my concern about any such parallelism.

The ILC should be very wary not to create a legal regime applicable to non-legally binding international agreements which mirrors the treaty regime and in so doing, elevates non-legally binding international agreements to the level of international law or quasi-international law. That should be avoided at all cost.

Fifth, and pursuant to my comments 1 to 4 above, I believe that the work of the Commission on this topic should be oriented to assisting States — which increasingly have recourse to non-legally binding international agreements to avoid entering into a treaty and being bound by international law — on how to do so. While having clarity on the differences between a treaty and a non-legally binding international agreement will be useful — and a discussion on those differences may be necessary and indeed unavoidable — drawing criteria between treaties and non-legally binding international agreements, as the SR seems to propose in paragraph 143(b), runs the risk of prejudging over the binding or non-legally binding nature of the innumerable agreements concluded worldwide before the ILC undertook its current work, and whose characterization as a treaty or as a non-legally binding international agreement can only be determined upon the examination of each individual agreement.

Hence the importance, in my view, that the work of the ILC is forward-looking and oriented at giving States practical guidance as to what issues they should take account and be aware of as they prepare to agree on an agreement which is not intended to create binding rights and obligations under international law or give rise to their international responsibility in the future.

Sixth and last, and partly for the concerns expressed above, I believe that the Commission should avail itself of some time to formally or informally discuss the future of its work on this topic in the coming weeks — taking advantage of the SR's decision not to propose text for adoption in the current session — which I commend and think that should be emulated in all future topics. The orientation of the future work and end product of the Commission should be the primary object of those discussions.

Mr. Chair,

I move now to the relevant substantive questions posed by the SR in his Report.

On chapter VI, I will only say that, while some consultation of the jurisprudence and the doctrine may be useful, it is State practice and the legal position taken in particular by States with regard to non-legally binding international agreements what should be the main — not to say the exclusive — focus of our attention. I therefore agree with the SR's proposal in paragraphs 76 to 83 to examine examples of non-legally binding international agreements, the

domestic practices concerning non-legally binding international agreements, and any position taken by States with respect to their nature, regime or effects under international law.

On chapter VII, I can go along with the term “agreements” as it appears to be the one most generally used in international and domestic practice. The expression “non-legally binding” that qualifies “agreements” should — I hope — alleviate concerns about any confusion with treaties, which are legally binding under international law.

I also agree that only “international” agreements of this type should be the focus of our work, understood as those entered into between States, between States and international organizations, between international organizations, and between administrative authorities, federated States, or cities or central banks of different countries.

It is the “subjects” to an agreement and not the “applicable law” which makes a non-legally binding agreement international or domestic since, as I said previously, a non-legally binding “international” agreement is not governed by international law but may come under the domestic laws of the respective States. Obviously, an agreement concluded between the domestic entities of a single State should be excluded as the matter falls within the domestic jurisdiction of that State and entirely outside the scope of international law.

Let me emphasise that I see no good reason to exclude inter-institutional agreements, between substate entities of different countries, from the scope of our work. These are the most numerous nowadays, and not including these seems counter-intuitive as it is with regard to inter-institutional agreements — which are often negotiated and signed without the agreement or the knowledge of the ministries of foreign affairs — where the problem presents the most. I encourage the SR to examine this question by reference to relevant examples in his next Report.

This brings me to chapter VIII and the identification of criteria for distinguishing non-legally binding international agreements from treaties.

I agree with the SR that the intention of the parties — not to bind themselves under international law, as stems from the text of the agreement, should be the relevant factor. State consent being a fundamental principle of international law on which the entire international legal system rests, a State should not be bound by an agreement to which it did not intend to be bound by. It follows that only the parties to the agreement and no judicial body has the power to “re-categorize” a non-legally binding agreement into a treaty or vice-versa, when the parties agreed on the binding or non-binding nature of an agreement. Different from this is when the parties to an agreement disagree on its legally binding or non-binding character and the interpretation of the agreement is the object of a judicial proceeding.

Moreover, I believe that drawing a list of “indicators” of the intention of the parties to enter into a non-legally binding international agreement, as proposed by the SR in paragraph 122, would provide States with useful practical guidance, and I strongly encourage the SR to further examine the practice of States to identify what those indicators may be. However, we should

not lose sight of the fact that an international agreement is binding or non-binding depending on the will of the parties to be bound or not to be bound by it under international law. Indicators cannot and should not prejudice nor override the will of the parties when entering into these agreements, but rather contribute objectively to the determination of the parties' will.

On chapter IX, and I already made it clear, I wholeheartedly agree with the SR in paragraph 129 that non-legally binding international agreements are not governed by the law of treaties. In fact, as I also said before, non-legally binding international agreements are not governed by international law, full stop.

This is not to say that in concluding or implementing non-legally binding international agreements States can violate international law. International law always imposes limits to the conduct of States, either acting unilaterally or jointly with other States. But this does not transform non-legally binding international agreements into legally binding agreements under international law.

States are bound by the prohibition of the violation of *jus cogens* norms when they conclude non-legally binding international agreements, not because Article 53 of the Vienna Convention on the Law of Treaties says so, but because a peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted. This Commission has affirmed the general nature of peremptory norms in its Draft Conclusions on Identification and Legal Consequences of Peremptory Norms of General International Law (*jus cogens*) in 2022. A State or States must respect peremptory norms always.

The same may be said of other treaty or customary rules binding the parties, which States cannot derogate from through an international agreement that is non-legally binding.

Mr. Chair,

For the sake of brevity, I will jump to section C of chapter IX which addresses the "(Potential) legal effects of non-legally binding international agreements". I agree with the SR in paragraph 133 that this is "One of the thorniest and most sensitive questions — given its significant practical and political implications".

As the SR recalls in footnote 265, when the 35 countries of the American continent were asked whether a non-binding agreement could have legal effects (e.g., giving rise to a claim of *estoppel*), in the context of the work that the Interamerican Juridical Committee was performing on the subject, "none of the Member State responses admitted [that] possibility". "On the contrary, the responses addressing the question were uniformly of the view that a non-binding agreement cannot, by definition, generate any legal effects" (CJI/doc.553/18, para. 44).

I myself am open minded to discuss the potential legal effects listed by the SR in paragraph 138, with the exception of numeral (d) as I believe that the use of non-legally binding

agreements as a means of interpretation of a treaty is a matter pertaining to the law of treaties and addressing it here will only create confusion. It would also introduce in our discussions the question of whether a non-legally binding international agreement might be binding in certain contexts.

In any event, any consideration of the potential legal effects of non-legally binding international agreements should be carried out upon receipt of the responses of UN member States to a properly tailored questionnaire asking whether a non-legally binding international agreement could have legal effect, and if so, what those legal effects are precisely. I would strongly caution here against entering into a theoretical debate and rely on doctrine and jurisprudence, when it is the views and the practice of States what must be the ultimate consideration.

Mr. Chair,

Finally, on chapter X relating to the form of the outcome of our work, I reiterate that guidelines and not conclusions is the one I favoured for the reasons that I already elaborated upon. Also, and against the SR's better judgement, I do think that States may benefit from best practices, model clauses or other recommendations to the draft guidelines, and I would encourage the Commission to consider this possibility.

Mr. Chair,

To conclude, I would like to quote a colleague with whom I had the privilege to exchange views on the topic. He said that non-legally binding international agreements are like Coke Zero. People drink it because it doesn't make you gain weight. If it does, then why not go for the real thing and drink Coke Original Taste instead. Similarly, States have recourse to non-legally binding international agreements — among other reasons — to avoid creating the international legal rights and obligations and effects of a treaty; and the Commission would be well advised not to deprive States of a flexible tool for the conduct of their international relations or face outright rejection in the Sixth Committee.

Mr. Chair,

These considerations bring me to the end of my statement.

I would like to conclude by thanking once again the Special Rapporteur for his outstanding work. The SR's Report is an example of what a report should be: concise and to the point; well researched; representative in terms of the State practice, the doctrine and case law of the different regions and legal systems and the different languages; and posing all the relevant questions without precluding any outcomes.

Thank you Mr. Chair, and I apologize once again for the extension of my Statement. I thank you all for your time and attention.