

The Concordance of Multilingual Legal Texts at the WTO: Institutionalizing Best Practices and Lessons Learned

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La poésie, par définition, est intraduisible.¹

I. Introduction

Language and cultural identity are inextricably intertwined.² The primary languages of international law influence its development.³ The language structure may itself influence the development of the law.⁴ Therefore, it should come as no surprise that multilingualism is a sensitive and complex subject in a global organization such as the World Trade Organization (WTO).

This article is the result of the discussions in the WTO Secretariat Workshop on the Concordance of Multilingual Legal Texts and the subsequent meetings with WTO Members and with the WTO Language Services and Documentation Division. The objective of the workshop was to share best practices of different international organizations that use multilingual legal texts, in order to seek ways to improve the WTO processes in the negotiation, drafting, translation, interpretation and litigation phases.

There will always be errors and problems that arise in the drafting and translation process.⁵ This is true for any lengthy written document. In the WTO legal texts, there is a need for full concordance, not simply translation. That is, there must be the same number of paragraphs and sentences in the English, French and Spanish texts, as well as concordance across the Covered Agreements.⁶ In spite of the complexity of the task of achieving full concordance in the English, French and Spanish legal texts,

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¹ Roman Jakobson, «Aspects linguistiques de la traduction», en *Essais de linguistique générales*, Paris, Editions de Minuit, 1963, 78-86. The full quote is as follows: «La poésie, par définition, est intraduisible. Seule est possible la transposition créatrice.» (“Poetry, by definition, is not translatable. Only creative transposition is possible.”) Of course, WTO legal texts are not poetry and “creative transposition” is not desirable in their translation. I thank Fermín Alcoba for making this point.

² This is recognized under international human rights law. See Denise Gilman, A "Bilingual" Approach to Language Rights: How Dialogue Between U.S. and International Human Rights Law May Improve the Language Rights Framework, 24 *Harv. Hum. Rts. J.* 1 (2011).

³ Colin B. Picker, *International Law's Mixed Heritage: A Common/Civil Law Jurisdiction*, 41 *Vand. J. Transnat'l L.* 1083, 1124 and Cesare P.R. Romano, *The Americanization of International Litigation*, 19 *Ohio St. J. on Disp. Resol.* 89, 115-16 (2003).

⁴ Max Loubser, *Linguistic Factors into the Mix: The South African Experience of Language and the Law*, 78 *Tul. L. Rev.* 105, 107-08 (2003).

⁵ I thank Alejandro Jara for this observation.

⁶ I thank Fermín Alcoba for this observation.

the translations of the results of the Uruguay Round are excellent.⁷ Indeed, this is not the first time that best practices have been reviewed at the WTO.

However, there is a need to create and update procedures to deal with problems before and after they occur.⁸ An ounce of prevention is worth a pound of cure.⁹ The focus of any procedural reforms should be problem solving, not problem creation, in order to institutionalize best practices and lessons learned. It is important to bear in mind that translation professionals need adequate time to do translations at the end of negotiations that create new legal texts.¹⁰

This article is organized as follows. Section II provides an overview of the issues raised by multilingual processes at the WTO in the negotiation, drafting, translation, interpretation and litigation phases. Section III compares concordance procedures in the WTO, European Union (EU), and United Nations (UN), and summarizes the workshop proposals for the prevention and correction of linguistic discrepancies in the WTO legal texts. Section IV categorizes linguistic differences among the WTO legal texts and considers the suitability of proposed solutions for each category. Section V surveys linguistic differences in the Agreement on Safeguards. Section VI summarizes the experience with linguistic discrepancies in the dispute settlement process. The conclusion proposes an agenda for further work.

II. Issues raised by multilingual processes at the WTO

English, French and Spanish are the working languages of the WTO.¹¹ The WTO operates in the three languages and official policy is that documents should be translated.¹² Nevertheless, English is the most commonly used working language.

While formal trade negotiations and meetings of the WTO bodies can be conducted in the three working languages, with the use of simultaneous interpretation, other, more informal meetings most often are conducted in English. The Uruguay Round Agreements were drafted in English and then translated into French and Spanish. These agreements cover hundreds of pages of treaty text. Each of the English, French and Spanish legal texts of the WTO is authentic.¹³

Differences in the WTO legal texts occur for several reasons. First, time frames for translating negotiated texts are short. Second, when negotiators make last minute changes, they might not be picked up in the translation; for example, when “should” get changed to “shall”. Third, once negotiators have reached agreement, the legal texts become untouchable. There is no process in place at the WTO to correct translations following the approval of the legal texts. While Chile and the LSDD each proposed a procedure for correcting errors in the legal texts, neither proposal was adopted.¹⁴

The Vienna Convention on the Law of Treaties sets out a procedure for the rectification of errors in Article 79.¹⁵ This rectification procedure is followed by the

⁷ I thank Fermín Alcoba for this observation.

⁸ I thank Alejandro Jara for this observation.

⁹ I thank Ulf Jonson for this observation.

¹⁰ I thank Alejandro Jara for this observation.

¹¹ While the WTO Agreement establishes that the WTO legal texts are authentic in English, French and Spanish, it does not formally establish “official” languages for the WTO. However, English, French and Spanish are the working languages in practice.

¹² Håkan Nordström, Participation of Developing Countries in the WTO – new evidence based on the 2003 official records, 2005, http://www.noits.org/noits06/Final_Pap/Hakan_Nordstrom.pdf, 12.

¹³ Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations.

¹⁴ See Chile’s proposal in Document WT/GC/W/473 and the LSDD proposal in Appendix 2 of this article.

¹⁵ The text of Article 79 is reproduced in Appendix 1 of this article.

United Nations. This rectification procedure was also agreed on at the close of the Uruguay Round for introducing corrections to the Spanish and French texts of the GATT 1947, but the corrected Spanish and French versions of the GATT 1947 were never authenticated.

By virtue of Article 33 of the Vienna Convention on the Law of Treaties, the terms of a plurilingual treaty are presumed to have the same meaning in each authentic text. When a comparison of the authentic texts discloses a difference in meaning that cannot be resolved through interpretation under Articles 31 and 32, Article 33 requires the adoption of the meaning that best reconciles the texts, having regard to the object and purpose of the treaty. These rules of interpretation have been applied in several WTO panel and Appellate Body reports.¹⁶ However, other issues can arise.

To date, most panel and all Appellate Body reports have been written in English and then translated into French and Spanish.¹⁷ Most panel and Appellate Body hearings are conducted in English as well. The WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) leaves open the question of language rights in the dispute settlement process and provides no extra time for translation of panel and Appellate Body reports within the prescribed timetables.¹⁸ These reports have become longer and more complex, but the time allowed for translation has remained the same. This means that pieces of the reports are distributed to different translators and then assembled and harmonized to produce the final version within the allotted time.¹⁹ There is no formal procedure in place to review and correct translations of panel and Appellate Body reports. Panels and the Appellate Body do not always agree with the translations, but there is little time to review them and to make changes. Translators seek to use consistent terminology over time. However, languages evolve over time and the terminology that panels and the Appellate Body choose may differ from past usage.²⁰

¹⁶ For a thorough review of panel and Appellate Body reports in which discrepancies have arisen, see Bradley J. Condon, “Lost in Translation: Plurilingual Interpretation of WTO Law” 1:1 *Journal of International Dispute Settlement* 191-216 (2010), Bradley J. Condon, “La interpretación plurilingüe en los informes de los grupos especiales y del Órgano de Apelación” 1:1 *Revista de Derecho Económico Internacional* 32-50 (2010) and Bradley J. Condon, *Lost in Translation: A Comparative Analysis of Plurilingual Interpretation in WTO Panel and Appellate Body Reports* (May 13, 2010). Society of International Economic Law (SIEL), Second Biennial Global Conference, University of Barcelona, July 8-10, 2010. Available at SSRN: <http://ssrn.com/abstract=1607030>.

¹⁷ The first panel proceedings ever conducted in Spanish at the GATT or the WTO were those in Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala, DS331, in which Guatemala was the complainant. The panel was composed as follows: Chairman: Mr. Julio Lacarte-Muró, Members: Mr. Cristian Espinosa Cañizares and Mr. Álvaro Espinoza. See Bradley J. Condon, *El Derecho de la Organización Mundial del Comercio* (London, Cameron May, 2007), vii. However, the first panel report to be drafted originally in Spanish was Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric, DS418. The panel was composed as follows: Chairman: Mr. Pierre Pettigrew, Members: Ms Enie Neri de Ross and Ms Gisela Bolívar. The complainants in this dispute were Costa Rica, El Salvador, Guatemala and Honduras. *is Dominican Republic – Safeguard Measures on Imports of Polypropylene Bags and Tubular Fabric, Constitution of the Panel Established at the Request of Costa Rica, El Salvador, Guatemala and Honduras, Note by the Secretariat, WT/DS415/8, WT/DS416/8, WT/DS417/8, WT/DS418/8, 14 March 2011.*

¹⁸ Ernst Ulrich Petersmann, “Additional Negotiation Proposals on Improvements and Clarifications on the DSU”, in Fredico Ortino and Ernst-Ulrich Petersmann, *The WTO dispute settlement system, 1995-2003*, Kluwer Law International, 2004, 91-98, 98.

¹⁹ I thank Juan Mesa for this observation.

²⁰ For example, when the WTO legal texts were drafted and translated, the term “implementación” was not used to translate the term “implementation” from English. However, this translation is now accepted in Spanish.

WTO jurisprudence has become a very important part of WTO law.²¹ Panels and the Appellate Body bear this in mind in drafting reports and carefully choose the terms that they use. However, unlike the legal texts, panel and Appellate Body reports are not the fundamental source of WTO law, there is no provisions that provides that the reports are “authentic” in English, French and Spanish, and there is no rule of interpretation that applies to multilingual jurisprudence. Thus, it is unlikely that differences between the original language version and translated versions of jurisprudence could be raised as a legal argument in WTO disputes. However, such differences raise other issues.

In 2012, the WTO issued the first panel report that was drafted originally in Spanish.²² In this case, the English and French versions are the translations. Translators often edit panel and Appellate Body reports during the translation process, since the translation process affords an opportunity to examine the text carefully. However, there is no formal process in place to ensure that panels and the Appellate Body agree with the editing that results. Translators use databases to ensure consistent usage of legal terminology. However, when a panel report is drafted in Spanish, the panel might choose different Spanish terminology than the translators’ database indicates. To what extent should translators edit the original version of a panel report to ensure consistent usage? There is no formal process in place to address this issue.

Drafting a panel report in Spanish also raises issues in the event of an appeal. If the division of the Appellate Body that hears such an appeal is made up of Appellate Body members who do not work in Spanish, these Appellate Body members will have to rely on the English translation of the panel report, rather than basing their rulings on the original text of the panel report. What are the implications for the appeal process?

The majority of law firms that have important WTO practices conduct their work in English. However, as the importance of WTO law grows and expertise in WTO law spreads to firms that conduct their work in French or Spanish, more lawyers will consult the WTO legal texts in these other languages. Differences among the texts may lead to confusion if, for example, Spanish-speaking lawyers prepare legal arguments based on the Spanish text of the treaties (and the Spanish translations of panel and Appellate Body reports), while their counterparts prepare theirs in English. Indeed, failure to consider linguistic differences as a possible source of a dispute can represent an obstacle to resolving a dispute through negotiation.²³

The translation process can add an additional layer of complexity in trade negotiations. In the Doha Round of multilateral trade negotiations, the issue of how to translate specific terms in an agreement has arisen among negotiators, since different countries may use different terms to express the same idea. When negotiators agree to use a specific term in the translated text, this agreement must be conveyed to the translators who do the official translation. However, there is no formal procedure in place to address such situations. This can create tensions between negotiators and translators.

²¹ Report of the Appellate Body, United States – Final Anti-dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R, adopted 20 May 2008, paragraphs 158-162.

²² Report of the Panel, Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala, WT/DS331/R, 31 January 2012.

²³ This occurred in a dispute between the Soviet Union and the United States, in which there was a discrepancy between the English and Russian texts regarding the right of innocent passage in Article 22 of the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, UN Doc. A/CONF.62/122 (1982) 21 ILM 1261 (1982). See Aceves, W. J. (1996). Ambiguities in Plurilingual Treaties: A Case Study of Article 22 of the 1982 Law of the Sea Convention. *Ocean Development and International Law Journal* 27, 187-233 at 204.

In WTO accession negotiations, translation problems can create tensions between negotiators and cause delays. In this case, the languages at issue are not necessarily the three WTO languages and the translators are not WTO translators. Rather, negotiators for the acceding country are most likely to rely on their own translators to draft their commitments in English.

Differences between authentic texts also have implications in domestic legal systems. Countries adopt and implement treaties in their official languages. Thus, for example, where there is a difference between the English and Spanish texts, English-speaking and Spanish-speaking countries will adopt and implement different texts of the WTO agreements in question. This in turn can affect the interpretation and application of WTO norms by legislators, administrative agencies and national courts.

Finally, multilingual processes at the WTO raise important issues regarding the WTO budget and the possibility of adding other working languages to the WTO. The WTO Language Services and Documentation Division (LSDD) has a staff of 158, or 25% of the 639 staff members of the entire WTO Secretariat.²⁴ The LSDD has a budget of CHF 25 million,²⁵ which represented 12.8% of the total WTO budget of CHF 196 million in 2011.²⁶

III. Comparison of concordance procedures at WTO, EU, and UN

The EU has a Directorate for Quality of Legislation and an intra-institutional handbook that sets out legislative drafting guidelines.²⁷ The EU objective is to produce the same legal effect in 23 languages. However, discrepancies do arise. Sometimes the source of the discrepancy is the drafting in the original language and sometimes it is the translation process. English is the usual working language for drafting legislation, but it may be English from non-native speakers or from native speakers that have lost touch with their native tongue while working in a multilingual environment.²⁸

The EU guidelines include: (1) Self-control by drafters to avoid phrasing that would be difficult to translate; and (2) Addressing “wrong once-for-ever right syndrome”, by allowing changes to inappropriate translations in subsequent legal texts that are based on earlier legal documents. In order to enhance consistent use of terminology, the EU uses a database that calls up all texts in which similar phrases have been used in past legislation, as well as terminology that has been addressed by authorities. In addition, a codification process harmonizes terminology in subsequent versions of legislation.²⁹

The UN Publications, Editing and Proofreading Section is responsible for documents such as the Draft Articles of the International Law Commission (ILC). The drafting process is multilingual. Translators are involved in the drafting process from the beginning. Texts are subject to a separate editing and correction process that addresses discrepancies between texts at a later stage. Editors ensure consistency between pieces of texts that are split up and sent out to different translators. The face-to-face meeting of a concordance committee is a very important stage in the editing process. The members of the ILC discuss the texts in a meeting that focuses in part on the terms used in different languages. Concepts, definitions and word choices are set out

²⁴ Overview of the WTO Secretariat, http://www.wto.org/english/thewto_e/secret_e/intro_e.htm, 2011-07-08.

²⁵ Juan Mesa, Director, WTO Language Services and Documentation Division.

²⁶ WTO Secretariat budget for 2011, http://www.wto.org/english/thewto_e/secret_e/budget_e.htm.

²⁷ See Appendix 3 of this article, which reproduces the EU Joint Practical Guide, Guideline 5. The complete set of guidelines is available at <http://eur-lex.europa.eu/en/techleg/index.htm>.

²⁸ I thank Ulf Jonson for this observation.

²⁹ I thank Ulf Jonson for this observation.

in a section of the document entitled “Use of terms”. When discrepancies are found at a late stage in the process, a corrigendum is attached.³⁰

Sometimes drafters and translators have to rely on terms from old agreements and precedents and are stuck with choices made in the past. This tends to perpetuate past mistakes and weaknesses. In the UN process, translators can resolve this problem by adding a note regarding the reason for departing from old usage.

Unlike the EU and the UN, the WTO has neither a separate procedure for quality control nor a separate procedure for editing and proofreading. The translators must serve these functions in addition to their function as translators.³¹ However, the WTO uses similar procedures. Like the EU, the WTO also uses a terminology database, which explains which term to use according to the context in which it is used.³² However, the database does not contain a collection of words and phrases that have been judicially considered, which must be searched in docsonline.wto.org. Unlike the EU, the WTO does not have a formal set of drafting guidelines. Like the UN, the WTO uses an editing process to ensure consistency between pieces of texts that are split up and sent out to different translators. However, the WTO editing process is not separate from the translation process. At the end of the Uruguay Round, an ad hoc concordance committee was created *after* the English texts had been approved, which prevented any changes to the English text.

The following proposals emerged from the WTO workshop to address procedural problems regarding the multilingual concordance of WTO legal texts.

Prevention ex ante

- a. Provide more time for translations.
- b. Create a list of categories of discrepancies to red flag issues where translation and interpretation problems might occur.
- c. Develop best practices guidelines based on the experience of the WTO, other international organizations and countries with multilingual legislation, such as:
 - i. Create online drafting guidelines for negotiators;
 - ii. Involve translators in the drafting process from the start, especially in the harmonization of the original texts;
 - iii. Set up a concordance committee that meets face-to-face;
 - iv. Encourage drafters to make better use of the WTO terminology database (wtoterm.wto.org); and
 - v. Allow drafters and translators to provide notes to explain choice and meaning of terms used in texts.

A proposal to implement a procedure to edit translations after the approval of texts was rejected, since it could be perceived as an opportunity to reopen negotiations.

Cure ex post

- a. Establish a system to correct existing errors in accordance with VCLT Article 79;
- b. Establish rules of legal interpretation to address certain categories of discrepancies;
- c. Create a rule of legal interpretation that, while the English, French and Spanish texts are each authentic, the text in the original language prevails in case of discrepancy; and
- d. Establish a "rectification procedure", borrowing from GATT / WTO practice to correct errors in tariff schedules.

³⁰ I thank Fernando Lagares for this observation.

³¹ I thank Fermín Alcoba for this observation.

³² See wtoterm.wto.org.

The foregoing proposals relate to errors in the legal texts, not the process for translating and editing panel and Appellate Body reports. Since WTO jurisprudence is translated into the working languages, proposals should be considered for this process as well. Dispute settlement has become longer and more complex, leaving less time for translation. Panel reports include party submissions, which must also be translated.

Drafting guidelines would be useful for WTO jurisprudence. It would be useful as well to clarify procedures for translators to suggest changes to the original language version and establish guidelines for the final editing of reports by translators, panels and the Appellate Body. While correct and consistent usage is important in reports, flexibility in the choice of terminology might be facilitated by allowing translators to use notes on terminology choices in translated documents.

IV. Categorization of Differences in English, French and Spanish Legal Texts

It is useful to categorize differences in the legal texts, since the procedural solutions to resolve differences may be different for different categories. Some differences are substantive, while others are merely superficial differences that can be attributed to differences in the way that languages express the same idea.³³ However, it is not always possible to categorize differences as superficial or substantive in the absence of a dispute that involves the specific legal provision in question. That is, it is not possible to predict how superficial or substantive a difference may prove to be when a panel or the Appellate Body applies the legal provision in the context of a dispute or when the provision is the subject of negotiations among WTO Members.

Substantive differences in the legal texts can be categorized as follows: (1) simple errors; (2) difficulty of translating ambiguous terms; (3) harmonization problems (phrases that are identical across different WTO agreements in one language differ in another); and (4) different placement of terms in the different languages, which creates ambiguity. Examples of these differences are set out below. The examples below are not intended to be exhaustive. Rather, they serve to illustrate why procedural solutions to resolve differences may be different for different categories.

1. Simple errors

This section provides three examples of what might be referred to as simple errors. Each example provides a different type of simple error: (a) should/shall; (b) and/or; and (c) an error of omission. However, depending on the context, some might debate whether these types of errors constitute simple errors, differences in usage or difficulties in translating concepts. There is no process in place at the WTO to correct these types of simple error after approval of the legal texts. As noted above, such a process has been proposed. However, it would be useful to discuss the extent to which such a process should be designed to address different types of errors in different ways. Following each example, I discuss how controversial the correction process might be for each type of error.

a. DSU Article 18.2

DSU Article 18.2 uses mandatory language in English (shall) and French (fournira), but not in Spanish (podrá).

³³ I thank Fermín Alcoba for this observation.

A party to a dispute **shall** also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public.

Une partie à un différend **fournira** aussi, si un Membre le demande, un résumé non confidentiel des renseignements contenus dans ses exposés écrits qui peuvent être communiqués au public.

A petición de un Miembro, una parte en la diferencia **podrá** también facilitar un resumen no confidencial de la información contenida en sus comunicaciones escritas que pueda hacerse público.

In this example, the difference between the Spanish text, on the one hand, and the English and French texts, on the other hand, appears to be a simple error. However, correcting this type of simple error could be a controversial process, since the correction would require a choice as to whether the provision is to be mandatory or not.

Moreover, there has been some discussion regarding the correct translation of “should” and “shall” in Spanish, among both negotiators and translators. “Should” can be translated in Spanish as “deberá” or “debería”. In the WTO legal texts, translators chose to translate “should” as “deberá”, rather than “debería”. This choice was made because “should” generally connotes a positive, though non-obligatory, term in English. In Spanish, “debería” has a negative connotation, in the sense that it does not matter whether the action is taken and implies permission to do opposite. For example, if one says, “I really should not eat that second piece of cake”, the speaker likely will do so. In Spanish, “deberá” has a more positive connotation that more closely reflects the manner in which “should” is used in the legal texts.³⁴

In English, “should” is generally not mandatory, whereas “shall” generally is mandatory. However, Article 11 of the DSU provides that a panel “should make objective assessment of the matter before it”, which has been interpreted as a mandatory due process provision.³⁵ Thus, in this context, “should” means “shall”. The French text uses “devrait” and the Spanish text uses “deberá”, which both mean “should”. In this example, there is no error in translation. Rather, the issue came to light as a result of subsequent interpretations of this provision in WTO disputes. However, this example highlights the importance of negotiators and drafters keeping the translation process in mind when choosing terms in the original language in which the legal text is drafted. Whenever possible, terms should be chosen that will not cause problems in the translation process. This example highlights the need to use terms consistently when drafting treaty text, since translators will seek to use terminology consistently in the translation process.

b. GATS Articles II:1 and XVII:1

GATS Article II:1 consistently uses “and” in the three languages.

...cada Miembro otorgará inmediata e incondicionalmente a los servicios y a los proveedores de servicios de cualquier otro Miembro un trato no menos favorable que el que conceda a los servicios similares y a los proveedores de servicios similares de cualquier otro país.

³⁴ I thank Silvia for this explanation.

³⁵ Appellate Body Report, EC – Poultry, para. 133, Appellate Body Report, Chile – Price Band System, para. 173, Appellate Body Report, Thailand – Cigarettes (Phillipines), para. 147.

...each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services **and** service suppliers of any other country.

...chaque Membre accordera immédiatement et sans condition aux services et fournisseurs de services de tout autre Membre un traitement non moins favorable que celui qu'il accorde aux services similaires **et** fournisseurs de services similaires de tout autre pays.

In a similar context, GATS Article XVII:1 uses “and” in English and French but uses “or” in Spanish.

... cada Miembro otorgará a los servicios y a los proveedores de servicios de cualquier otro Miembro...un trato no menos favorable que el que dispense a sus propios servicios similares **o** proveedores de servicios similares.

...each Member shall accord to services and service suppliers of any other Member...treatment no less favourable than that it accords to its own like services **and** service suppliers.

...chaque Membre accordera aux services et fournisseurs de services de tout autre Membre...un traitement non moins favorable que celui qu'il accorde à ses propres services similaires **et** à ses propres fournisseurs de services similaires.

In this example, the context indicates that the difference between the Spanish text, on the one hand, and the English and French texts, on the other hand, is a simple error. Correcting this type of error should not be controversial, since the consistent use of “and” in GATS Article II:1 indicates which is the correct term. However, this can not always be said of errors involving “and” and “or”, since the choice of one term or the other determines whether the requirements are cumulative or not.

c. Antidumping Agreement Article 3.3(b)

Antidumping Agreement Article 3.3(b) sets out two conditions in the English and French texts, but only one condition in the Spanish text.³⁶

Where imports of a product from more than one country are simultaneously subject to anti dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and **(b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.**

Dans les cas où les importations d'un produit en provenance de plus d'un pays feront simultanément l'objet d'enquêtes antidumping, les autorités chargées des

³⁶ I thank Jesse Kreier for this example.

enquêtes ne pourront procéder à une évaluation cumulative des effets de ces importations que si elles déterminent a) que la marge de dumping établie en relation avec les importations en provenance de chaque pays est supérieure au niveau *de minimis* au sens du paragraphe 8 de l'article 5 et que le volume des importations en provenance de chaque pays n'est pas négligeable, et **b) qu'une évaluation cumulative des effets des importations est appropriée à la lumière des conditions de concurrence entre les produits importés et des conditions de concurrence entre les produits importés et le produit national similaire.**

Cuando las importaciones de un producto procedentes de más de un país sean objeto simultáneamente de investigaciones antidumping, la autoridad investigadora sólo podrá evaluar acumulativamente los efectos de esas importaciones si determina que a) el margen de dumping establecido en relación con las importaciones de cada país proveedor es más que *de minimis*, según la definición que de ese término figura en el párrafo 8 del artículo 5, y el volumen de las importaciones procedentes de cada país no es insignificante y **b) procede la evaluación acumulativa de los efectos de las importaciones a la luz de las condiciones de competencia entre los productos importados y el producto nacional similar.**

This type of error may be referred to as an error of omission, since one of the conditions is missing in the Spanish text. The English and French texts refer to conditions of competition between the imported products *and* the conditions of competition between the imported products and the like domestic product. The Spanish text refers only to the conditions of competition between the imported products and the like domestic product. In this context, correcting the error may prove controversial, since it might imply changing the practices of investigating authorities in Spanish-speaking countries where the Spanish text has been adopted and now forms part of the national legal system.

2. Difficulty of translating ambiguous terms

Constructive ambiguity is sometimes used in treaty negotiations, for example when it is not possible to reach agreement on more precise language or the definition of terminology. This section provides two examples regarding the difficulty of translating ambiguous terms. This category differs from the preceding category, since these are not examples of errors in translation. Thus, this category of translation issue is not likely to be resolved by creating a process at the WTO to correct translation errors after approval of the legal texts. Rather, this category of issue should be resolved at the drafting stage, through terminology guidelines for negotiators and drafters. Since the use of ambiguous terms may suggest difficulty in reaching agreement on more precise terms, efforts to improve concordance among legal texts *ex post* would likely prove to be more controversial than in the case of simple errors of translation. Ambiguity is best prevented at the drafting stage.

a. Safeguards Agreement Article 4.1(c)

Safeguards Agreement Article 4.1(c) defines the term “domestic industry” using different terminology in Spanish (una proporción importante) than it does in French (une proportion majeure) and English (a major proportion).³⁷

³⁷ I thank Alejandro Jara for this example.

...a “domestic industry” shall be understood to mean...those whose collective output...constitutes **a major proportion** of the total domestic production of those products.

...l’expression “branche de production nationale” s’entend...de ceux dont les productions additionnées...constituent **une proportion majeure** de la production nationale totale de ces produits.

...se entenderá por “rama de producción nacional”...aquellos cuya producción conjunta...constituya **una proporción importante** de la producción nacional total de esos productos.

b. GATT Article VI:1

GATT Article VI:1 refers to "**establishment** of a domestic industry" in English, but uses the term “creación” in Spanish and “creation” in French. This difference influenced the Panel’s interpretation in *Mexico – Olive Oil*.³⁸

The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the **establishment** of a domestic industry.

Les parties contractantes reconnaissent que le dumping, qui permet l’introduction des produits d’un pays sur le marché d’un autre pays à un prix inférieur à leur valeur normale, est condamnable s’il cause ou menace de causer un dommage important à une branche de production établie d’une partie contractante ou s’il retarde de façon importante la **création** d’une branche de production nationale.

Las partes contratantes reconocen que el dumping, que permite la introducción de los productos de un país en el mercado de otro país a un precio inferior a su valor normal, es condenable cuando causa o amenaza causar un daño importante a una rama de producción existente de una parte contratante o si retrasa de manera importante la **creación** de una rama de producción nacional.

c. GATT Article XX(g)

GATT Article XX(g) requires that conservation measures be “made effective in conjunction with restrictions on domestic production or consumption”. The French and Spanish equivalents of the term “made effective” are less ambiguous: “sont appliqués” and “se apliquen”. In *China – Raw Materials*, the Appellate Body referred to the French and Spanish terms to confirm that Article XX(g) does not contain an additional requirement that the conservation measure be primarily aimed at making effective the restrictions on domestic production or consumption.³⁹

3. Harmonization problems

³⁸ I thank Marisa Goldstein for this example.

³⁹ Report of the Appellate Body, *China – Measures Related to the Exportation of Various Raw Materials* (China – Raw Materials), WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, adopted 22 February 2012, para. 356.

In the category of harmonization problems, phrases that are identical across different WTO agreements in one language diverge in another. For example, many agreements draw upon GATT terminology, using the same phrases in other agreements as those used in GATT to express similar obligations or exceptions.

a. TRIPS Article 4.1 and GATT Article I:1

In English and French, TRIPS Article 4.1 and GATT Article I:1 use the same wording to express a key part of the MFN obligation (shall be accorded immediately and unconditionally/ seront, immédiatement et sans condition, étendus). However, the Spanish text uses different phrases in the two provisions to express the same obligation: “será concedido inmediata e incondicionalmente” (GATT Article I:1) and “se otorgará inmediatamente y sin condiciones” (TRIPS Article 4.1).

GATT Article I:1 (MFN)

shall be accorded immediately and unconditionally
seront, immédiatement et sans condition, étendus
será concedido inmediata e incondicionalmente

TRIPS Article 4 (MFN)

shall be accorded immediately and unconditionally
seront, immédiatement et sans condition, étendus
se otorgará inmediatamente y sin condiciones

b. TRIPS Article 27.2 and GATT Article XX

TRIPS Article 27.2 incorporates some language from GATT Article XX. In English and French, TRIPS Article 27.2 uses the same form of the word necessary as in GATT Article XX, but in Spanish there is a small variation (“necesarias” in GATT and “necesariamente” in Spanish).

GATT Article XX (a) (b)

- (a) necessary to protect public morals;
- (b) necessary to protect human, animal or plant life or health;

- a) nécessaires à la protection de la moralité publique;
- b) nécessaires à la protection de la santé et de la vie des personnes et des animaux ou à la préservation des végétaux;

- a) necesarias para proteger la moral pública;
- b) necesarias para proteger la salud y la vida de las personas y de los animales o para preservar los vegetales;

TRIPS Article 27.2

necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment

nécessaire...pour protéger l'ordre public ou la moralité, y compris pour protéger la santé et la vie des personnes et des animaux ou préserver les végétaux, ou pour éviter de graves atteintes à l'environnement

necesariamente para proteger el orden público o la moralidad, inclusive para proteger la salud o la vida de las personas o de los animales o para preservar los vegetales, o para evitar daños graves al medio ambiente

c. Agreement on Agriculture Article 9.1 and SCM Agreement Article 1.1(a)(1)

Agreement on Agriculture Article 9.1, paragraphs (a) and (b), refer to export subsidies provided by “governments or **their agencies**”, in English, and by “les pouvoirs publics ou **leurs organismes**”, in French. SCM Agreement Article 1.1(a)(1) defines a subsidy as a financial contribution “by a government or **any public body**”, in English, and “des pouvoirs publics ou de **tout organisme public**”, in French. However, in Spanish Agreement on Agriculture Article 9.1, paragraphs (a) and (b) use the phrase “por los gobiernos o por **los organismos públicos**”. SCM Agreement Article 1.1(a)(1) uses the phrase “de un gobierno o de cualquier **organismo público**”. In US – Anti-Dumping and Countervailing Duties (China), China argued that, since the same term “organismo público” is used in both provisions in Spanish, this term should be given the same interpretation in both. However, the Appellate Body rejected this argument, since specific terms may not have identical meanings in every agreement. Where the ordinary meaning of a term is broad, its interpretation may differ in different agreements where those agreements have different contexts and objects and purposes.⁴⁰

This category of translation problem is more closely related to the category of simple errors than to the category of ambiguous terms. As such, harmonization problems could be addressed in an *ex post* correction procedure, following the adoption of the legal texts. However, this category is a good candidate for a preventive procedure, since this category of translation problem could be addressed in the translation process itself, by formally creating a separate stage in the translation process in which translators ensure consistent usage across agreements where phrases and terms are borrowed from one agreement and incorporated into another agreement.

4. Different placement of words

In TBT Agreement Annex 1.1, the location of the word “requirements” creates an ambiguity regarding whether the requirements refer only to labelling.⁴¹ In French, the equivalent word, “prescriptions”, appears to refer to packaging, marking or labelling. In Spanish, the equivalent word, “prescripciones”, refers to all of the terms in the list: terminology, symbols, packaging, marking or labelling.

It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling **requirements** as they apply to a product, process or production method.

Il peut aussi traiter en partie ou en totalité de terminologie, de symboles, de **prescriptions** en matière d'emballage, de marquage ou d'étiquetage, pour un produit, un procédé ou une méthode de production donnés.

⁴⁰ United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (US – Anti-Dumping and Countervailing Duties (China)), WT/DS379/AB/R, adopted 25 March 2011, paras. 330-331..

⁴¹ I thank Jennifer Hamaoui for this example.

También puede incluir **prescripciones** en materia de terminología, símbolos, embalaje, marcado o etiquetado aplicables a un producto, proceso o método de producción, o tratar exclusivamente de ellas.

In this particular example, the ambiguity arises from the translation, not from the use of constructive ambiguity in the negotiation phase. However, this category is different in nature from the first and third categories, since it does not involve simple translation errors or harmonization problems. This category is more closely related to the second category, since it increases the difficulty involved in the translation process. In this case, the difficulty may arise due to structural differences between different languages. This category could be addressed by creating a procedure that permits the addition of translators' notes to the translated text, in addition to creating drafting guidelines.

In addition to the foregoing categories drawn from examples in the legal texts, other problems may arise as the result of the ongoing evolution of WTO law and the ongoing evolution of the working languages. These other problems include: (1) generic terms that are susceptible to evolutionary interpretation;⁴² (2) terms that have special meaning in accordance with VCLT Article 31(4);⁴³ (3) false cognates (words that appear similar but that have a different meaning in different languages, such as *actual* (English), *actuel/actuelle* (French) and *actual* (Spanish));⁴⁴ (4) words in the original language that have no equivalent in the other languages (such as liability/responsibility);⁴⁵ (5) the need to use the terms used in old agreements and precedents to express the same idea in new agreements.⁴⁶

In addition, differences in language usage among countries that use different terminology in the same language can be a source of debate regarding the correct choice of terminology. These “intra-linguistic differences”⁴⁷ also can lead to the use of different terms to express the same idea in different parts of translated texts, if the task of translating a text is distributed among different translators and there is no editing process to harmonize usage across texts.

Some problems occur in the WTO process because last minute changes to the legal text in English are not incorporated into the translated text; for example, when *should* is changed to *shall*.⁴⁸ Texts that are provisional become untouchable once approved. Then time is up.⁴⁹

V. Differences in the Agreement on Safeguards

The following tables sets out some differences in the Agreement on Safeguards. Some differences are more significant than others. The purpose of this table is to present an example of the differences that can arise in the context of a single agreement, both superficial and substantive.

⁴² I thank Lauro Locks for this observation.

⁴³ I thank Lauro Locks for this observation.

⁴⁴ “Actual” can be translated many different ways in Spanish, depending on the context. For example, “the cited actual cases” could be translated as “citó casos reales”. “There was no actual written agreement” could be translated as “no hubo un acuerdo escrito propiamente dicho”. In Spanish, “actual” means “present” or “current”. In French, “actuel/actuelle” has the same meaning. However, “actual” in English does not have this meaning. I thank Fermín Alcoba for this example.

⁴⁵ I thank Fernando Lagares for this observation.

⁴⁶ I thank Fernando Lagares for this observation.

⁴⁷ Fernando Prieto Ramos, “El traductor como redactor de instrumentos jurídicos: el caso de los tratados internacionales”, 15 *Journal of Specialised Translation* 200 (January 2011).

⁴⁸ I thank Fermín Alcoba for this observation.

⁴⁹ I thank Fermín Alcoba for this observation.

Article	English	French	Spanish	Problem
2.1	such product is being imported...in such increased quantities	ce produit est importé...en quantités tellement accrues	las importaciones de ese producto...han aumentado en tal cantidad	Spanish is in past tense, but English and French are not. Spanish text is more ambiguous. See <i>Argentina – Footwear (EC)</i> , 25 June 1999, DS121, paras. 5.90, 5.156, 5.162, 5.163, 5.186, 8.148, 8.166
2.2	a product being imported	un produit importé	al producto importado	English has different verb tense.
4.1(c)	a major proportion	une proportion majeure	una proporción importante	Spanish differs from English and French. See <i>US – Lamb (AB)</i> .
5.1	a different level is necessary	un niveau différent est nécessaire	la necesidad de fijar un nivel diferente	Spanish uses necessity, rather than necessary. Implication depends on whether “necessary” was intended to convey a meaning that differs from “necessity”.
5.2(a)	method is not reasonably practicable	méthode ne sera raisonnablement pas applicable	método no sea razonablemente viable	Unclear whether there are significant differences in meaning.
7.1	period of time as may be necessary	la période nécessaire	el período que sea necesario	French text differs.
9.1	as long as its share of imports	tant que la part de ce Membre dans les importations	cuando la parte que corresponde a éste en las	Unclear whether there are significant differences in

			importaciones	meaning.
12.1	shall immediately notify the Committee on Safeguards upon:	notifiera immédiatement au Comité des sauvegardes:	hará inmediatamente una notificación al Comité de Salvaguardias cuando:	upon/cuando missing in French text
12.4	after the measure is taken	après que la mesure aura été prise	después de adoptada la medida	Different wording in Spanish. Unclear whether there are significant differences in meaning.

The foregoing table had the effect of provoking debate over which differences are substantive and which are merely superficial. This debate highlighted the difficulty of predicting how important differences might prove to be and also highlighted the different perspectives of translators and legal counselors on this point.

VI. Linguistic differences in the WTO dispute settlement system

The experience to date in the WTO dispute settlement system suggests that the multilingual nature of the WTO Agreements does not make treaty interpretation significantly more difficult than it would be with a text authentic in one language only. In practice, the Appellate Body and the parties to disputes treat the English text as if it were a “master” text. Panels appear less likely to treat English as a master text, particularly when they use text comparison to resolve ambiguities in the three authentic texts. Like the Appellate Body and the parties to disputes, panels often refer to the French and Spanish texts to confirm their interpretation of the English text. This practice diverges from the the concept of equality of languages.

Article 33 of the Vienna Convention on the Law of Treaties⁵⁰ reflects customary international law regarding the interpretation of treaties authenticated in two or more languages. It provides as follows:⁵¹

Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.

⁵⁰ U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entered into force January 27, 1980.

⁵¹ Article 85 of the Vienna Convention provides that its texts in Chinese, Spanish, French, English and Russian are equally authentic. This article only reproduces the text of Article 33 in English, French and Spanish because these languages use the same alphabet and because the focus of this article is on the application of Article 33 in the WTO, where these three languages are the official languages. There are no discrepancies in the English, French and Spanish texts.

3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

The Appellate Body has taken the view that the customary rules of treaty interpretation reflected in Article 33 of the Vienna Convention requires the treaty interpreter to seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language, but also to make an effort to find a meaning that reconciles any apparent differences, taking into account the presumption that they have the same meaning in each authentic text.⁵² Indeed, consulting the different authentic texts may be viewed as an interpretative tool that assists in determining the ordinary meaning of treaty terms in their context, in light of the object and purpose, rather than a source of conflicting texts of treaty terms.⁵³ The presumption in paragraph 33(3) and the obligation in paragraph 33(4) to adopt the meaning that best reconciles the texts require the treaty interpreter to avoid conflicting interpretations.

In its commentary on the draft Article that was later adopted as Article 33(3) of the Vienna Convention,⁵⁴ the International Law Commission made several observations. Paragraph 1 expressed the general rule of the “equality of the languages

⁵² WTO Appellate Body Report, *Chile — Price Band System and Safeguard Measures Relating to Certain Agricultural Products (Chile — Price Band System)*, WT/DS207/AB/R, adopted 23 October 2002, para. 271; WTO Appellate Body Report, *European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India — Recourse to Article 21.5 of the DSU by India (EC — Bed Linen (Article 21.5 — India))*, WT/DS141/AB/RW, adopted 24 April 2003, footnote 153 to para. 12; WTO Appellate Body Report, *United States — Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada (US — Softwood Lumber IV)*, WT/DS257/AB/R, adopted 17 February 2004, para. 59 and footnote 50; WTO Appellate Body Report, *European Communities — Conditions for the Granting of Tariff Preferences to Developing Countries (EC — Tariff Preferences)*, WT/DS246/AB/R, adopted 20 April 2004, para. 147; WTO Appellate Body Report, *United States — Subsidies on Upland Cotton (US — Upland Cotton)*, WT/DS176/AB/R, adopted 21 March 2005, para. 424 and footnote 510.

⁵³ McNair expresses this view in the following terms: ‘[W]hen the treaty does not indicate which text is authentic or which in case of divergence should prevail, there is ample authority for the view that the two or more texts should help one another, so that it is permissible to interpret one text by reference to another.’ Lord McNair, (1961). *The Law of Treaties*. New York: Oxford University Press. 433.

⁵⁴ Yearbook of the International Law Commission (1966), Vol. II, p. 224, <http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (2 September 2009). The draft Article provided as follows:

Article 29. Interpretation of treaties in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text. Except in the case mentioned in paragraph 1, when a comparison of the texts discloses a difference of meaning which the application of articles 27 and 28 does not remove, a meaning which as far as possible reconciles the texts shall be adopted.

and the equal authenticity of the texts in the absence of any provision to the contrary”.⁵⁵ While some treaties designate one language as authoritative in the case of divergence, this is not the case with the covered agreements of the WTO. The International Law Commission chose to not address in paragraph 1 the issues of whether the “master” text should be applied automatically as soon as the slightest difference appears in the wording of the texts or whether recourse should first be had to all or some of the normal means of interpretation in an attempt to reconcile the texts before concluding that there is a case of “divergence”, since the jurisprudence was unclear on this point.⁵⁶

The International Law Commission emphasized that the plurality of the authentic texts of a treaty is “always a material factor in its interpretation”, but stressed that in law there is only one treaty accepted by the parties and one common intention even when two authentic texts appear to diverge.⁵⁷ The effect of the presumption in paragraph 33(3) is to entitle each party to use only one authentic text of a treaty at the outset.⁵⁸ Moreover, this presumption makes it unnecessary for tribunals to compare language texts on a routine basis; comparison is only necessary when there is an allegation of ambiguity or divergence among authentic texts, which rebuts the presumption.⁵⁹ A duty of routine comparison would imply the rejection of this presumption.⁶⁰ The practice of the Appellate Body and WTO panels supports the view that routine comparison is not necessary, as does the practice of many domestic courts and other international tribunals.⁶¹

In practice, most multilingual treaties contain some discrepancy between the texts. Discrepancies in the meaning of the texts may be an additional source of ambiguity in the terms of the treaty. Alternatively, when the meaning of terms is ambiguous in one language, but clear in another, the multilingual character of the treaty can facilitate interpretation. Because there is only one treaty, the presumption in paragraph 3 that the terms of a treaty are intended to have the same meaning in each authentic text “requires that every effort should be made to find a common meaning for the texts before preferring one to another”.⁶² Regardless of the source of the ambiguity,

⁵⁵ Paragraph 1 refers to the languages in which the text of the treaty has been ‘authenticated’ rather than ‘drawn up’ or ‘adopted’, in order to take account of article 9 of the draft articles, in which the Commission recognized ‘authentication of the text’ as a distinct procedural step in the conclusion of a treaty. Yearbook of the International Law Commission (1966), Vol. II, p. 224, <http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (2 September 2009). The rule in paragraph 1 dates from at least 1836. McNair, above n 51, 432. It is interesting to note that the working language of the Commission was English.

⁵⁶ Yearbook of the International Law Commission (1966), Vol. II, p. 224, <http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (2 September 2009).

⁵⁷ Yearbook of the International Law Commission (1966), Vol. II, p. 225, <http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (2 September 2009).

⁵⁸ Aust, A. (2000). *Modern Treaty Law and Practice*, Cambridge, U. K.: Cambridge University Press, 205. Villiger, M. E. (2009). *Commentary on the 1969 Vienna Convention on the Law of Treaties*. Leiden: Brill., 458-459.

⁵⁹ Kuner, C. B. (1991). The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning. *The International and Comparative Law Quarterly*, 40, 953-964, at 954. Also see Tabory, M. (1980). *Multilingualism in International Law and Institutions.*, 177, and Germer, P. (1970). Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties. *Harvard International Law Journal*, 11, 400-427.

⁶⁰ *Ibid.*

⁶¹ Kuner, above n 57, at 955-957; Germer, above n 57, 412-413. Germer notes that this practice seems to be dictated by practical convenience only, but does not alter the equality of the authentic texts. The practice of the Appellate Body is examined below.

⁶² Yearbook of the International Law Commission (1966), Vol. II, p. 225, <http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (2 September 2009). Also see *Kaslikili/Sedudu Island (Botswana/Namibia) Case*, ICJ Reports 1999 1062, para. 25 and Villiger, above n 56, 458.

“the first rule for the interpreter is to look for the meaning intended by the parties to be attached to the term by applying the standard rules for the interpretation of treaties” in Vienna Convention Articles 31 and 32. The interpreter can not just prefer one text to another.⁶³

In formulating paragraph 3 of the draft Article, the Commission rejected the idea of a general rule laying down a presumption in favour of restrictive interpretation in the case of an ambiguity in multilingual texts⁶⁴ and rejected creating a legal presumption in favour of the language in which the treaty was drafted.⁶⁵ In doing so, the Commission rejected the approach taken by the Permanent Court in the *Mawommatis Palestine Concessions* case.⁶⁶

The draft Article provided that, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, “a meaning which as far as possible reconciles the texts shall be adopted”, whereas the final version of Article 33(4) provides that “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”. Adding the criterion of object and purpose addresses the possibility of the treaty interpreter applying her own criterion in situations where there alternative meanings that reconcile the text.⁶⁷

The Appellate Body does not consider the French and Spanish texts in all cases. It has only considered more than one authentic text in 22 of 99 Appellate Body reports, or 22.2 percent of all reports.⁶⁸ Figure 1 shows the number of reports in which the Appellate Body compares the authentic texts, by year. There is no correlation between the year of the appeal and the consideration of the three authentic texts. While there appeared to be a trend developing from 2000 to 2004, it abruptly ended in 2005-2006.

⁶³ Ibid.

⁶⁴ Yearbook of the International Law Commission (1966), Vol. II, p. 225-226, <http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (2 September 2009).

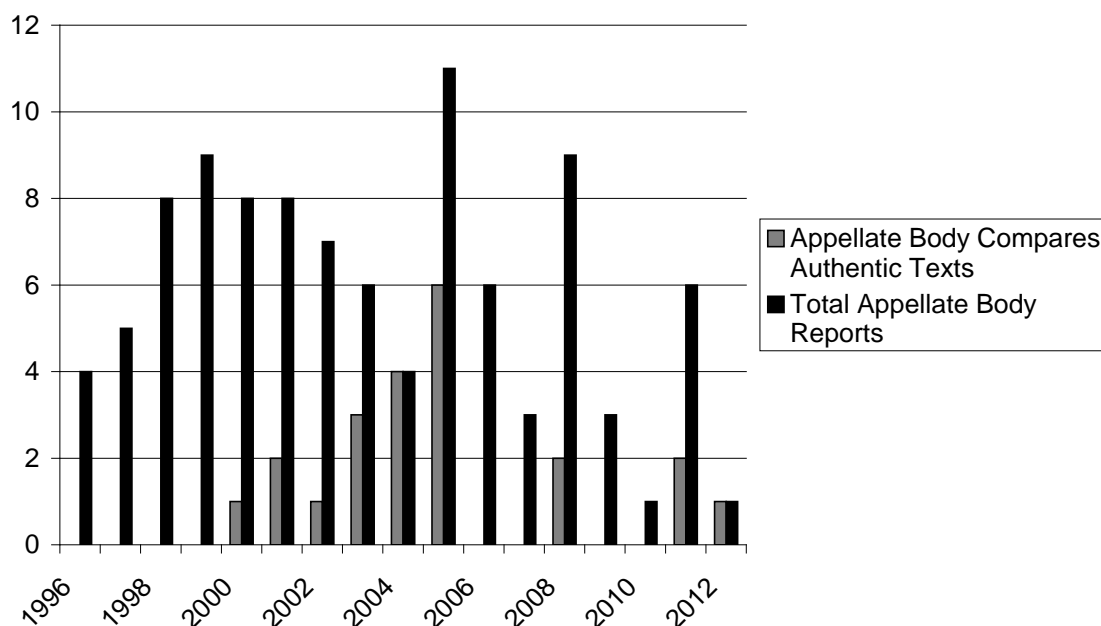
⁶⁵ Yearbook of the International Law Commission (1966), Vol. II, p. 226, <http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (2 September 2009).

⁶⁶ P.C.I.J. (1924), Series A, No. 2, p. 19. In the *Young Loan Arbitration* case, the Tribunal confirmed that the earlier international practice of referring to the original text as an aid to interpretation is incompatible with the principle of the equal status of all authentic texts in plurilingual treaties, which is incorporated in Article 33(1) of the Vienna Convention. *Young Loan Arbitration*, 59 ILR 494 (1980). In the *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)*, in interpreting a provision of the Treaty of Friendship, Commerce and Navigation between the United States of America and the Italian Republic of 1948, the International Court of Justice noted that it was possible to interpret the English and Italian texts “as meaning much the same thing”, despite a potential divergence in scope.” *Elettronica Sicula S.p.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15. International Court of Justice, Merits, *Case Concerning Elettronica Sicula S.p.A. (ELSI) (United States v. Italy)* 1989, <http://www.icj-cij.org/docket/files/76/6707.pdf> (4 September 2009).

⁶⁷ Linderfalk, U. (2007). *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*. The Hague: Springer., 364. In the *LaGrand (Germany/US) Case*, the International Court of Justice (ICJ) applied Article 33(4) to a divergence of text in Article 41 of the ICJ Statute (“doivent être prises” in French and “ought to be taken” in English). After recourse to Articles 31 and 32 did not remove the difference in meaning, the Court considered the object and purpose of the ICJ Statute to reach a conclusion that was in conformity with the travaux préparatoires of Article 41. *LaGrand (Germany/US) Case*, ICJ Reports, 2001 501 ff, paras. 100-109.

⁶⁸ As of 6 March 2012.

Figure 1: Number of Reports in which Appellate Body Compares Authentic Texts 1996-2012



The presumption in Article 33 means that there is no duty to compare the authentic texts in all cases, so the practice of the Appellate Body is consistent with Article 33 as a matter of law.⁶⁹ Nevertheless, when the Appellate Body does apply Article 33, it does not do so in a consistent fashion and fails to distinguish between, or confuses, the different rules contained in paragraphs 3 and 4 of Article 33.⁷⁰ In addition, the Appellate Body frequently interprets one text by reference to another, which is permissible⁷¹ but is not established explicitly in Article 33. The Appellate Body and the parties to disputes often refer to the French and Spanish texts to confirm their interpretation of the English text.⁷² There is no correlation between the official language(s) of the Appellant or Appellee and the comparison of authentic texts in Appellate Body reports, nor between the frequency of text comparison and the level of economic development of the parties.⁷³ There is insufficient data to determine whether there is a correlation with the language(s) spoken by the Members of the Appellate Body that hear a particular appeal or the languages spoken by the Appellate Body Secretariat staff have any influence. Table 1 summarizes Appellate Body reports in

⁶⁹ See Kuner, above n 57.

⁷⁰ Mavroidis notes that the Appellate Body sometimes uses the French and Spanish texts to confirm decisions reached using the English text (in *EC — Price Band System* and *EC — Bed Linen* [sic]), sometimes prefers interpretations that overlap in the three different texts (*US — Softwood Lumber IV*), but has also preferred the language of the French and Spanish texts (*EC — Tariff Preferences*). Mavroidis, P. C. (2008). No Outsourcing of Law? WTO Law as Practiced by WTO Courts. *American Journal of International Law* 102, 421-474 at 445-446. Van Damme observes that the Appellate Body “often considers arguments on the basis of Article 33 VCLT as irrelevant, unsubstantiated, or it ignores them”. Van Damme, I. (2009). *Treaty Interpretation by the WTO Appellate Body*. New York: Oxford University Press., 333.

⁷¹ McNair, above n 51, 433.

⁷² Van Damme characterizes the practice of using other authentic texts to confirm the interpretation of the English text as “supplementary means of interpretation”. Van Damme, above n 69, 335.

⁷³ Bradley J. Condon, “Lost in Translation: Plurilingual: Interpretation of WTO Law” 1:1 *Journal of International Dispute Settlement* 191-216 (2010), 206.

which the Appellate Body compares provisions, by report, WTO Agreement and provisions considered. Table 2 summarizes Appellate Body reports in which only parties compare provisions, also by report, WTO Agreement and provisions considered.

Table 1 Provisions and terms analyzed by Appellate Body, 1996-2012⁷⁴

AB Report	Provision	Terms
EC — Asbestos	GATT, art. III:4	productos similares/like products/produits similaires
Chile — Price Band	Agreement on Agriculture, art. 4.2	derechos de aduana propiamente dichos/ordinary customs duties/droits de douane proprement dits
EC — Bed Linen (art. 21.5 — India)	Antidumping Agreement, art. 9.1 & 9.4	9.1: se han cumplido/have been fulfilled/sont remplies 9.4: hayan limitado/have limited/ auront limité
US — Softwood lumber IV	SCM Agreement, art. 1.1(a)(1)(iii)	bienes/goods/biens
US — Countervailing Duty Investigation on DRAMs	SCM Agreement, art. 1.1(a)(1)(iv)	ordene/directs/ordonnent
US — Cotton	SCM Agreement, art. 6.3(c)	contención de la subida de los precios/price supression/empêcher des hausses de prix
US — Stainless steel (Mexico)	Antidumping Agreement, art. 6.10	el margen/an individual margin/une marge
US — Lamb	Safeguards Agreement, art. 4.1(a)	daño grave/serious injury/dommage grave
EC — Tariff Preferences	Enabling clause, para. 2(a)	conformidad/in accordance/conformemente tal como lo define/as described in/tel qu'il est défini
US — Oil Country Tubular Goods Sunset Reviews	Antidumping Agreement, art. 3	la determinación de la existencia de daño/determination of injury/la détermination de l'existence d'un dommage
US — Softwood lumber V	Antidumping Agreement, art. 2.2.1.1	tomar en consideración/consider/prendre en compte
US — Softwood lumber IV (art. 21.5 — Canada)	DSU, art. 21.5	medidas destinadas a cumplir/measures taken to comply/mesures pris pour se conformer
US — Customs Bond Directive/US — Shrimp	GATT, Al art. VI, paras. 2 y 3	la comprobación definitiva de los hechos/final determination

⁷⁴ As of 5 March 2012.

(Thailand)		of facts/la constatation définitive des faits
Canada — Wheat Exports and Grain	GATT, art. XVII:1(b)	la obligación/require/l'obligation
US — Gambling	GATS, art. XVI:2(c)	puntuación distinta en la versión en inglés
US — Section 211 Appropriations Act	TRIPS Agreement, art. 6quinquies A(1) París Convention	as is/telle quelle
US — Anti-Dumping and Countervailing Duties (China)	Agreement on Agriculture Article 9.1 and SCM Agreement Article 1.1(a)(1)	their agencies/leurs organismes/organismos públicos public body/ organisme public/ organismo público
China — Raw Materials	GATT Article XX(g)	made effective/sont appliqués/se appliquen

Table 2 Provisions and terms analyzed only by the parties on appeal, 1996-2012⁷⁵

AB Report	Provisions	Terms
Canada — Periodicals	GATT, art. III:8(b)	el pago de subvenciones/payment of subsidies/attribution de subventions
Korea — Alcoholic beverages	GATT, Al art. III:2	un producto directamente competidor o que puede substituirlo directamente/directly competitive or substitutable product/ un produit directement concurrent ou un produit qui peut lui être directement substitué
India — Quantitative Restrictions	GATT	inmediatamente/thereupon/immédiatement
Canada — Dairy	Agreement on Agriculture, art. 9.1©	pagos/payments/ versements
US — FSC	Agreement on Agriculture, art. 3.3	otorgar/provide/accorder
EC — Tube or Pipe Fittings	Antidumping Agreement, art. 3.5	cualesquiera otros factores de que tengan conocimiento/any known factor □ousous les facteurs connus
US — FSC (art. 21.5 EC — II)	Agreement on Agriculture, art. 3.3	otorgar/provide/accorder
US — Continued suspension	DSU, art. 17.10	actuaciones/proceedings/travaux
Canada — Continued	DSU, art. 17.10	actuaciones/proceedings/travaux

⁷⁵ As of 5 March 2012.

suspension		
EC — Fasteners (China)	Antidumping Agreement, art. 6.10	as a rule/en règle générale/por regla general

In panel reports issued from 1999 to 2009, one or more parties or the panel compared the authentic texts of a WTO Agreement in 52 out of 106 panel reports, or 49 percent of reports. Text comparison occurs in panel reports both more often and more consistently than in Appellate Body reports. Like the Appellate Body, panels and the parties to disputes often refer to the French and Spanish texts to confirm their interpretation of the English text. However, the manner in which panels use the comparison of authentic texts is more varied than in Appellate Body reports. In some cases, the parties use only one other text to support their interpretation of the English text, while in other cases they use both of the other texts. In one case, one party used the Spanish text to support its interpretation of the English text, while the other party used the French text to support the opposite interpretation of the same English text.⁷⁶ This variation in the practice of parties also occurs in the Appellate Body.⁷⁷

VII. Conclusion

This analysis of the issues that arise regarding concordance between the English, French and Spanish WTO legal texts serves as a starting point for the discussions regarding ways to improve the process in the negotiation, drafting, translation and litigation phases. It reveals that there are different categories that may require different processes and different solutions.

The concordance of multilingual legal texts is not simply a translation issue. It is also a drafting issue and an interpretation issue. When texts are drafted in the original language, drafters should, as far as possible, take care to choose terminology that can be translated into the other official languages. WTO translators work with short deadlines and without the benefit of separate procedures for quality control or editing. Translation professionals need adequate time and editing procedures if they are to improve the quality of WTO translations.

The focus of the workshop was legal texts, rather than dispute settlement documents. However, as Fermín Alcoba has noted, DSU time frames are short and make no explicit allowance for the time that it takes to complete translations. Moreover, WTO jurisprudence plays an important role in the interpretation of the legal texts. Therefore, procedural reforms could be considered for the translation process regarding panel and Appellate Body reports, not just regarding the translation of legal texts.

Future workshops may wish to focus on the following:

1. Categorization of the types of existing discrepancies that could be addressed in a rectification procedure and how such a rectification procedure should work.
2. Creation of a list of categories of discrepancies to red flag issues where translation and interpretation problems might occur in the future.
3. Preparation of drafting guidelines for legal texts and panel and Appellate Body reports.
4. Preparation of translation and editing guidelines for panel and Appellate Body reports to better define the roles of translators and the drafters of the reports.

⁷⁶ US — Export Restraints, 29 June 2001, WT/DS194/R, note 60.

⁷⁷ Bradley J. Condon, “La interpretación plurilingüe en los informes de los grupos especiales y del Órgano de Apelación” 1:1 *Revista de Derecho Económico Internacional* 32-50 (2010).

5. Expanding the comparison of WTO practices beyond the practices of the EU and the UN Publications, Editing and Proofreading Section, to include those of other UN agencies, other international tribunals, such as the Court of International Justice, as well as countries that deal with multilingual legislation, such as Canada and Switzerland.

Appendix 1

Vienna Convention on the Law of Treaties, 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 contracting States are agreed that it contains an error, the error shall, unless they decide upon some other means of correction, be corrected:

(a) by having the appropriate correction made in the text and causing the correction to be initialled by duly authorized representatives;

(b) by executing or exchanging an instrument or instruments setting out the correction which it has been agreed to make; or

(c) by executing a corrected text of the whole treaty by the same procedure as in the case of the original text.

2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:

(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procès-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;

(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.

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.

4. The corrected text replaces the defective text ab initio, unless the signatory States and the contracting States otherwise decide.

5. The correction of the text of a treaty that has been registered shall be notified to the Secretariat of the United Nations.

6. Where an error is discovered in a certified copy of a treaty, the depositary shall execute a procès-verbal specifying the rectification and communicate a copy of it to the signatory States and to the contracting States.

Appendix 2

Procedure suggested by LSDD with regard to the existing texts

- (i) The Chairman of the General Council would inform Members that, pursuant to the proposal by Chile and following the consultations held subsequently, it seems desirable to correct some linguistic discrepancies that have been noted between the English text and the Spanish and/or French versions of the Agreements contained in the Uruguay Round Final Act.
- (ii) These discrepancies are exclusively the result of translation problems and therefore, since there is no need to renegotiate the text but simply to ensure linguistic harmonization, it does not appear necessary to invoke the complex amendment procedure of Article X of the WTO Agreement. Instead, the United Nations procedure for the rectification of errors could be employed, as was agreed should be done in 1994 for the correction of the linguistic discrepancies in the French and Spanish texts of the GATT 1947. It should be noted that those texts too were authentic* and that nevertheless on pragmatic grounds it was agreed that the original (or, in any case, the reference text) was the English.
- (iii) Should the General Council agree to this procedure, the Chairman would request Members to communicate in writing to the Secretariat any discrepancy they may have noted in the Spanish or French versions of the Uruguay Round texts, allowing them a period of [60] days for doing so.
- (iv) The Secretariat would then establish, for each language, a list of the corrections proposed by Members and those detected by the Secretariat itself, and would invite interested Members to participate in meetings to be held in due course to examine the corrections to be introduced into the Spanish or French texts.
- (v) With the corrections approved at those meetings the Secretariat would establish a second list for each language. This second list would be circulated to all Members who would be given a period of [90] days to indicate whether they had any objection (normally there should not be any objections as these would have been voiced during the earlier meetings).
- (vi) This would be a “no objection” procedure, in other words, if no Member had any objection the corrections would be adopted as the end of the [90] days. The lists would then be deposited with the Depository of the authentic texts of the Final Act and would immediately become an integral part of those texts.
- (vii) If, following the adoption of these corrections, any further discrepancy should subsequently come to light, the same procedure could be followed, but without need for a meeting before each individual case. In other words, the proposal for rectification would be communicated to the Secretariat, which would circulate it to Members, and if there was no objection it would be adopted after [90] days. In the event of an objection, a meeting would be convened and the initial procedure would be repeated.

* The French was authentic as a whole and from the beginning. Some of the provisions of the GATT 1947 were even negotiated in French, as noted elsewhere. The Spanish version of Parts I-III of the GATT 1947, which was translated subsequently, is not authentic, but was taken virtually entirely from the Havana Charter, of which an authentic version in Spanish did exist. Part IV was authentic in Spanish from the start.

Appendix 3

Joint Practical Guide, Guideline 5

Guide of the European Parliament, the Council and the Commission for persons involved in the drafting of legislation within the Community institutions

<http://eur-lex.europa.eu/en/techleg/index.htm>

5. Throughout the process leading to their adoption, draft acts shall be framed in terms and sentence structures which respect the multilingual nature of Community legislation; concepts or terminology specific to any one national legal system are to be used with care.

5.1. A person drafting a Community act of general application must always be aware that his text must satisfy the requirements of Council Regulation No 1, which requires the use of all the official languages in legal acts. That entails additional requirements beyond those which apply to the drafting of a national legislative text.

5.2. First, the original text must be particularly simple, clear and direct, since any over-complexity or ambiguity, however slight, could result in inaccuracies, approximations or real mistranslations in one or more of the other Community languages.

Example of drafting to be avoided:

‘The market prices of [product X] shall be the prices ex-factory, exclusive of national taxes and charges:

a) of the fresh product packaged in blocks;

b) raised by an amount of [EUR X] to take account of the transport costs necessary.’

Text to be preferred:

‘The market prices of [product X] shall be the prices ex-factory of the fresh product packaged in blocks, exclusive of national taxes and charges.

Those prices shall be raised by an amount of [EUR X] to take account of the transport costs necessary.’

5.2.1. Elliptical turns of phrase or short cuts are to be avoided. It is a false economy to use them to convey a message so complex that an explanation is called for.

Example of drafting to be avoided:

‘If products do not satisfy the requirements laid down in Article 5, the Member States shall take all necessary measures to restrict or prohibit the marketing of those products or to ensure they are withdrawn from the market, subject to penalties for the other eventuality decided on by the Member States.’

Text to be preferred:

‘If products do not satisfy the requirements laid down in Article 5, the Member States shall take all necessary measures to restrict or prohibit the marketing of those products or to ensure they are withdrawn from the market.

Member States shall determine the penalties to be applied in the event of failure to comply with those restrictions, prohibitions or withdrawal from the market.’

5.2.2. Overly complicated sentences, comprising several phrases, subordinate clauses or parentheses (interpolated clauses) are also to be avoided.

Example of drafting to be avoided:

‘All parties to the agreement must have access to the results of the work, subject to the understanding that research institutes have the possibility to reserve use of the results for subsequent research projects.’

Text to be preferred:

‘All parties to the agreement must have access to the results of the work.’

However, research institutes may reserve use of the results for subsequent research projects.'

5.2.3. The grammatical relationship between the different parts of the sentence must be clear. There should be no doubt, for example, as to whether an object relates to the verb in the main clause or to that in a subordinate clause.

Example of drafting to be avoided:

'... in order to understand and to be able correctly to apply these provisions ...'

5.2.4. Jargon, certain vogue words and Latin expressions used in a sense other than their generally accepted legal meaning are also to be avoided.

For example:

— **in French:** *'une approche proactive', 'en synergie avec'*;

— **in English:** *'proactive', 'integrated resource management system', 'quasi-abolition of central ex-ante visa controls'*;

— **'in fine' in the sense of 'in conclusion', 'a contrario' in the sense of 'on the contrary'**.

5.3. Second, the use of expressions and phrases — in particular, but not exclusively, legal terms — too specific to the author's own language or legal system, will increase the risk of translation problems.

Two points, in particular, must be borne in mind:

5.3.1. Certain expressions in one language — and in particular quite common ones such as the French *'sans préjudice'* — have no equivalent in other Community languages. In those languages, they can therefore only be translated using circumlocutions and approximations, which inevitably result in semantic divergences between the various language versions. Expressions which are too specific to one language should therefore be avoided as far as possible.

5.3.2. As regards actual legal terminology, terms which are too closely linked to national legal systems should be avoided.

Example:

The concept of 'faute', which is well known in French law, has no direct equivalent in other legal systems (in particular, English and German law); depending on the context, terms such as 'illégalité', 'manquement' (in relation to an obligation), etc., which can easily be translated into other languages ('illegality', 'breach', etc.) should be used instead.

5.4. The aim is that, as far as possible, and taking account of the specific nature of Community law and its terminology, those called on to apply or interpret the act in each Member State (officials, judges, lawyers, etc.) must perceive it not as a 'translation' in a negative sense — but as a text which corresponds to a certain legislative style. Texts peppered with loan words, literal translations or jargon which are hard to understand are the source of much of the criticism of Community legislation which is, as a result, regarded as alien.

5.5. Finally, two essentially practical comments must be made as to the relationship between the original text and translations of it.

5.5.1. First, the author must ensure that translators can immediately identify the sources drawn on in the original text. If a passage in the original text has been taken from an existing text (Treaty, directive, regulation, etc.) that must be clear from the text or indicated separately, where necessary by appropriate electronic means (see Guideline 6). There is a risk that any hidden citations without a reference to the source will be translated freely in one or more languages, even though the author specifically intended to use the authentic wording of an existing provision.

5.5.2. Second, the author must realise that comments from translators and, more generally, all departments which carry out a linguistic check of the text can be extremely useful. Such checks provide an opportunity to identify any errors and ambiguities in the original text, even after a lengthy gestation period and even — perhaps especially — when the drafting has been the subject of much discussion between a number of people. The problems encountered may then be brought to the attention of the author. In many cases, the best solution will be to alter the original, rather than the translation.