The interpretation of multilingual tax treaties

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CHAPTER 6 – THE CORRECTION OF ERRORS: ARTICLE 79 VCLT

1. Introduction

Both Articles 33 and 79(3) VCLT deal with the (apparent) lack of concordance between two or more authentic texts of a treaty. However, while the former concerns *prima facie* differences between authentic texts that must be removed by means of interpretation, the latter deals with apparent discrepancies in meaning among the authentic treaty texts[1876] caused by an error in one of such texts, which must be corrected in accordance with one of the procedures specified in Article 79(1) and (2) VCLT.

Errors affecting treaties may be classified as (i) factual errors and (ii) technical errors in the treaty text(s).[1877]

Factual errors consist of misunderstandings of facts and circumstances relevant for the treaty's existence and application, as well as disagreements between the contracting States on the meaning (of certain parts) of the treaty. Factual errors may be broadly divided into (a) non-fundamental errors, which may be overcome by means of interpretation;[1878] and (b) fundamental errors related to matters constituting the conditions to the parties' agreement to be bound by the treaty. The latter errors may invalidate the contracting States' consent to treaties.[1879]

Technical errors are mere inaccuracies in the text(s) of a treaty that are recognized as such by the parties and must consequently be rectified by mutual consent.

Article 79 VCLT deals with technical errors. According to paragraph 1, where the parties find and agree upon the existence of an error in the authenticated text(s) of the

[1876] Under the VCLT system, the authentic treaty texts, in the parties' intention, always have the same meaning.
[1877] On the distinction between different kinds of errors affecting treaties, see the commentary on Article 14 (Absence of error) of the First Report on Law of Treaty submitted to the ILC by Lauterpacht, acting as Special Rapporteur (YBILC 1953-II, pp. 153-154); see also M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 178-179.
[1878] Such errors may also consist of discrepancies between the various authentic texts of a treaty. In such a case, however, the error must be distinguished from a technical error since (i) the discrepancy is not recognized as a mere error in the wording of the treaty by all the parties and therefore (ii) the apparent difference of meaning between the authentic texts must be removed by means of interpretation (i.e. by applying Articles 31, 32 and 33 VCLT).
[1879] On the possibility that a treaty is found to not bind a contracting State, where its consent to be bound was based on an error, see Article 48 VCLT, which specifies that the error must relate to a fact or situation that was assumed by a contracting State to exist at the time when the treaty was concluded and formed an essential basis of that State's consent to be bound by the treaty. See also, among others, R. Jennings and A. Watts (eds.), *Oppenheim's International Law. Volume I. Peace* (London: Longman, 1992), pp. 1288-1289; A. MacNair, *The Law of Treaties* (Oxford: Clarendon Press, 1961), p. 211. Lauterpacht described these kinds of errors as mistakes that "go to the root of the matter and affect the essential aspect of the treaty" (see YBILC 1953-II, p. 154).

treaty, such an error must be corrected. Paragraph 1 also put forward three possible techniques of correction,[1880] which may in any case be derogated from by the parties. The correction has effect *ex tunc*, unless the parties decide otherwise.[1881]

Paragraph 3 makes clear that the above rules on the correction of errors also apply where two or more authentic texts exist and there is a lack of concordance among such texts that the parties agree should be corrected.

2. Historical background and preparatory work

In the First Report on the Law of Treaties submitted to the ILC by Sir Humphrey Waldock, Articles 24 and 25 dealt specifically with the correction of errors in the treaty text(s).[1882] In the commentary thereto, the Special Rapporteur pointed out that the formulation of those provisions was primarily based on the precedents cited in the Hackwort's *Digest of International Law*,[1883] due to the absence of any tentative article dealing with the correction of errors both in the Reports on the Law of Treaties prepared by the previous Special Rapporteurs and in the Draft Convention on the Law of Treaties with Comments prepared by the Harvard Research in International Law.[1884]

The relevant text of draft Article 24 read as follows:[1885]

> *Article 24.*
> *The correction of errors in the texts of treaties for which there is no depositary*
> 1. Where a typographical error or omission is discovered in the text of a treaty for which there is no depositary after the text has been signed, the signatory States shall by mutual agreement correct the error […]
> 2. The provisions of paragraph 1 shall also apply *mutatis mutandis* to any case where there are two or more authentic texts of such a treaty which are discovered not to be concordant and the parties are agreed in considering that the wording of one of the texts is inexact and

[1880] They are: (i) initialed corrections made in the original text of the treaty; (ii) corrections set out in a specific instrument (to be executed or exchanged); (iii) corrections in a new treaty text, which is executed by the same procedure as in the case of the original text.
[1881] See Art. 79(4) VCLT.
[1882] YBILC 1962- II, pp. 80-81. The relevant difference between Articles 24 and 25 consisted in that the former dealt with treaties without depositaries and the latter with treaties with depositaries. For an exhaustive review of the legislative history of Article 79 VCLT, see S. Rosenne, *The Law of Treaties – A Guide to the legislative history of the Vienna Convention* (New York: Oceana Publications, 1970), pp. 398-401.
[1883] G. H. Hackworth, *Digest of International Law*. *Volume V* (Washington: United States Government Printing Office, 1943), pp. 93-101. In addition to this source, the Special Rapporteur referred to the information contained in the *Summary of the Practice of the Secretary-General as Depositary of Multilateral Agreements* with regard to treaties with a depositary. See YBILC 1962-II, pp. 80-81 and YBILC 1962-I, p. 182, para. 60 and p. 185, para. 87.
[1884] Research in International Law, "Draft Convention on the Law of Treaties with Comments", 29 *American Journal of International Law - Supplement* (1935), 653 *et seq.*
[1885] With reference to the specific issue of multilingual treaties, Article 25 is not different, as a matter of substance, from Article 24. The only significant departures relate to the procedure to be followed for modifying the text(s) of the treaty, due to the existence of a depositary.

requires to be amended in order to bring it into harmony with the other text or texts.

According to the commentary to Article 24, the need to introduce articles dealing with the correction of errors was due to the frequency with which errors and inconsistencies were found in the treaties' texts. More importantly, the commentary noted that the correction of such errors and inconsistencies essentially appeared to be a matter for agreement between the parties.[1886]

The ILC discussed the topic for the first time at its 657th meeting, held on 5 June 1962. The discussion was centered mainly on defining the types of errors that could be corrected by means of the procedures listed in the draft articles.

At the outset, Mr Lachs pointed out the need for a modification of the scope of Articles 24 and 25, due to the possible existence of errors other than typographical errors or omission. In that respect, according to Mr Lachs, the issue at stake was strictly connected to that concerning the distinction between changes in the text of a treaty that have to be treated as corrections as opposed to those that have to be considered amendments and reservations. As example, he referred to the case of the 1929 Warsaw Convention,[1887] where the term "transporteur" was used (confused) for the term "expéditeur" and the parties to the treaty agreed on the correctness of the latter. Mr Lachs recalled that when that convention entered into force all the contracting parties were obliged to ratify the correction. The Senate of the United States, however, charcaterized the change as a reservation and the United States ratified it as such.[1888]

Mr Bartos agreed with Mr Lachs's the statement that not only typographical errors and omissions may occur in treaties. He labeled errors other than those of a typographical kind "substantive" errors. To illustrate the issue, he made reference to two cases. The second case related to the Agreement concerning minor frontier traffic between Italy and Yugoslavia of 3 February 1949.[1889] In an annex of that agreement, a list of towns excluded from the frontier traffic had been erroneously substituted for a list of the towns between which the traffic was allowed. Interestingly, Mr Bartos affirmed that, "although that error had been purely technical, the results had exceeded the scope of typographical errors or omissions", thus meaning that (i) technical errors include typographical errors and omissions, but should not be limited thereto and (ii) substantive errors may be of a technical nature. However, he did not put forward a detailed or comprehensive definition of "technical errors".[1890]

Mr Gros also agreed that the procedures to be used in the case of correction of errors should not be limited to typographical errors or omissions. In that respect, he gave the example of frontier treaties in which the wrong elevations had been referred to in the

[1886] See YBILC 1962-II, p. 80.
[1887] Convention for the Unification of Certain Rules regarding International Air Transport, concluded in Warsaw on 12 October 1929.
[1888] See YBILC 1962-I, p. 183, para. 64.
[1889] United Nations *Treaty Series,* Vol. 33, p. 142.
[1890] See YBILC 1962-I, p. 183, para. 65.

text through errors in map reading.[1891]

Mr Jiménez de Aréchaga warned the ILC about the possible risks connected to the inclusion of substantive errors in the scope of Articles 24 and 25. He stated that the ILC should have been careful not to include the kind of errors vitiating the consent to be bound and, therefore, capable of invalidating the treaties. In that respect, where the scope of Article 24 had been broadened to include substantive errors, the structure of the article could have proved unsatisfactory. In particular, the phrase "States shall by mutual agreement correct the error", in the context of Article 24(1) as a whole, could have been read as meaning that any contracting party claiming the existence of an error in a treaty provision (e.g. the incorrect description of a river) could have considered itself not bound by such a provision. Therefore, according to Mr Jiménez de Aréchaga, before broadening the scope of Article 24, the ILC should have made clear in the text thereof that the agreement of the parties on the existence of the error was a prerequisite to its correction.[1892]

Sir Humphrey Waldock, in replying to the above comments, stated that it was of primary importance to distinguish between the case of correction of errors, on the one hand, and that of amendments to the treaty, on the other. According to the Special Rapporteur, when dealing with substantive errors, it was difficult to draw a line between these two cases and much depended on whether or not the parties agreed that an error had in fact occurred. In this context, difficulties mainly arose where the consensus of the parties upon the existence of an error was lacking and, especially in cases of misuse of words in different authentic texts, the issue verged on the subject of amendments. Therefore, according to Sir Humphrey Waldock, the ILC should have proceeded very cautiously in extending the scope of Article 24(1).[1893]

Mr Paredes found that the text of Article 24 could be amplified to deal also with substantive errors altering the relationship between the parties and jeopardizing the very existence of the treaty. However, he made clear that whenever the parties did not agree upon the existence of a substantive error in the text, the issue should be decided by the International Court of Justice.[1894] It should be noted that in the first part of his comment Mr Paredes, as well as Mr Gros and Mr Tunkin in their subsequent interventions,[1895] seemed to use the term "purely technical errors" as a synonym for "typographical errors".

Ultimately, Mr Lachs and Mr Tunkin pointed out that the prerequisite for the agreement of the parties upon the existence of an error seemed already present in the text of Article 24(1) and, therefore, they agreed on the possibility to extend the scope thereof to include the correction of any kind of error.[1896]

When the discussion turned to the content of Article 25, the focus moved to the possible

[1891] See YBILC 1962-I, p. 183, para. 67.
[1892] See YBILC 1962-I, pp. 183-184, para. 70.
[1893] See YBILC 1962-I, p.184, para. 75.
[1894] See YBILC 1962-I, p.184, paras. 76-77.
[1895] See YBILC 1962-I, p.184, paras. 78 and 81.
[1896] See YBILC 1962-I, p.184, paras. 80 and 81.

lack of concordance between the various texts of multilingual treaties.

Sir Humphrey Waldock, in replying to a comment of Mr de Luna, said that errors arising from the lack of concordance were particularly frequent and could involve points of substance. In those cases, where the parties agreed on the existence of such errors, the procedure for correction should be the same laid down for "technical errors".[1897]

Mr Rosanne suggested the possible need to distinguish between the faulty concordance of the language versions (i.e. texts) actually negotiated and the lack of concordance of the translated versions, which was more likely to be due to inadvertence.[1898] In that respect, however, Mr Bartos pointed out that the authentic texts in other languages were not regarded as translations, which seemed to suggest the artificiality of the distinction drawn by Mr Rosenne.[1899]

Finally, Mr Verdross said that the problem of technical errors, on the existence of which the parties could presumably easily reach an agreement, was quite different from that created by the lack of concordance between the various language versions (i.e. texts) of a treaty. According to Mr Verdross, such lack of concordance could have been to some extent deliberate and might give rise to difficulties of interpretation. He concluded that the issue of the interpretation of the text of a treaty drawn up in several languages was an entirely different one from that of the correction of errors in the text.[1900] The Special Rapporteur agreed on that the lack of concordance between authentic texts drawn up in several languages constituted a serious problem, which often also involved questions of interpretation.[1901]

At the end of the discussion, Mr Pal (Chairman) proposed to refer Articles 24 and 25 to the Drafting Committee for redrafting them in light of the comments made during the debate. The ILC so agreed.

The redrafted version of Article 24 was re-introduced for discussion at the ILC's 661st meeting, held on 13 June 1962.[1902] The relevant parts thereof read as follows:

> *Article 24.*
> *The correction of errors in the texts of treaties for which there is no depositary*
> 1. Where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the interest states shall by mutual agreement correct the error […]
> 2. The provisions of paragraph 1 shall also apply where there are two or more authentic texts of a treaty which are not concordant and where it is proposed to consider the wording

[1897] See YBILC 1962-I, p.185, para. 90. Note that the term "technical errors" seems here to be used by Sir Humphrey Waldock as a synonym for "typographical errors".
[1898] See YBILC 1962-I, p.185, para. 92.
[1899] See YBILC 1962-I, p.185, para. 93.
[1900] See YBILC 1962-I, p.185, para. 94.
[1901] See YBILC 1962-I, p.185, para. 95.
[1902] The redrafted text of Article 25 (dealing with the correction of errors in the texts of treaties for which there is a depositary) was re-introduced for discussion at the ILC's 662nd meeting, held on 14 June 1962 (see YBILC 1962-I, pp. 217 *et seq*., paras. 1-12). No issue relevant for the present study was raised during those discussions.

of one of the text inexact and requiring to be corrected.[1903]

From a comparative analysis of the original and the redrafted articles, it can be seen that the scope had been broadened to encompass not only the correction of typographical errors and omission, but also errors of substance that are "discovered" in the treaty texts and the correction of which is agreed upon by the parties. With specific reference to multilingual treaties, it was clarified that the same procedure provided for the correction of errors discovered in a single text was also applicable in the case of discordance between two or more authentic texts. Furthermore, the text of paragraph 2 was simplified. Apart from that, as the same Special Rapporteur pointed out, the redrafted article did not fundamentally differ from the original.[1904]

During the following discussion, Mr Bartos pointed out that Mr Rosenne and he understood that the new text of Article 24(2) also covered discrepancies between the different versions of a treaty drawn up in several languages. He therefore asked the Special Rapporteur if he agreed to insert an explanation to that effect in the commentary, which would eliminate the need to lay down the rule in the article itself.[1905]

Mr Liang, however, stated that the wording of paragraph 2 was still unsatisfactory. In particular, he said that he was not quite clear as to the force of the expression "it is proposed". In that respect, he suggested modifying the second part of that paragraph to read "and where it is considered that the wording of one of the texts is inexact and requires to be corrected".[1906] In replying to such a point, Sir Humphrey Waldock noted that, in his original draft, he had stressed the need for the parties to agree that an error had occurred, to avoid the danger of a party unilaterally declaring the text inexact and using that as an excuse for not accepting the treaty. He concluded that, in the Drafting Committee's view, the reference to the mutual agreement of the parties expressly provided for in paragraph 1 extended to paragraph 2 and the proposal referred to in the second part of the paragraph had to be a "formal" one. Accordingly, he suggested replacing the second part of paragraph 2 with the expression "and where it is proposed to correct the wording of one of the texts".[1907]

At the end of the discussion, Mr Pal (Chairman) proposed to refer once again Article 24 to the Drafting Committee for redrafting it in light of the comments made during the debate. The ILC so agreed.

The redrafted version of Article 24 was presented at the ILC and adopted thereby without any discussion at its 668th meeting, held on 26 June 1962.

The relevant parts of Article 24, as adopted by the Commission, read as follows:[1908]

[1903] See YBILC 1962-I, pp. 212-213, para. 11.
[1904] See YBILC 1962-I, p. 213, para. 12.
[1905] See YBILC 1962-I, p. 213, para. 16.
[1906] See YBILC 1962-I, p. 213, para. 19.
[1907] See YBILC 1962-I, p. 213, paras. 20 and 22.
[1908] See YBILC 1962-I, pp. 259-260, para. 48.

> *Article 24.*
> *The correction of errors in the texts of treaties for which there is no depositary*
> 1. Where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the interested states shall by mutual agreement correct the error […]
> 2. The provisions of paragraph 1 shall also apply where there are two or more authentic texts of a treaty which are not concordant and where it is proposed to correct the wording of one of the texts.

In the process of drafting the Report of the Commission to the General Assembly, covering the work of the ILC during its fourteenth session, the Commission made a few minor changes, leaving the substance of the article untouched, and renumbered it as Article 26.[1909]

The commentary included in the Report of the Commission to the General Assembly made clear that paragraph 1 dealt with the corrections of "errors in the text" and that such errors might be due either to typographical mistakes, or to a misdescription or mis-statement due to a misunderstanding. As a result, the correction could also affect the substantive meaning of the texts authenticated. In this respect, the commentary clarified that where the contracting States were not agreed as to the text being erroneous, a dispute arose and the "mistake" was of a kind that belonged to another branch of the law of treaties.[1910] Only where the contracting States were agreed as to the existence of an error was the matter simply one of correction of error, therefore falling under Article 26.[1911]

The commentary went on to affirm the applicability of the same article (and techniques of correction) in cases of rectifications of discordant authentic texts drawn up in two or more languages.[1912] In addition, it pointed out that the ILC noted that the issue may also arise of correcting not the authentic text itself but (non-authentic) versions of the treaty prepared in other languages. According to the ILC, however, this was not a matter of altering an authentic text of the treaty and, therefore, it was unnecessary for the article to cover the point. In these cases, the contracting States could modify the translation(s) by mutual agreement without any special formality.[1913]

In response to the comments put forward by the Japanese, Swedish and United States governments, Sir Humphrey Waldock proposed a new draft of Article 26 in his Fourth Report on the Law of Treaties.[1914] The relevant part thereof read as follows:

> *Article 26.*

[1909] See YBILC 1962-II, p. 183.
[1910] I.e. that of interpretation and, under a different perspective, invalidation of treaties.
[1911] See YBILC 1962-II, p. 183, para. 2 of the commentary.
[1912] See YBILC 1962-II, pp. 183-184, para. 3 and para. 5, first sentence, of the commentary.
[1913] See YBILC 1962-II, p. 184, para. 5 of the commentary.
[1914] With regard to both the governments' comments and the Special Rapporteur's observations and proposals, see YBILC 1965-II, pp. 60-61.

> *The correction of errors in the texts of treaties for which there is no depositary*
> 1. Unless otherwise agreed between the interested States, where an error is discovered in the text of a treaty for which there is no depositary after the text has been authenticated, the error shall be corrected […]
> 2. Paragraph 1 applies also where there are two or more authentic texts of a treaty which are not concordant and where it is agreed to correct the wording of one of the texts.

For the purpose of the present analysis, it is noteworthy that the reference to the agreement of the parties on the correction of the wording of two or more discordant authentic texts was made explicit in paragraph 2. In contrast, the reference to the agreement of the parties as to the existence of an error and its correction was not unambiguous in the text of new paragraph 1. Finally, the Special Rapporteur reduced the paragraphs of the article from 4 to 2, thus partially satisfying the instances of curtailment of the provisions of Articles 26 and 27 put forward by the Japanese government (which, additionally, had proposed to consolidate Articles 26 and 27 in a single article).

The new text was discussed by the ILC at its 802nd meeting, held on 15 June 1965.

Mr Castrén suggested, as a matter of form, following the Japanese proposal of consolidating the content of the original Articles 26 and 27 in a single article, while retaining the substance of the new articles drafted by the Special Rapporteur.[1915] Mr Ruda and Mr Tunkin also supported the proposal for an amalgamation of Articles 26 and 27.[1916]

Similarly, Mr Elias called for more simplification in the text of Articles 26 and 27,[1917] while Mr Rosanne warned the ILC of the physiological danger deriving from having many provisions dealing with the various manifestations of error.[1918] Mr Ago agreed on such points.[1919]

The discussion then turned once again on the scope of Articles 26 and 27, i.e. to which kind of errors those articles should apply. The issue was raised by Mr Reuter, according to whom Article 26 was not comprehensible to anyone unfamiliar with the ILC's previous proceedings and the meaning of the term "error", as used in that article, was also not very clear. He recalled that the only definition of such a term was given in Article 34(4),[1920] which referred to an "error in the wording" as opposed to an error of substance, but concluded that also such a reference was unclear. According to Mr Reuter, the current text of Article 26 could be interpreted as also covering much more serious errors than typographical errors. Since different categories of error raised widely different problems, some of which could prove very serious (such as in the case of errors

[1915] See YBILC 1965-I, p. 186, para. 8.
[1916] See YBILC 1965-I, p. 187, paras. 18, 20 and 33.
[1917] See YBILC 1965-I, p. 187, para. 12.
[1918] In the Special Rapporteur's Fourth Report on the Law of Treaties, the articles dealing with errors were four: Articles 26, 27, 27(bis) and 34. For Mr Rosanne's comment, see YBILC 1965-I, p. 187, paras. 13-14.
[1919] See YBILC 1965-I, p. 187, para. 23.
[1920] With regard to the text of Article 34, dealing with errors invalidating the contracting States' consent to be bound by the treaty, see YBILC 1963-II, p. 195. Article 34(4) read as follows:

> 4. When there is no mistake as to the substance of a treaty but there is an error in the wording of its text, the error shall not affect the validity of the treaty and articles 26 and 27 then apply.

of translation), Mr Reuter suggested that the ILC defer consideration of Articles 26 and 27 and make a careful study of each category of error. He concluded that, in any event, Articles 26 and 27 as they stood did not make it clear that they referred to all kinds of error, so long as the contracting States agreed to correct them. On the contrary, such a scope of Articles 26 and 27 should have been made clear right at the beginning of the articles.[1921]

The other members of the ILC, however, did not share Mr Reuter's position. The Special Rapporteur, in summarizing the discussion that took place on the matter, made clear that Articles 26 and 27 dealt with errors "in expression" (i.e. errors "in the wording", using the expression adopted in Article 34(4)), while Article 34 dealt with errors "in substance". The foremost difference between these two kinds of error was that, with reference to the former, the parties recognized their existence and agreed on their correction, while the same did not hold true with reference to the latter.[1922] The origin or type of the errors (e.g. clerical errors, typographic errors, translation errors, etc.) was not relevant for the purpose of applying Articles 26 and 27, the only decisive criterion being the agreement of the parties as to its existence and correction. Second, as pointed out by Mr Tunkin, Mr Yasseen and Mr Ago, in the case of errors "in expression", the content of the treaty provision was agreed upon by the parties and its unique meaning was not correctly and univocally expressed by the wording of the provision, which therefore needed to be corrected, while, in the case of errors "in substance" affecting the text of a treaty, different parties were attributing different meanings to the same treaty provision, e.g. due to the diverse terms used in two authentic texts of a treaty. As a consequence, the latter kind of error could, in contrast to the former, also vitiate the parties' consent to be bound by the treaty. In such a case, Article 34 was applicable.[1923] Some ILC members, however, agreed that these concepts could be expressed more clearly in the text of the relevant articles than they currently were.[1924]

At the end of the discussion, the Special Rapporteur referred to the distinction between cases involving the correction of errors and those involving the amendment of a treaty: "Even where the parties agreed that the text of the treaty contained some infelicitous expression, which might perhaps be unfortunate because of some political nuance, the case would still be one of error in expression. If, however, the parties admitted that the text was completely correct but merely wished to change it by agreement, the case was really one of amendment and should be governed by the separate provisions on the amendment of treaties".[1925]

Finally, in replying to a comment of Mr Tsuruoka,[1926] Mr Rosenne and Sir Humphrey Waldock clarified that the issue of the correction of an error could arise even after the ratification of a treaty and the provisions of Articles 26 and 27 would apply also

[1921] See YBILC 1965-I, p. 188, paras. 26, 29 and 31.
[1922] See YBILC 1965-I, p. 189, paras. 51-52. See also the concurrent position expressed by Mr Pal (YBILC 1965-I, p. 189, para. 47).
[1923] See YBILC 1965-I, pp. 188-189, paras. 32, 37 and 39.
[1924] See YBILC 1965-I, pp. 188-189, paras. 37, 39 and 51.
[1925] See YBILC 1965-I, p. 190, para. 53.
[1926] See YBILC 1965-I, p. 190, paras. 58 and 60.

in that event.[1927]

The articles under analysis were ultimately referred to the Drafting Committee with a view of shortening them in light of the discussion held.

The discussion was resumed at the ILC's 815th meeting, held on 1 July 1965.

Mr Bartos (Chairman) invited the ILC to consider the new text of Article 26 proposed by the Drafting Committee, which also incorporated the substance of previous Article 27. The relevant parts of new Article 26 read as follows:[1928]

> *Article 26.*
> *Correction of errors in texts or in certified copies of treaties*
> 1. Where, after the authentication of the text of a treaty, the contracting States are agreed that it contains an error, the error shall, unless they otherwise decide, be corrected […]
> 3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which it is agreed should be corrected.

With specific reference to paragraph 3, Sir Humphrey Waldock explained that it dealt with the case, unlike that considered by paragraph 1, in which there was no error in the text, but a lack of concordance between two or more language versions.

Such a clarification, however, seems a bit puzzling to the author. If the parties agree on the existence of a lack of concordance, which they decide to eliminate by modifying one (or more) of the authentic texts, it follows that they also at least implicitly agreed that the modified authentic text(s) was/were unsatisfactory in expressing the concept they agreed upon and that was correctly expressed by the other authentic text(s). The author cannot see any difference between the logical process that leads to the correction in cases dealt with in paragraph 3 and that foreseen in paragraph 1. In both cases, the activity is directed to (i) discovering the presence of a written expression that does not properly convey the concept agreed upon by the parties (the error) and (ii) correcting such a written expression, whether in the single authentic text, solely in some of the various authentic texts, or in all the various authentic texts (the correction of the error).

The text of new Article 26 was adopted by the ILC and Sir Humphrey Waldock and Mr Reuter (acting Chairman of the Drafting Committee) were entrusted with the settlement of few minor drafting issues.

The above text, with some slight modifications, was finally incorporated in Article 79 VCLT, whose relevant parts read as follows:

> *Article 79*
> *Correction of errors in texts or in certified copies of treaties*
> 1. Where, after the authentication of the text of a treaty, the signatory States and the

[1927] See YBILC 1965-I, p. 190, paras. 59 and 62.
[1928] See YBILC 1965-I, p. 276, para. 6.

> contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected […]
> 3. The rules in paragraphs 1 and 2 apply also where the text has been authenticated in two or more languages and it appears that there is a lack of concordance which the signatory States and the contracting States agree should be corrected.

3. Analysis of Article 79 VCLT

The purpose of Article 79 VCLT is to establish methods to rectify errors and inconsistencies found in the authentic texts of the treaty.[1929] The article, however, leaves the contracting States free to decide both whether to proceed to a formal correction of the text and the method of correction to be adopted.[1930]

In order for Article 79 VCLT to be applicable, it is necessary that a two-pronged condition is satisfied: there must be:

(i) a technical error in some of the authentic texts of the treaty that
(ii) all contracting States recognize as such.

The first prong highlights that the focus of the analysis carried out by the parties is on the language expressions encompassed in the text of the treaty and not on some extra-textual element; moreover, it specifies that there must be a technical error, i.e that the treaty text is different from how it should be in order to properly express the meaning attached thereto by the contracting States.

The second prong makes clear that the above-mentioned error is to be recognized as such by all contracting States, i.e. that, according to all of them, some authentic texts do not properly convey the agreed meaning they attached thereto from the outset. Therefore, in order for Article 79 VCLT to apply in relation to a specific error, there must be full agreement among the parties on the concept underlying the language expression containing the error and, hence, on the meaning it conveys.

Where the existence of the above-mentioned error is not agreed upon by all contracting States, the error falls outside the scope of Article 79 VCLT.[1931] In that case, the following scenarios may be hypothesized.

First, all contracting States agree on the meaning that the specific language expression should convey, but, although some of them maintain that language expression does not properly convey such a meaning, others consider that it does and are thus not willing to replace it with a new language expression. Generally, where this scenario occurs, while there is no apparent disagreement among the contracting States on the meaning of the currently used language expression when the prototypical denotata thereof are taken into account, disagreement may arise when non-prototypical cases are assessed as falling within or outside the scope of such an expression. In the latter case,

[1929] See paragraph 1 of the commentary to Article 74 of the 1966 Draft (YBILC 1966-II, p. 272).
[1930] See paragraph 3 of the commentary to Article 74 of the 1966 Draft (YBILC 1966-II, p. 272).
[1931] See paragraph 1 of the commentary to Article 74 of the 1966 Draft (YBILC 1966-II, p. 272).

the disagreement may be removed by means of interpretation under articles 31-33 VCLT.

Second, the contracting States do not agree on the meaning that the language expression should convey and, for that reason, some of them maintain that the language expression does not accurately convey its proper meaning, while others maintain that it does so. In this scenario, there is an issue of interpretation of the language expression currently used in the treaty, which has to be solved in accordance with Articles 31-33 VCLT.

Third, the disagreement on the meaning to be conveyed by the language expression is so relevant that an error invalidating the contracting States' consent to be bound by the treaty might be deemed to exist. Article 48 VCLT will apply to this case.

In light of the above, the statement made by the ILC in paragraph 1 of the commentary to Article 74 of the 1966 Draft (corresponding to Article 79 VCLT), according to which "the correction may affect the substantive meaning of the text as authenticated", appears awkward. The author submits that it should be read in its context as pointing out that the correction might, in extreme cases, alter the *utterance meaning* of the language expression; however, it can never modify the meaning originally attached thereto by the contracting States, since the general effect *ex tunc*[1932] of the correction implies that the contracting States have not intended such meaning to be modified at all by the correction. Moreover, if that were not the case, corrections would mingle with amendments.[1933]

With regard to the type of errors that may be corrected by means of Article 79 VCLT, paragraph 1 of the commentary to Article 74 of the 1966 Draft refers to typographical mistakes, misdescriptions or mis-statements due to misunderstandings.[1934]

With reference to the type of errors specifically governed by Article 79(3), Tabory included among them the lack of concordance due to differences in punctuation, spelling errors, typographical errors, omissions, numeric differences and inaccurate translations.[1935]

These lists, however, are by no means intended to be comprehensive, since, as the analysis of the relevant preparatory works clearly shows, Article 79 VCLT is meant to apply to all technical errors in the text of a treaty recognized as such by the contracting States, no regard being paid to their origin and typology.

Technical errors in the texts of the treaty comprise the lack of concordance between authentic texts drawn up in different languages. Therefore, where the contracting States agree that some authentic texts do not properly convey the agreed meaning of a certain treaty provision, while the others do, the former are corrected in order to better convey such a meaning. As previously stated, there is no substantial

[1932] See Article 79(4) VCLT and paragraph 6 of the commentary to Article 74 of the 1966 Draft (YBILC 1966-II, p. 273).
[1933] Amendments are separately dealt with in Part IV of the VCLT (Articles 39 through 41 thereof).
[1934] See YBILC 1966-II, p. 272.
[1935] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 183-184 and, in particular, footnotes 73, 74 and 75 therein.

difference between the logical process that leads to the correction in cases dealt with in paragraph 3 of Article 79 VCLT and that foreseen in paragraph 1 thereof. In both cases, the activity is directed to (i) discovering the presence of a language expression that does not properly convey the concept agreed upon by the contracting States (the error) and (ii) correcting such a language expression, whether in the single authentic text, solely in some of the various authentic texts, or in all the various authentic texts (the correction of the error).

Finally, it is worth reflecting on the statement by Tabory that "the borderline between the correction of technical errors and the interpretation of discordant meanings in multilingual documents in certain instances, is doubtful and unclear".[1936] The author, in order to substantiate her statement, referred to the case of the correction of the Chinese authentic text of the Convention on the Prevention and Punishment of the Crime of Genocide[1937] and, in particular, to the controversy within the Sixth Committee of the UN General Assembly on whether the amendment of the Chinese authentic text of the Convention constituted a revision or a rectification thereof.[1938]

Tabory's statement may be agreed upon if it is considered to refer solely to the decision-making process by means of which the contracting States assess whether the proposed new text of the treaty conveys the agreed meaning better than the corresponding current authentic text. Undoubtedly, in the course of this process, various interpretative issues come out, such as:

(i) whether the current authentic texts all convey the same meaning;
(ii) whether there is a meaning clearly agreed upon by all contracting States;
(iii) whether the proposed new text of the treaty properly conveys the meaning expressed by the other authentic texts; or
(iv) whether the proposed new text may cause more interpretative difficulties than the current authentic text does.

In particular, a key issue that might emerge in this phase concerns the actual shape of the supposedly agreed meaning of the treaty provision at stake, if such a meaning exists at all.

However, once all contracting States have gone through such a decision-making process, have agreed upon the existence of an error and have corrected it according to the provisions of Article 79 VCLT, the borderline between the correction of technical errors and the interpretation of *prima facie* discordant authentic texts become absolutely sharp, due to the agreed rejection of the old text by the contracting States and their decision to rely solely on the new authentic text[1939] for interpretative purposes. The

[1936] See M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), p. 184 and p. 216, point 6.
[1937] See "Resolutions of the General Assembly Concerning the Law of Treaties: Memorandum prepared by the Secretariat", 14 February 1963, in YBILC 1963-II, pp. 32-35, paras. 144-154.
[1938] With regard to the debate within the Sixth Committee, see "Resolutions of the General Assembly Concerning the Law of Treaties: Memorandum prepared by the Secretariat", 14 February 1963, in YBILC 1963-II, pp. 33-35, para. 153.
[1939] Together with the other languages authentic texts still in force.

borderline is thus drawn by the declared agreement among all contracting States. No longer does an interpretative issue concern the relation between the rejected text and the new text, nor the relation between the former and the other languages authentic texts. The only interpretative issues remaining concern the meaning to be attributed to the various (current) authentic texts and the possible existence of a discordance among the apparent meanings thereof. The existence of such issues, however, logically has nothing to do with any previous or subsequent correction of errors.

Conversely, until the contracting States agree on the existence of an error and correct it under the provisions of Article 79 VCLT any alleged inconsistency existing among the meanings attributable to the various authentic texts is to be resolved by means of interpretation, according to the provisions of Articles 31-33 VCLT. In this respect, the very same fact that the existence of an error is not clear-cut and is still debated among the contracting States makes absolutely clear-cut and uncontroversial the fact that Article 79 VCLT cannot apply, while Article 33 VCLT must.[1940]

[1940] See the issue rose by Tabory in distinguishing the cases where Articles 79 or 33 VCLT would apply (see M. Tabory, *Multilingualism In International Law and Institutions* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1980), pp. 184-185). In this regard, it is interesting to recall that, according to paragraph 1 of the commentary to Article 74 of the 1966 Draft (YBILC 1966-II, p. 272), "[i]f there is a dispute as to whether or not the alleged error or inconsistency is in fact such, the question is not one simply of correction of the text but becomes a problem of mistake which falls under article 45. The present article only concerns cases where there is no dispute as to the existence of the error or inconsistency".