

Lost in Translation: Plurilingual Interpretation of WTO Law

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Abstract

This article analyzes the extent to which the Appellate Body compares the authentic texts in its examination of the WTO Agreements and the extent to which the parties themselves do so in their appellate arguments. The texts of the WTO Agreements are authentic in English, French and Spanish. Article 33 of the *Vienna Convention on the Law of Treaties* governs the interpretation of treaties authenticated in two or more languages. WTO practice diverges significantly from the rules set out in Article 33 and the *travaux préparatoires* of the International Law Commission. The terms of a plurilingual treaty are presumed to have the same meaning in each authentic text, which means that a treaty interpreter need not compare the authentic texts as a routine matter as a matter of law. Nevertheless, routine comparison of authentic texts would be good practice in the WTO context, since there are several discrepancies that could affect the interpretation of WTO provisions.

I. INTRODUCTION

On September 12, 2006, for the first time in the history of the GATT or the WTO, a panel hearing was conducted in Spanish. The three members of the panel—Mr. Julio Lacarte-Muró, Mr. Cristian Espinosa Cañizares and Mr. Álvaro Espinoza—made all of their comments and posed all of their questions in Spanish only. The parties—Mexico and Guatemala—presented all of their pleadings entirely in Spanish, as did most of the third parties.¹

English, French and Spanish are the official languages of the WTO. Each of the English, French and Spanish legal texts of the WTO is authentic.² Versions in other languages are not authentic.³ In practice, English is the “working” language of the WTO. While formal trade negotiations and meetings of the WTO bodies are conducted in the three official languages, with the use of simultaneous interpretation, other, more informal meetings are conducted in English. Most panel and Appellate Body reports are written in

¹ *Mexico — Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, DS331.

² Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, final, authenticating clause, GATT Secretariat, *The Results of the Uruguay Round of Multilateral Trade Negotiations, the Legal Texts* (Geneva, 1994), 2. However, some documents, while they form part of the treaty text, are only authentic in one or two languages. For example, the Lists of Specific Commitments attached to the GATS are authentic in English only (the United States), Spanish only (Mexico) and in English and French only (Canada).

³ Article 33(2) of the Vienna Convention on the Law of Treaties distinguishes between ‘text’, which refers to any rendition in a language in which the treaty was authenticated, and ‘version’, which refers also to languages other than those in which the text was authenticated. This was one of the few questions raised in the discussions of the ILC in the process of drafting this article. Sir Humphrey Waldock, 16 Yearbook of the International Law Commission (1966), Vol. I, part 2, 874th meeting, 208, para. 3 (accessed 29 September 2009). Also see M Tabory, *Multilingualism in International Law and Institutions* (1980), 170-71; EB Zane, ‘The Interpretation Problems of Multilingual Treaties’ *AmbienteDiritto.it - Rivista giuridica - Electronic Law Review*, http://www.ambientediritto.it/dottrina/Dottrina_2008/the_interpretation_bindazane.htm#16, accessed 24 September 2009.

English and then translated into French and Spanish. Likewise, the Uruguay Round Agreements were drafted in English and then translated into French and Spanish. These agreements cover hundreds of pages of treaty text. It thus is not surprising that the authentic texts sometimes diverge. When there is a divergence of treaty language among the authentic texts, the rules of interpretation of Article 33 of the Vienna Convention on the Law of Treaties can be applied to reconcile the divergence.⁴

In the view of Linderfalk, “authenticated texts of a multi-language treaty can always be reconciled through an application of VCLT 33(4)”.⁵ However, if the rules of treaty interpretation are capable of reconciling discrepancies among the English, French and Spanish texts, discrepancies among these texts still have the potential to cause systemic problems. Until recently, panel and Appellate Body hearings have been conducted in English and the reports have been drafted in English. Thus, as long as there were no problems with the English text of the agreements, the French and Spanish texts merely provided one more step in the process of treaty interpretation. As long as panels and the Appellate Body consider treaty text in the three languages all the time, it should not matter in which language the report is written. However, this only occurs in a minority of cases, which may be one reason why many discrepancies among the English, French and Spanish legal texts have gone unnoticed.

The majority of law firms that have important WTO practices conduct their work in English. Indeed, the lawyers of those firms prepare legal arguments 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 other languages than English. Discrepancies 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 discrepancies as a possible source of a dispute can represent a significant obstacle to resolving a dispute through negotiation.⁶

In addition to the potential for problems in the international arena, discrepancies between different authentic texts have implications in domestic legal systems.⁷ Countries

⁴ Paragraph 1 refers to ‘divergence’, while paragraph 4 refers to ‘difference’. These terms appear to be interchangeable. JM Mössner, *Die Auslegung mehrsprachiger Staatsverträge. Bemerkungen zu Artikel 33 der Wiener Konvention über das Recht der Verträge vom 23. mai 1969*, AVR 15 (1972) 300, n 130. ME Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009), 459, n 38.

⁵ U Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (2007), 369. Sir Humphrey Waldock’s view appears to be consistent with Linderfalk’s view: ‘if no reconciliation of the texts was possible, the interpretation should be left to be determined in the light of all the circumstances’. Sir Humphrey Waldock, 16 Yearbook of the International Law Commission (1966), Vol. I, part 2, 874th meeting, 210, para. 33 (accessed 29 September 2009).

⁶ 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 WJ Aceves, ‘Ambiguities in Plurilingual Treaties: A Case Study of Article 22 of the 1982 Law of the Sea Convention’, 27 *Ocean Development and International Law Journal* 187-233 (1996) at 204.

⁷ I thank my colleague Professor Gabriela Rodríguez for making this point. Of course, in states with more than one official language, tensions also may arise between the legal principle of equal authenticity and the

tend to adopt and implement treaties in their official languages.⁸ Thus, for example, where there is a discrepancy 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 create a divergence in compliance with WTO norms by legislators or a divergence in the interpretation and application of WTO norms by administrative agencies and national courts.⁹

This article begins by examining the text of Article 33 of the Vienna Convention, together with the *travaux préparatoires* of the International Law Commission, relevant jurisprudence from the International Court of Justice (ICJ) and relevant doctrine. It then examines WTO jurisprudence in which the Appellate Body has applied Article 33 of the Vienna Convention and examined the treaty text in the three authentic languages. This examination reveals that the Appellate Body has only considered the three authentic texts in just over twenty-two percent of cases, even though Article 33 is material part of treaty interpretation, according to the International Law Commission,¹⁰ and reflects the customary rules of treaty interpretation.¹¹ This article then analyzes a number of instances in which the treaty texts of the WTO diverge and how these differences should be resolved according to the rules of treaty interpretation. The article concludes that WTO panels and the Appellate Body should apply Article 33 of the Vienna Convention more systematically and considers what other type of mechanism might serve to address this issue at the WTO.

II. ARTICLE 33 OF THE VIENNA CONVENTION

Most treaties are bilingual or plurilingual.¹² Article 33 of the Vienna Convention on the Law of Treaties¹³ reflects customary international law regarding the interpretation of treaties authenticated in two or more languages. It provides as follows:¹⁴

nature of language, for example in Canada (English and French) and Hong Kong (Chinese and English). D Cao, 'Inter-lingual uncertainty in bilingual and multilingual law', 39 *Journal of Pragmatics* 69 (2007).

⁸ R Urueña, 'El problema de la interpretación de tratados redactados en diversos idiomas, según el derecho internacional', 14 *Language Problems and Language Planning* (1990) 209-223, at 211. For example, France adopted the Treaty of Rome in French only. *Ibid* at 214.

⁹ Tabory, above n 2, 962. Aceves cites the example of *Foster v. Neilson*, 27 U.S. (2 Pet.) 253 (1829) and *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833), in which the United States Supreme Court considered a treaty between the United States and Spain, drafted in English and Spanish. The Supreme Court reached opposite conclusions regarding whether the treaty was self-executing because it only considered the English version in the first case and considered both versions in the second. Aceves, above n 6, at 228, n 176.

¹⁰ Yearbook of the International Law Commission (1966), Vol. II, p. 225, <http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (accessed 2 September 2009).

¹¹ *LaGrand (Germany/US) Case*, ICJ Reports, 2001 502, para. 101. Villiger, above n 4, 461. For a more general analysis of the application of customary rules of treaty interpretation in WTO law, see I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (2009).

¹² A Aust, *Modern Treaty Law and Practice* (2000), 202. Most exceptions are very old treaties or treaties between states which have the same mother tongue or official language. *Ibid*. Prior to 1919, most treaties were drafted in French and very old treaties were drafted in Latin. Mössner, above n 4, 279. Villiger, above n 4, 454. Also see P Germer, 'Interpretation of Plurilingual Treaties: A Study of Article 33 of the Vienna Convention on the Law of Treaties' 11 *Harvard International Law Journal* 400-427 (1970).

¹³ U.N. Doc A/CONF.39/27 (1969), 1155 U.N.T.S. 331, entered into force January 27, 1980.

¹⁴ 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

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.
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.

Interprétation de traités authentifiés en deux ou plusieurs langues

1. Lorsqu'un traité a été authentifié en deux ou plusieurs langues, son texte fait foi dans chacune de ces langues, à moins que le traité ne dispose ou que les parties ne conviennent qu'en cas de divergence un texte déterminé l'emportera.
2. Une version du traité dans une langue autre que l'une de celles dans lesquelles le texte a été authentifié ne sera considérée comme texte authentique que si le traité le prévoit ou si les parties en sont convenues.
3. Les termes d'un traité sont présumés avoir le même sens dans les divers textes authentiques.
4. Sauf le cas où un texte déterminé l'emporte conformément au paragraphe 1, lorsque la comparaison des textes authentiques fait apparaître une différence de sens que l'application des articles 31 et 32 ne permet pas d'éliminer, on adoptera le sens qui, compte tenu de l'objet et du but du traité, concilie le mieux ces textes.

Interpretación de tratados autenticados en dos o más idiomas

1. Cuando un tratado haya sido autenticado en dos o más idiomas, el texto hará igualmente fe en cada idioma, a menos que el tratado disponga o las partes convengan que en caso de discrepancia prevalecerá uno de los textos.
2. Una versión del tratado en idioma distinto de aquel en que haya sido autenticado el texto será considerada como texto auténtico únicamente si el tratado así lo dispone o las partes así lo convienen.
3. Se presumirá que los términos del tratado tienen en cada texto auténtico igual sentido.
4. Salvo en el caso en que prevalezca un texto determinado conforme a lo previsto en el párrafo 1, cuando la comparación de los textos auténticos revele una diferencia de sentido que no pueda resolverse con la aplicación de los artículos 31 y 32, se adoptará el sentido que mejor concilie esos textos, habida cuenta del objeto y fin del tratado.

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.

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.¹⁵ 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.¹⁶ 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.

The draft Article that was later adopted as Article 33(3) of the Vienna Convention 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.¹⁷

In its commentary on the draft Article, the International Law Commission made several observations. Paragraph 1 expressed the general rule of the “equality of the languages and the equal authenticity of the texts in the absence of any provision to the contrary”.¹⁸ While some treaties designate one language as authoritative in the case of

¹⁵ 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.

¹⁶ 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, *The Law of Treaties* (1961), 433.

¹⁷ Yearbook of the International Law Commission (1966), Vol. II, p. 224, <http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (2 September 2009).

¹⁸ 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

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.¹⁹

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.²⁰ 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.²¹ 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.²² A duty of routine comparison would imply the rejection of this presumption.²³ The practice of the Appellate Body supports the view that routine comparison is not necessary, as does the practice of many domestic courts and other international tribunals.²⁴

In practice, most plurilingual treaties contain some discrepancy between the texts, which can either complicate or facilitate the interpretation of a treaty. When the absence of a complete consensus or lack of sufficient time to co-ordinate the texts results in discrepancies in the meaning of the texts, the plurality of the texts may be an additional source of ambiguity or obscurity in the terms of the treaty. Alternatively, when the meaning of terms is ambiguous or obscure in one language, but clear in another, the plurilingual 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”.²⁵ Regardless of the source of the ambiguity or obscurity, “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

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 16, 432. It is interesting to note that the working language of the Commission was English.

¹⁹ Yearbook of the International Law Commission (1966), Vol. II, p. 224,

<http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (2 September 2009).

²⁰ Yearbook of the International Law Commission (1966), Vol. II, p. 225,

<http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (2 September 2009).

²¹ Aust, above n 12, 205. Villiger, above n 4, 458-459.

²² CB Kuner, ‘The Interpretation of Multilingual Treaties: Comparison of Texts versus the Presumption of Similar Meaning’ 40 *The International and Comparative Law Quarterly* (1991) 953, at 954. Also see Tabory, above n 2, at 177, and Germer, above n 12.

²³ Ibid.

²⁴ Kuner, above n 22, at 955-957. The practice of the Appellate Body is examined below.

²⁵ 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 4, 458.

for the interpretation of treaties” in Vienna Convention Articles 31 and 32. The interpreter can not just prefer one text to another.²⁶

In the *Mawommatis Palestine Concessions* case, the Permanent Court said, “...where two versions possessing equal authority exist one of which appears to have a wider bearing than the other, it [the Court] is bound to adopt the more limited interpretation which can be made to harmonize with both versions and which, as far as it goes, is doubtless in accordance with the common intention of the Parties.”²⁷ However, 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 plurilingual texts.²⁸

In the *Mawommatis Palestine Concessions* case,²⁹ the Permanent Court preferred a more restrictive interpretation “because the original draft of this instrument was probably made in English”.³⁰ However, the Commission rejected creating a legal presumption in all cases in favour of the language in which the treaty was drafted, “since much might depend on the circumstances of each case and the evidence of the intention of the parties”.³¹ 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.³²

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.³³ In that case, the United States claimed that Italy had violated Article VII of the Treaty, which ensured the right “to acquire, own and dispose of immovable property or interests therein within the territories of the other High Contracting Party”, in English, and “acquistare, possedere e disporre di beni immobili o di altri diritti reali nei territori dell’altra Alta Parte Contraente”, in Italian.³⁴ Italy argued that this Article did not apply to the US company because its property rights (“diritti reali”) were limited to shares in the Italian company that owned the immovable property in question. The United States contended that “immovable property or interests therein” was sufficiently broad to include indirect

²⁶ Ibid.

²⁷ P.C.I.J. (1924), Series A, No. 2, p. 19.

²⁸ Yearbook of the International Law Commission (1966), Vol. II, p. 225-226, <http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (2 September 2009).

²⁹ P.C.I.J. (1924), Series A, No. 2, p. 19.

³⁰ P.C.I.J. (1924), Series A, No. 2, p. 19.

³¹ Yearbook of the International Law Commission (1966), Vol. II, p. 226, <http://untreaty.un.org/ilc/publications/yearbooks/1966.htm> (2 September 2009).

³² *Young Loan Arbitration*, 59 ILR 494 (1980). Also see the dissenting opinion in *Young Loan Arbitration*. Aust argues that paragraph 33(4) does not mean that each language text will carry the same weight and that placing more reliance on the text in which the treaty was negotiated and drafted is not incompatible with paragraph 33(4). Aust, above n 12, 205.

³³ *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).

³⁴ *Elettronica Sicula S.P.A. (ELSI)*, para. 131.

ownership of property rights held through a subsidiary that is not a United States corporation. The court rejected the US argument. While “interest” in English has several possible meanings, it is in English usage a term commonly used to denote different kinds of rights in land. It therefore was possible to interpret the English and Italian texts of Article VII as “meaning much the same thing”, especially since the clause in question was in any event limited to immovable property.³⁵

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. As Linderfalk has pointed out, if alternatives are equally good, there must be an objective criterion that the interpreter can apply to choose among them and that criterion is object and purpose.³⁶

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).³⁷ 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 find that orders under Article 41 are binding, a conclusion that was in conformity with the *travaux préparatoires* of Article 41.

Linderfalk argues that the process of harmonization in Article 33 must take place in a predetermined order.³⁸ First, the treaty interpreter must determine whether the difference in meaning can be removed through the application of Articles 31 and 32. In his view, most differences can be removed at this stage. Second, if there is divergence in meaning, does one text prevail? This step does not apply to the WTO agreements, since there is no provision indicating that one text will prevail in the event of a discrepancy. Third, if there is divergence in meaning, “the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted”. This step requires that the texts be reconciled, not the meanings.³⁹ This requires the treaty interpreter to consider alternative meanings and to choose the one which best reconciles the texts, not according to the subjective view of the interpreter, but according to the objective criterion of the object and purpose of the treaty.⁴⁰

Tabory sets out the following steps: (1) Understand the treaty on the basis of one text, which is presumed to express the common meaning in accordance with Article 33(3); (2) If there is a problem or lack of clarity, compare the authentic texts in an effort

³⁵ *Elettronica Sicula S.P.A. (ELSI)*, para. 132.

³⁶ Linderfalk, above n 5, 364.

³⁷ *LaGrand (Germany/US) Case*, ICJ Reports, 2001 501 ff, paras. 100-109.

³⁸ Linderfalk, above n 5, 357-358.

³⁹ *Ibid*, 361.

⁴⁰ *Ibid*, 361, 364. Linderfalk also argues persuasively that this implies that the role played by the object and purpose in Article 33 is distinct from the role it plays in Article 31. *Ibid*, 365-366. The jurisprudence of the European Court of Justice provides good examples of resolving discrepancies by reference to the object and purpose. D Shelton, ‘Reconcilable Differences? The Interpretation of Multilingual Treaties’ 20 *Hastings International and Comparative Law Review* 611-638 (1997), at 630-631.

to find their common meaning, in accordance with Article 33(4); (3) If there is a difference of meaning, apply Article 31 and, as a supplementary means, Article 32; and (4) Reconcile the texts in light of the object and purpose, in accordance with Article 33(4).⁴¹

The very nature of languages and legal systems is an important source of discrepancies. There can be discrepancies in the use of legal terminology even when countries use the same language and have a common legal system.⁴² Some expressions may be difficult to translate into another language. In the recent Judgment of the International Court of Justice in the *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, the dispute centered on the interpretation, and translation into English and French, of the phrase in Spanish “con objetos de comercio”, which defined the scope of Costa Rica’s freedom of navigation on the San Juan River under the Treaty of Limits of 1858.⁴³ Differences between legal systems and legal cultures further complicate the task of translating legal concepts.⁴⁴ Indeed, the further apart the language structures are and the further apart the legal systems are, the more difficult it will be to translate legal terms without altering the meaning.⁴⁵ In the case of the WTO, English, French and Spanish are not that far apart, relatively speaking.⁴⁶ They use virtually identical alphabets and have a considerable amount of common vocabulary, much of which is based on Latin. In addition, each of the three languages has incorporated vocabulary from each other. While there are some

⁴¹ Tabory, above n 2, 177.

⁴² I thank Professor Gabriela Rodríguez for this insight. For example, the term ‘goods’ is expressed in Mexico as ‘mercancías’ and in Colombia as ‘mercaderías’. The Spanish text of the North American Free Trade Agreement (NAFTA) refers to dispute settlement panel(s) as ‘panel(es)’ (see Articles 1903-1905, 1909, 2008, 2011, 2015-2019, among others), whereas the Spanish text of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes refers to ‘grupo especial’ or ‘grupos especiales’ (see articles 6-16, among others). Similarly, for ‘accession’ NAFTA uses the term ‘accesión’ (Article 2204) whereas the Marrakesh Agreement Establishing the World Trade Organization uses the term ‘adhesión’ (Article XII).

⁴³ Judgment, 13 July 2009, <http://www.icj-cij.org/docket/files/133/15321.pdf?PHPSESSID=b51c86918987ffb9d3478faf043a742f>, paras. 43-45, 51-56. Nicaragua argued that this expression must be translated literally as ‘avec des marchandises de commerce’ and ‘with articles of trade’, which would limit Costa Rica’s freedom of navigation to the transport of goods intended to be sold in a commercial exchange. Costa Rica argued that the expression should be interpreted broadly as ‘à des fins de commerce’ and ‘for the purposes of commerce’, so that the word ‘objetos’ would refer to objects in the abstract sense of ends and purposes. Based on an interpretation under Article 31 of the Vienna Convention, the Court agreed with Costa Rica’s interpretation. See paras. 45, 52-56. The Court went on to find that that ‘the terms by which the extent of Costa Rica’s right of free navigation has been defined, including in particular the term “comercio”, must be understood to have the meaning they bear on each occasion on which the Treaty is to be applied, and not necessarily their original meaning.’ Thus, the right of free navigation in question applied to the transport of persons as well as the transport of goods. See paras. 70-71.

⁴⁴ BJ Condon, ‘NAFTA at Three-and-One-Half Years: Where Do We Stand and Where Should We Be Headed? A Cross-Cultural Analysis of North American Legal Integration’ 23 *Canada-United States Law Journal* 347 (1997).

⁴⁵ Aceves, above n 6, at 206-207. B Grossfeld, ‘Language and the Law’ 50 *J. Air. L. & Com.* 793 (1985) at 801.

⁴⁶ Indeed, because French and Spanish are both romance languages, they share a virtually identical structure and a similar use of punctuation. Many legal terms are virtually identical in these two languages. As a result, the French and Spanish texts are often closer to each other than to the English text, but not always. I thank Professor Gabriela Rodríguez for this insight.

differences in the structure of each language, these differences are relatively limited. Thus, it should be relatively easy to compare texts on a routine basis at the WTO.

III. WTO JURISPRUDENCE APPLYING VIENNA CONVENTION ARTICLE 33

This section examines the Appellate Body reports in which one or more parties or the Appellate Body compared the authentic texts of a WTO Agreement, organized according to the nature of the analysis and in chronological order. In seven reports, the Appellate Body refers explicitly to a specific paragraph of Article 33 of the Vienna Convention. In six reports, it compares the texts without any reference to Article 33 and without any of the parties raising arguments based on a comparison of the texts. In twelve reports one or more parties presented arguments based on a comparison of the texts. In three of these reports the Appellate Body also compares the texts and in nine it does not. In seven reports, the Appellate Body uses the French and Spanish texts to confirm or support its interpretation of the English text. In two reports, the Appellate Body misapplies the rule in Article 33(3). In two reports, the Appellate Body confuses the rules in different paragraphs in Article 33. In the following review of these reports, the year the appeal was filed is noted for each report in the text, in order to show that there is no correlation between the manner in which the comparison of texts takes place and the year in which the appeal was filed.⁴⁷

The Appellate Body has cited Article 33 in the following seven reports: (1) *EC — Asbestos* (2000) (Article 33(1));⁴⁸ *Chile — Price Band System* (2002) (Article 33(4));⁴⁹ *EC — Bed Linen (Article 21.5 — India)* (2003) (Article 33(3));⁵⁰ *US — Softwood Lumber IV* (2003) (Article 33(3));⁵¹ *US — Countervailing Duty Investigation on DRAMs* (2005) (Article 33(3));⁵² *US — Upland Cotton* (2005) (Article 33(3));⁵³ and *US — Stainless Steel (Mexico)* (2008) (Article 33(3)).⁵⁴ In *EC — Asbestos*, the Appellate Body was not clear regarding whether it was applying the presumption in Article 33(3) or the rule in Article 33(4); it only made reference to Article 33(1) of the Vienna Convention. In *Chile — Price Band System*, the Appellate Body correctly applied Article 33(4) to reconcile divergent texts. In *EC — Bed Linen (Article 21.5 — India)*, the Appellate Body applied the presumption in Article 33(3) when it reconciled divergent texts. In *US — Softwood Lumber IV*, *US — Countervailing Duty Investigation on DRAMs*, *US — Cotton* and *US — Stainless Steel (Mexico)*, the Appellate Body read the presumption in Article 33(3) of the

⁴⁷ On the WTO website, the Appellate Body Reports are arranged according to the year the appeal was filed, which does not necessarily correspond to the year the Report was circulated or adopted. Appellate Body Reports, http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm. The calculations in figures 1 and 2, below, are based on that list. However, the citations of the reports in the footnotes refer to the year in which the reports were adopted.

⁴⁸ WTO Appellate Body Report, *European Communities — Measures Affecting Asbestos and Asbestos—Containing Products (EC — Asbestos)*, WT/DS135/AB/R, adopted 5 April 2001, para. 91, n 62.

⁴⁹ WTO Appellate Body Report, *Chile — Price Band System*, above n 15, paras. 265-271, 273.

⁵⁰ WTO Appellate Body Report, *EC — Bed Linen (Article 21.5 — India)*, above n 15, para. 123, n 153.

⁵¹ WTO Appellate Body Report, *US — Softwood Lumber IV*, above n 15, para. 59, n 50.

⁵² Appellate Body Report, *United States — Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea (US — Countervailing Duty Investigation on DRAMs)*, WT/DS296/AB/R, 20 July 2005, para. 111 and n 176.

⁵³ WTO Appellate Body Report, *US — Upland Cotton*, above n 15, para. 424, n 510.

⁵⁴ WTO Appellate Body Report, *United States — Final Anti-dumping Measures on Stainless Steel from Mexico (US — Stainless Steel (Mexico))*, WT/DS344/AB/R, adopted 20 May 2008, paras. 88-89, n 200.

Vienna Convention to require that the treaty interpreter seek the meaning that gives effect, simultaneously, to the terms of the treaty as they are used in each authentic language and used the comparison to support its interpretation of the English text. In comparing the texts, the Appellate Body stated that it was applying the presumption in Article 33(3), even though the presumption in Article 33(3) does not require a comparison of the texts.

In six reports, the Appellate Body has compared texts without citing Article 33 and without any Parties comparing texts in their arguments. In *US — Lamb* (2001),⁵⁵ *EC — Tariff Preferences* (2004),⁵⁶ *US — Oil Country Tubular Goods Sunset Reviews* (2004),⁵⁷ *US — Softwood Lumber V* (2004),⁵⁸ *US — Softwood Lumber IV (Article 21.5 — Canada)* (2005)⁵⁹ and *US — Customs Bond Directive/US — Shrimp (Thailand)* (2008)⁶⁰ the Appellate Body used the French and Spanish texts to confirm its interpretation of the English text.

In three reports, the Appellate Body has compared texts without citing Article 33 after one or more parties compared texts in their arguments. In *Canada — Wheat Exports and Grain Imports* (2004), the United States argued that its interpretation of the English text was confirmed by the French and Spanish texts,⁶¹ but the Appellate Body used the French and Spanish texts to support a different conclusion.⁶² In *US — Gambling* (2005), the United States argued that the Panel was wrong to rely upon the presence of commas in the French and Spanish texts and the absence of a comma in the English text because this approach was contrary to Article 33(4) of the Vienna Convention.⁶³ The Appellate Body found that all three language versions were grammatically ambiguous, so the mere

⁵⁵ WTO Appellate Body Report, *United States — Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia (US — Lamb)*, WT/DS177/AB/R, WT/DS178/AB/R, 16 May 2001, para. 124 and n 77.

⁵⁶ WTO Appellate Body Report, *EC — Tariff Preferences*, above n 15, paras. 145-148.

⁵⁷ WTO Appellate Body Report, *United States — Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina (US — Oil Country Tubular Goods Sunset Reviews)*, WT/DS268/AB/R, 17 December 2004.

⁵⁸ WTO Appellate Body Report, *United States — Final Dumping Determination on Softwood Lumber from Canada (US — Softwood Lumber V)*, WT/DS264/AB/R, 31 August 2004, para. 135, n 210.

⁵⁹ WTO Appellate Body Report, *United States — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, Recourse by Canada to Article 21.5 of the DSU (US — Softwood Lumber IV (Article 21.5 — Canada))*, WT/DS257/AB/RW, 20 December 2005, para. 66.

⁶⁰ WTO Appellate Body Report, *United States — Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties (US — Customs Bond Directive)*, WT/DS345/AB/R, 1 August 2008, *United States — Measures Relating to Shrimp from Thailand (US — Shrimp (Thailand))*, WT/DS343/AB/R, 1 August 2008, 205, 223 and n 266. Brazil did not refer to the French text.

⁶¹ WTO Appellate Body Report, *Canada — Measures Relating to Exports of Wheat and Treatment of Imported Grain (Canada — Wheat Exports and Grain Imports)*, WT/DS276/AB/R, 27 September 2004, para. 23.

⁶² *Ibid.*, para. 89, n 93, n 97.

⁶³ WTO Appellate Body Report, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services (US — Gambling)*, WT/DS285/AB/R, 20 April 2005, para. 24, 242. In the same case, the Appellate Body rejected the European Communities' argument that, because Members' Schedules of Specific Commitments under the GATS form an integral part of the WTO Agreement, the Panel correctly followed Article 33 of the Vienna Convention in comparing the terms of the Schedule used in the French and Spanish texts. The Appellate Body disagreed because the United States' Schedule explicitly states that it "is authentic in English only." *Ibid.*, paras. 99, 166.

presence or absence of a comma was not determinative of the issue.⁶⁴ The Appellate Body used the English text and supplementary means of interpretation (*travaux préparatoires*) to uphold the Panel's finding.⁶⁵ In *US — Section 211 Appropriations Act* (2001), the European Communities and the Appellate Body referred to both the English and French texts of the Paris Convention (1967).⁶⁶

In nine reports, one or more of the parties compared texts but the Appellate Body did not. In *Canada — Periodicals* (1997), Canada used the French text to confirm its interpretation of the English text and the United States used the Spanish text to confirm its contrary interpretation.⁶⁷ The Appellate Body based its conclusion on the text, context, and object and purpose, not the French or Spanish texts.⁶⁸ In *Korea — Alcoholic Beverages* (1998), the European Communities and the United States each argued that the French and Spanish texts supported their respective interpretations of the English text.⁶⁹ However, the Appellate Body's reasoning focused on ordinary meaning, context and object and purpose and made no mention of the Spanish and French texts.⁷⁰ In *India — Quantitative Restrictions* (1999), the United States argued that its reading was supported by the French and Spanish texts.⁷¹ The Appellate Body did not respond to this argument. In *Canada — Dairy* (1999), Canada argued that its interpretation was supported by the French and Spanish texts,⁷² but the Appellate Body based its analysis on the ordinary meaning of the terms and the context, without considering the Spanish and French texts.⁷³ In *US — FSC* (1999), the United States and the European Communities each argued that their interpretation was confirmed by the French and Spanish texts.⁷⁴ The Appellate Body found it unnecessary to address the issue.⁷⁵ In *EC — Tube or Pipe Fittings* (2003), Brazil argued that the Spanish text supported its argument.⁷⁶ The Appellate Body found that it need not resolve this question in the appeal and did not consider this aspect of Brazil's

⁶⁴ Ibid, para. 245.

⁶⁵ Ibid, paras. 246-252.

⁶⁶ WTO Appellate Body Report, *United States — Section 211 Omnibus Appropriations Act of 1998 (US — Section 211 Appropriations Act)*, WT/DS176/AB/R, 1 February 2002, paras. 16, 137. This case is included in this review of Appellate Body reports that consider plurilingual aspects of the WTO Agreements because the Paris Convention is incorporated by reference into the Agreement on Trade Related Aspects of Intellectual Property Rights.

⁶⁷ WTO Appellate Body Report, *Canada — Certain Measures Concerning Periodicals (Canada — Periodicals)*, 30 July 1997, WT/DS31/AB/R, pp. 8, 13.

⁶⁸ Ibid, pp. 33-34.

⁶⁹ WTO Appellate Body Report, *Korea — Taxes on Alcoholic Beverages (Korea — Alcoholic Beverages)*, WT/DS75/AB/R, WT/DS84/AB/R, 17 February 1999, paras. 44, 75.

⁷⁰ Ibid, paras. 112-124.

⁷¹ WTO Appellate Body Report, *India — Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products (India — Quantitative Restrictions)*, WT/DS90/AB/R, 22 September 1999, paras. 60, 64.

⁷² WTO Appellate Body Report, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Canada — Dairy)*, WT/DS103/AB/R, WT/DS113/AB/R, 27 October 1999, para. 32.

⁷³ Ibid, para. 112.

⁷⁴ WTO Appellate Body Report, *United States — Tax Treatment for 'Foreign Sales Corporations' (US — FSC)*, WT/DS108/AB/R, 20 March 2000, paras. 35, 57.

⁷⁵ Ibid, para. 132.

⁷⁶ WTO Appellate Body Report, *European Communities — Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil (EC — Tube or Pipe Fittings)*, WT/DS219/AB/R, 18 August 2003, para. 34.

argument.⁷⁷ In *US — FSC (Article 21.5 — EC II)* (2005), the United States and the European Communities each argued that the French and Spanish texts supported their interpretation of the English text.⁷⁸ The argued that the French and Spanish texts of Article 3.3 of the Agreement on Agriculture do not differ in any way from the English text.⁷⁹ The Appellate Body did not find it necessary to examine the issue.⁸⁰ In *US — Continued Suspension* (2008), third party Norway's argument was based in part on a comparison of the English, Spanish and French texts in accordance with Article 33 of the Vienna Convention, but the Appellate Body did not refer to Article 33 or the other texts in its ruling on this point.⁸¹ In *Canada — Continued Suspension* (2008), the European Communities and Norway referred to the French and Spanish texts to support their arguments.⁸² As in *US — Continued Suspension*, the Appellate Body did not refer to Article 33 or the other texts in its ruling.

The above cases are the only ones in which one or more of the parties or the Appellate Body considered more than one authentic text of the WTO Agreements.⁸³ The foregoing review of Appellate Body jurisprudence reveals some interesting insights into the use of the different authentic texts in Appellate Body jurisprudence.

The Appellate Body does not consider the French and Spanish texts in all cases. It has only considered more than one authentic text in nineteen of 86 Appellate Body reports, or 22.1 percent of all reports.⁸⁴ Figure 1 shows the number of reports in which the Appellate Body compares the authentic texts, by year. Figure 2 shows the percentage of reports in which the Appellate Body compares the authentic texts, by year. There is no apparent 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.

⁷⁷ Ibid, para. 176.

⁷⁸ WTO Appellate Body Report, *United States — Tax Treatment for 'Foreign Sales Corporations' — Second Recourse to Article 21.5 of the DSU by the European Communities (US — FSC (Article 21.5 — EC II))*, WT/DS108/AB/RW2, 14 March 2006, paras. 35, 57.

⁷⁹ Ibid, para. 57.

⁸⁰ Ibid, para. 132.

⁸¹ WTO Appellate Body Report, *United States — Continued Suspension of Obligations in the EC — Hormones Dispute (US — Continued Suspension)*, WT/DS320/AB/R, adopted 14 November 2008, para. 255, and Annex IV — Procedural ruling of 10 July to allow public observation of the oral hearing, 10 July 2008.

⁸² WTO Appellate Body Report, *Canada — Continued Suspension of Obligations in the EC — Hormones Dispute (Canada — Continued Suspension)*, WT/DS321/AB/R, adopted 14 November 2008, paras. 35, 255.

⁸³ This is based on a search of 85 Appellate Body reports (those published from the date the Appellate Body was established to 4 October 2009 or the first fifteen years of operation) for the terms 'Article 33', 'French' and 'Spanish'. Thus, this search captures reports in which the Appellate Body has compared the different texts, but without referring explicitly to Article 33.

⁸⁴ The list of Appellate Body reports at http://www.wto.org/english/tratop_e/dispu_e/ab_reports_e.htm states that there are 98 reports (7 October 2009). However, that number is based on the number of case numbers (98), rather than the actual number of reports in the list (85), since some reports have more than one case number.

Figure 1: Number of Reports in which Appellate Body Compares Authentic Texts 1996-2009

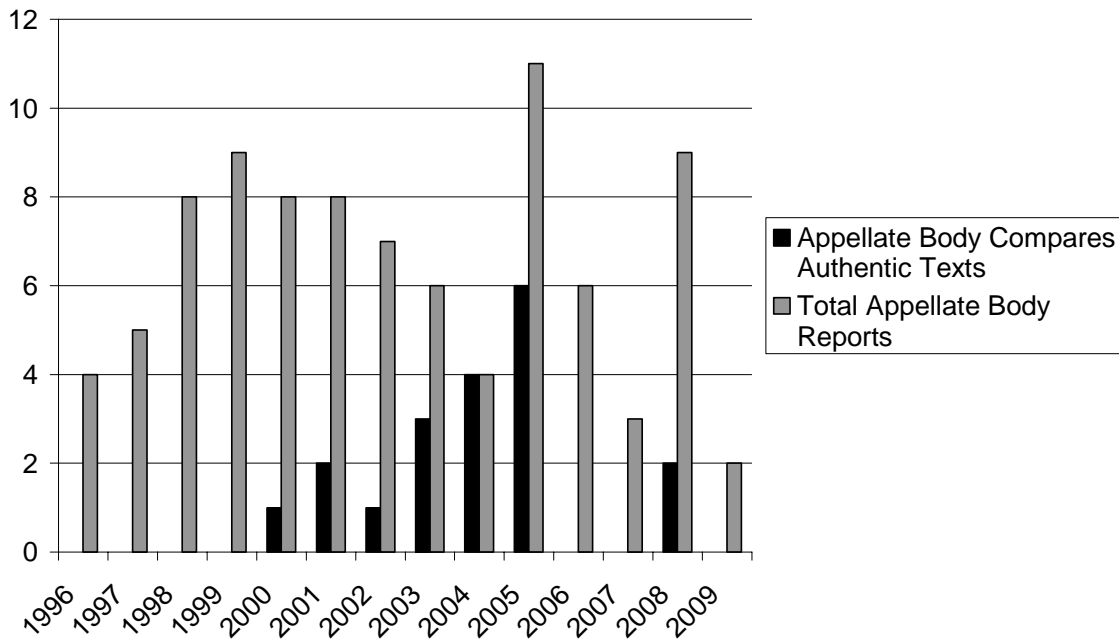
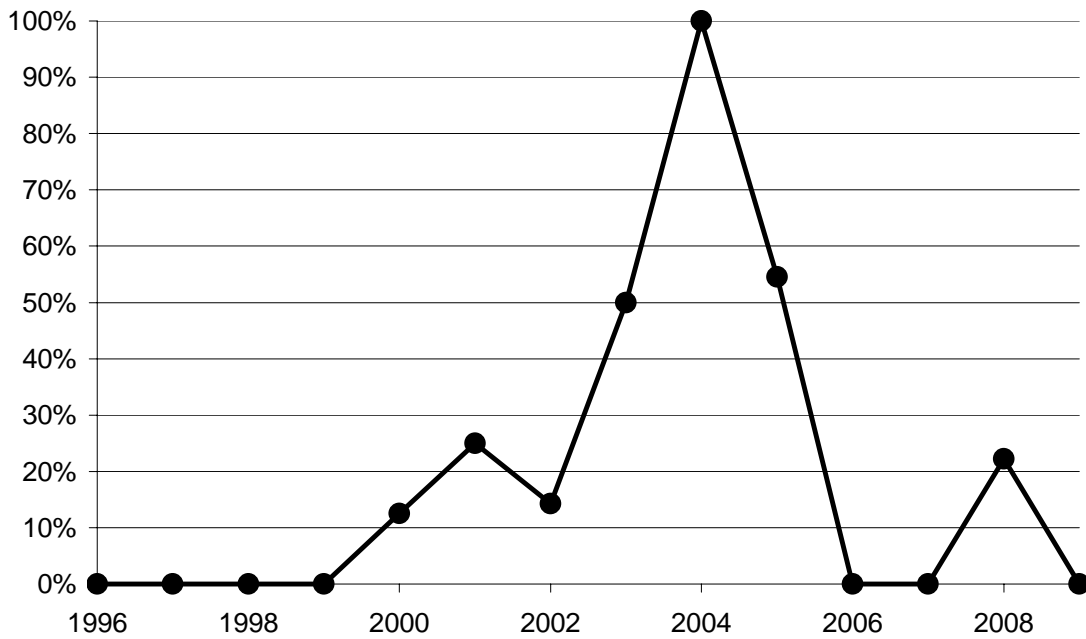


Figure 2: Percentage of Reports in Which Appellate Body Compares Authentic Texts



If the application of Article 33 is a material part of treaty interpretation when the treaty is authentic in more than one language, and reflects the customary rules of treaty interpretation, the failure to apply Article 33 in all cases could be considered inconsistent

with at least the spirit of Article 3.2 of the DSU.⁸⁵ However, 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.⁸⁶ 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 33.⁸⁷ In addition, the Appellate Body frequently interprets one text by reference to another, which is permissible⁸⁸ 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.

Is there a correlation between the official language(s) of the Appellant or Appellee and the 24 Appellate Body reports in which one or more parties or the Appellate Body compares authentic texts? In 19 of these 25 reports (76%), at least one Appellant or Appellee has French or Spanish as an official language. However, if we also consider reports in which the comparison of authentic texts does not occur, then it becomes apparent that there is no correlation between the official language(s) of the Appellant or Appellee and the comparison of authentic texts in Appellate Body reports (see Figure 3). The percentage of reports in which there is a comparison of authentic texts ranges from zero percent (for Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Peru and Venezuela) to 40 percent (for Argentina). Nor does there appear to be any correlation between the text comparison and the level of economic development. Chile (25%) and the EC (26.2%) are comparable. Argentina (40%) and Canada (41.7%) are also comparable.

Is there a correlation between the language(s) spoken by the Members of the Appellate Body that hear a particular appeal? There is insufficient data to determine which languages each Member speaks. Nor is there sufficient data to determine whether the languages spoken by the Appellate Body Secretariat staff have any influence.

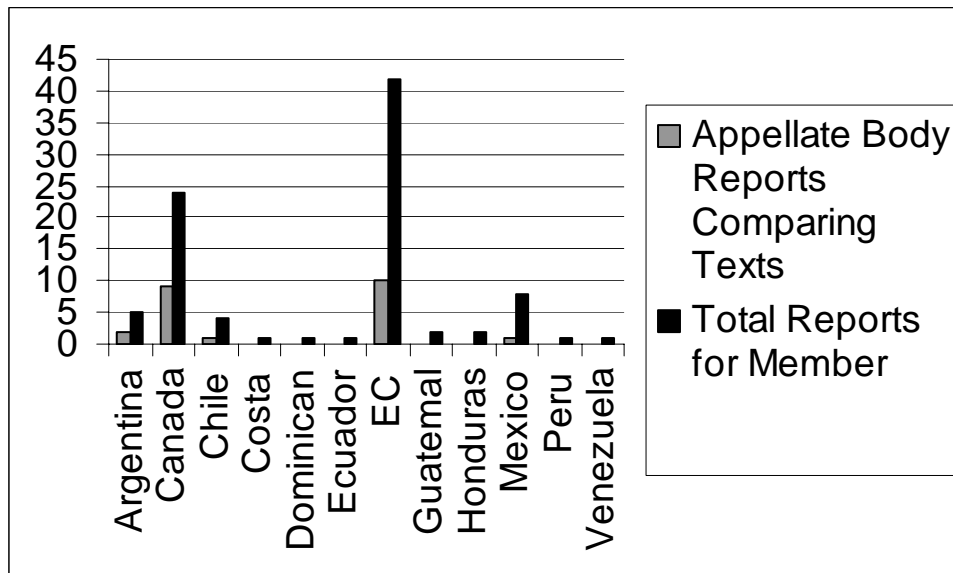
⁸⁵ DSU Article 3.2 provides that, ‘The dispute settlement system of the WTO...serves...to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.’ The Appellate Body has held that the ‘customary rules of interpretation of public international law’ include Articles 31, 32 and 33 of the Vienna Convention on the Law of Treaties. Also see above n 16 and accompanying text.

⁸⁶ See Kuner, above n 22.

⁸⁷ 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*). PC Mavroidis, ‘No Outsourcing of Law? WTO Law as Practiced by WTO Courts’, 102 *AJIL* 421 (2008) at 445-446.

⁸⁸ McNair, above n 16, 433.

Figure 3: Text Comparison among Appellants/Appellees with French or Spanish as Official Language



IV. DISCREPANCIES IN WTO AGREEMENTS NOT YET ADDRESSED

There are a number of examples of discrepancies that have yet to be addressed in the jurisprudence. These examples reveal that the correct application of Vienna Convention Article 33 can vary considerably from one situation to another. In the following cases, the divergence among the texts rebuts the presumption in Article 33(3). Thus, the analysis will consist of two steps: (1) removal of the divergence in meaning through the application of Article 31 and, if necessary, Article 32; and (2) if the first step does not resolve the divergence, adoption of the meaning which best reconciles the texts, having regard to the object and purpose of the treaty.

The text of DSU article 7.2 is different in the English and French texts, on the one hand, and the Spanish text, on the other. The English and French texts require panels to “address the *relevant provisions* in any covered agreement or agreements cited by the parties to the dispute” [emphasis added], whereas the Spanish text refers only to the “provisions”, omitting the world “relevant.”⁸⁹ DSU Article 7.1 (part of the context of DSU Article 7.2) sets out the standards terms of reference of panels: “To examine, in the light of the *relevant provisions* in (name of the covered agreement(s) cited by the parties to the dispute)... [emphasis added].” DSU Article 7.1 refers to the “relevant provisions” in all three languages. DSU Article 3.3, which indicates the object and purpose of the WTO dispute settlement system and also serves as context, provides that the prompt settlement of disputes “is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.” The reference to “provisions” in the Spanish text of DSU Article 7.2 should be interpreted to refer to the “relevant provisions”, since this interpretation is consistent with both the context and the objective of achieving the prompt settlement of disputes. The divergence

⁸⁹ I thank Mateo Diego-Fernández Andrade for pointing out this discrepancy.

in this situation can be removed by considering the context and the object and purpose, in accordance with Article 31.

In the last sentence of DSU Article 18.2, there is a discrepancy between the Spanish text, on the one hand, and the English and French texts, on the other:

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.

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.

In the English and French texts, a party has the obligation to provide a non-confidential summary, upon request of a Member, whereas the Spanish text does not express this as an obligation.⁹⁰ However, in all three texts there is no time limit within which a party must comply with the request of a Member. As a result of the ordinary meaning and the absence of a time limit (context), it is not possible to enforce compliance. The practice of the Members is not to provide non-confidential summaries, but this practice is not sufficient to qualify as subsequent practice establishing the agreement of the parties regarding the interpretation of the treaty under Article 31(3).⁹¹ It is difficult to see how further analysis under either Article 31 or Article 32 can remove such a clear divergence between the texts. If one applies the rule in Vienna Convention Article 33(4) in this context, “the meaning which best reconciles the texts” is that there is no obligation to provide a non-confidential summary. In this situation, the application of Article 33 is less straightforward because the correct interpretation depends on what the provisions do not say and favors the Spanish text, even though the Spanish text may have been the result of a poor translation of the English text.

In the Safeguards Agreement, Article 2 sets out the conditions in which a Member may apply a safeguard measure to a product:

1. A Member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.

2. Safeguard measures shall be applied to a product being imported irrespective of its source.

Paragraphs 2.1 and 2.2 both refer to the product “being imported” in the English text. The Spanish text refers to “importaciones de ese producto” (“imports of that product”) in paragraph 2.1 and “producto importado” (“imported product”) in paragraph 2.2. The

⁹⁰ I thank Mateo Diego-Fernández Andrade for pointing out this discrepancy.

⁹¹ In order to establish subsequent practice within the meaning of Article 31(3)(b): ‘(1) there must be a common, consistent, discernible pattern of acts or pronouncements; and (2) those acts or pronouncements must imply agreement on the interpretation of the relevant provision.’ WTO Appellate Body Report, *US — Gambling*, above n 63, para. 192.

French text refers to “ce produit est importé” (“this product is imported”) in paragraph 2.1 and “produit importé” (“imported product”) in paragraph 2.2. In *US — Wheat Gluten*, the Appellate Body found it appropriate to assign the same meaning to this expression in both provisions of Article 2 of the Safeguards Agreement, “[i]n view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context”.⁹² However, this analysis was based on the use of identical expressions in the English text and did not refer to the discrepancies between the English, French and Spanish texts or to Vienna Convention Article 33. The Appellate Body was incorrect to base its interpretation on “the identity of the language”, since the language is not identical in the French and Spanish texts. However, in the French and Spanish texts the variation in the manner in which the provisions are expressed does not change the ordinary meaning of the treaty terms. In the French and Spanish texts the context also supports the Appellate Body’s interpretation of the English text. Thus, the divergence can be removed by considering the ordinary meaning and the context, in accordance with Article 31.

The Spanish and French texts of paragraph XX(b) differ from the English text. The English text states, “necessary to protect human, animal or plant life or health.” In contrast, the Spanish text states, “necesarias para proteger la salud y la vida de las personas y de los animales o para preservar los vegetales” (“necessary to protect the health and life of persons and of animals or to preserve plants”). Similarly, the French text states, “nécessaires à la protection de la santé et de la vie des personnes et des animaux ou à la préservation des végétaux” (“necessary for the protection of the health and life of persons and animals or for the preservation of plants”). Unlike the English text, the French and Spanish texts use distinct verbs regarding the protection of humans and animals, on the one hand, and the preservation of plants, on the other. Plant life is treated as a separate category. Rather than protecting the life or health of plants, the Spanish and French texts speak of *preserving* plants.⁹³ This difference could be relevant to determining whether there is a jurisdictional limitation in GATT Article XX(b), taking into account the context, the *travaux préparatoires* and the divergence between the texts.⁹⁴ GATS Article XIV(b), which uses the same language, also contains the same

⁹² WTO Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities (US — Wheat Gluten)*, WT/DS166/AB/R, adopted 19 January 2001, para. 96.

⁹³ At first glance, the noun used for plants in the Spanish and French versions appear to refer to vegetables, suggesting that the aim is to preserve commercial crops. However, in Spanish, the term ‘planta’ can refer to plants, floors of a building, factories and a part of the foot. The choice of the word *vegetales* is a more precise word that refers only to plants. The Real Academia Española provides two definitions of the noun *vegetal*: (1) Ser orgánico que crece y vive, pero no muda de lugar por impulso voluntario. (2) Hortalizas en general. *Hortaliza* is defined as ‘Planta comestible que se cultiva en las huertas.’ [Author’s translation: ‘Edible plant that is cultivated on farms.’] *Diccionario de la Lengua Española*, Vigésima segunda edición, <http://buscon.rae.es/diccionario/drae.htm>. In French, the word *végétal* is also more specific than the word ‘plante.’ The *Dictionnaire de L’Académie française*, 8th Edition, defines *végétal* as follows: ‘Il se dit de Tout ce qui est arbre ou plante par opposition à Animal et à Minéral’ [Author’s translation: ‘Used to describe all that are trees or plants, as opposed to animal or mineral’]. It defines *plante* thus: Nom général sous lequel on comprend tous les végétaux, comme les arbres, les arbrisseaux et les herbes. [Author’s translation: ‘General name used for all vegetation, such as trees, shrubs and herbaceous plants.’] http://www.lexilogos.com/francais_langue_dictionnaires.htm

⁹⁴ See BJ Condon, ‘GATT Article XX and Proximity of Interest: Determining the Subject Matter of Paragraphs b and g’, 9:2 *UCLA Journal of International Law and Foreign Affairs* 137-162 (2004), 151-152. The factors that suggest that paragraph XX(b) is limited to domestic, rather than transnational or

discrepancy as GATT Article XX(b) between the Spanish and French texts and the English text and can be resolved according to the same analysis. However, WTO jurisprudence has never considered this difference between the authentic texts of these provisions, in spite of several reports in which this language was relevant.⁹⁵

There is a serious discrepancy between the Spanish text of GATS Article XVII:1 (national treatment) and the other texts. The English text requires “treatment no less favourable than it accords to its own like services *and* service suppliers” [emphasis added] and the French text also refers to “ses propres services similaires *et* [and] à ses propres fournisseurs de services similaires” [emphasis added]. The Spanish text uses “o” (or) rather than “y” (and): “sus propios servicios similares *o* proveedores de servicios similares”. This discrepancy does not exist between the different texts of this phrase in GATS Article II:1 (most-favoured-nation treatment). In the analysis of whether products are “like” in the GATT national treatment obligations in Articles III:2, first sentence and III:4 and in the GATT most-favoured-nation obligation in I:1, WTO jurisprudence has considered the same criteria, even though the “accordion” of likeness varies from one context to the next in the GATT.⁹⁶ The WTO jurisprudence on the test of likeness in GATS Articles II and XVII is not well-developed, but the application of GATS non-discrimination obligations to both services and service suppliers raises the issue of whether these obligations require the consideration of the likeness and treatment of both services *and* service suppliers or simply services *or* service suppliers in order to determine whether there is a violation of the obligation.⁹⁷ The discrepancy between the Spanish text of GATS Article XVII:1 and the other texts goes to the heart of this issue. If the same criteria apply to determine likeness in both GATS Article XVII and II, as in GATT Articles I and III, then the meaning that best reconciles the different texts might be to interpret the word “or” in the Spanish text of GATS Article XVII:1 to mean “and”, as the term “and” is used in the other texts of GATS Article XVII:1 and in all three texts of GATS Article II:1. Alternatively, if the test of likeness is significantly different in GATS Article XVII:1 and GATS Article II:1, then the meaning that best reconciles the different texts might be to interpret the word “and” in the English and French texts of

global interests, include the following: (1) the other paragraphs of Article XX that use of the term ‘necessary’ apply to subjects that are regulated domestically, rather than internationally; (2) the negotiating history of Article XX(b) suggest that it is aimed at protecting health and life within the jurisdiction of the Member enacting the measure; (3) in the Preamble of the WTO Agreement, the difference in the references to the ‘world’s resources’ and protecting and preserving the environment in a manner consistent with the ‘respective needs and concerns’ of Members is consistent with a jurisdictional limit in paragraph XX(b); (4) the jurisdictional competence of States in the applicable rules of international law supports a jurisdictional limit; and (5) plant life is treated as a separate category in the French and Spanish texts and both use terms that suggests the relevant plant life is national rather than transnational or global. Also see BJ Condon, ‘Climate Change and Unresolved Issues in WTO Law’, *Journal of International Economic Law* 2009; doi: 10.1093/jiel/jgp033.

⁹⁵ WTO Appellate Body Report, *EC — Asbestos*, above n 48; WTO Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres (Brazil — Retreaded Tyres)*, WT/DS332/AB/R, adopted 17 December 2007.

⁹⁶ WTO Appellate Body Report, *Japan — Taxes on Alcoholic Beverages (Japan — Alcoholic Beverages II)*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996 and WTO Panel Report, *Indonesia — Certain Measures Affecting the Automobile Industry (Indonesia — Autos)*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998.

⁹⁷ M Cossy, ‘Determining ‘likeness’ under the GATS: Squaring the circle?’, WTO Working Paper ERSD-2006-08, 26 September 2006, http://www.wto.org/english/res_e/reser_e/ersd200608_e.pdf, 6-8.

GATS Article XVII:1 to mean “or”. However, the second option seems unlikely to satisfy the requirements of Vienna Convention Article 33(4), since it is unlikely to be the meaning that best reconciles the texts, having regard to the object and purpose of the treaty. Both Articles contain non-discrimination obligations. It would be contrary to the the context and the object and purpose to interpret or to apply the non-discrimination obligation differently in national treatment and most-favoured nation obligations, since neither the GATT nor the English and French versions do so.⁹⁸

GATS Article VI:4 requires the Council for Trade in Services to negotiate disciplines to ensure “that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services”. Profesor Trachtman proposed adopting the same types of disciplines that apply to domestic regulation of trade in goods, such as non-discrimination and necessity.⁹⁹ These types of disciplines were later adopted in the accounting services sector.¹⁰⁰ Paragraph 2 of the Disciplines on domestic regulation in the accounting sector requires that, “Members shall ensure that such measures are not more trade-restrictive than necessary to fulfil a legitimate objective”. Identical language is found in Article 2.2 of the TBT Agreement (technical regulations “shall not be more trade-restrictive than necessary to fulfil a legitimate objective”). However, in Spanish, this language is not identical in Paragraph 2 of the Disciplines on domestic regulation in the accounting sector (“no restrinjan el comercio más de lo necesario para cumplir un objetivo legítimo”) and Article 2.2 of the TBT Agreement (“no restringirán el comercio más de lo necesario para alcanzar un objetivo legítimo”). In the English texts, the use of identical language may indicate a desire to apply a similar or identical standard to determine necessity in the TBT Agreement and the Disciplines on domestic regulation in the accounting sector. In the Spanish texts, the differences are minor and express the same idea. The difference between the Spanish texts simply reflects a difference in usage among Spanish speakers. However, the use of distinct terminology might be taken to indicate a different intention, particularly if one considers the Spanish texts without considering the English texts. Nevertheless, the context, the history of the Disciplines and the minor difference between the Spanish texts, both of which convey the same idea, all point to an intention to express the same idea in the Disciplines as in the TBT Agreement. However, it remains to be seen whether these terms will be interpreted in the same manner in the TBT Agreement and the Disciplines, given the different contexts. That, however, is a separate issue from the question of how to address the discrepancies between the authentic texts.

Sometimes discrepancies are so minor that they are unlikely to have any legal significance. The English and Spanish texts of GATS Article XIV(c) and GATT Article XX(d) provide a good example. The first part of GATS Article XIV(c) is identical to the first part of GATT Article XX(d) in English, but there is a minor difference in the Spanish text. GATS Article XIV(c) states “necesarias para lograr la observancia de las leyes y los reglamentos que no sean incompatibles con las disposiciones del presente

⁹⁸ ND Ruiz Euler, ‘El trato nacional y la nación más favorecida en el Acuerdo General Sobre el Comercio de Servicios de la Organización Mundial de Comercio’, <http://cdei.itam.mx/RuizAGCS.pdf>.

⁹⁹ JP Trachtman, ‘Lessons for GATS Article VI from the SPS, TBT and GATT Treatment of Domestic Regulation’, 2002, http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID298760_code020205500.pdf?abstractid=298760.

¹⁰⁰ Disciplines on domestic regulation in the accounting sector, Adopted by the Council for Trade in Services 14 December 1998, S/L/64, para. 2, http://www.wto.org/english/tratop_e/serv_e/sl64.doc.

Acuerdo” and GATT Article XX(d) states “necesarias para lograr la observancia de las leyes y de los reglamentos que no sean incompatibles con las disposiciones del presente Acuerdo”. In both provisions, the illustrative list of laws includes “the prevention of deceptive practices”, using the identical phrase in the English texts. In the Spanish texts, GATS Article XIV(c) refers to “la prevención de prácticas que induzcan a error” and GATT Article XX(d) refers to “la prevención de prácticas que puedan inducir a error”. Both phrases have the same meaning. In both GATS Article XIV(c) and GATT Article XX(d), the illustrative list is not exhaustive. In the English texts, this is indicated by using the word “including”. In the Spanish texts, GATS Article XIV(c) uses the term “con inclusión de” and GATT Article XX(d) uses the term “tales como”. Again, the differences in the Spanish texts are so minor that they do not change the meaning. They are merely different ways of saying the same thing. Thus, their effect is the same as using the identical language in the English texts.

The foregoing review of some important discrepancies in the three authentic texts confirms that WTO panels and the Appellate Body need to examine the authentic texts in a more systematic fashion. Doing so will help to avoid reaching conclusions based on identical language in English where the text is not identical in French or Spanish (as happened in *US — Wheat Gluten*).¹⁰¹ In some cases, the differences are too minor to have much of an impact. In other cases, analyzing the three authentic texts may assist in the interpretation of core provisions, such as non-discrimination obligations in the GATS and the general exceptions of GATT Article XX(b) and GATS Article XIV(b). While it may not be obligatory, routine comparison of the authentic texts would not add a great burden to the work of WTO panels and the Appellate Body. Other than the comparison and reconciliation of the texts, the interpretation of multilingual treaties is the same as unilingual treaties.¹⁰²

An alternative to addressing discrepancies in panel and Appellate Body reports is to have the WTO Members correct errors in a more systematic fashion, in accordance with Article 79 of the Vienna Convention:

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:

¹⁰¹ WTO Appellate Body Report, *US — Wheat Gluten*, above n 92, para. 96.

¹⁰² While Tabory states that the only added element is the comparison of the texts, this is only true if no reconciliation is necessary. Tabory, above n 2, 195.

- (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.

However, this solution will only work when the Members are made aware of the discrepancies and will require an analysis of the significance of the discrepancies. Moreover, Article 79(3) conditions the application of Article 79 to multilingual treaties on two requirements: (1) the appearance of “a lack of concordance” between authentic texts and “the signatory States and the contracting States agree [that this lack of concordance] should be corrected”. Thus, if the problem is disputed (and therefore requires interpretation), Article 79 does not apply, but rather the rules of treaty interpretation apply.¹⁰³ Alternatively, a State may invoke an error as invalidating its consent, under Article 48 of the Vienna Convention.¹⁰⁴

It would be useful to keep a publicly available record of unresolved discrepancies on the website of the WTO, in order to minimize the problems that might be caused when such discrepancies go unnoticed.

Of course, the ideal solution is to resolve discrepancies at the drafting stage, rather than at the interpretation stage. Harmonizing the choice of words in the text in one language to express the same concept in different agreements or provisions is part of this drafting process.¹⁰⁵ A good way to address the problem at the drafting stage is to prepare plurilingual glossaries and reference manuals to assist drafters and translators and to ensure that terminology is used consistently.¹⁰⁶ The WTO has a glossary, but the definitions do not constitute authoritative interpretations of the legal texts of the WTO and the glossary is not comprehensive.¹⁰⁷ The WTO also has a Terminology Database,

¹⁰³ Zane, above n 2, n 17 and accompanying text.

¹⁰⁴ Ibid. Article 48 provides as follows: ‘A State may invoke an error in a treaty as invalidating its consent to be bound by the treaty if the error relates to a fact or situation which was assumed by that State to exist at the time when the treaty was concluded and formed an essential basis of its consent to be bound by the treaty.’

¹⁰⁵ Harmonization of the use of terms in one language is distinct from achieving concordance between the different languages, but the former assists the latter. Aceves, above n 6, at 211.

¹⁰⁶ Aceves, above n 6, at 209.

¹⁰⁷ WTO, Glossary, http://www.wto.org/english/thewto_e/glossary_e/glossary_e.htm (9 October 2009).

but it is not available to the public.¹⁰⁸ The WTO Language Services and Documentation Division also works with other international organizations to improve the translation process, for example through the use of computer assisted translation and sharing databases with other international organizations.¹⁰⁹

Another suggestion is to draft plurilingual treaties simultaneously in all of the languages that will be authentic texts.¹¹⁰ However, this seems impractical in the WTO context, since it would require trilingual drafters and negotiators if the process were to work well.¹¹¹ In the end, no method will be foolproof. Even the most elaborate systems of avoiding discrepancies in the drafting of plurilingual treaties will not prevent some discrepancies from occurring.¹¹² Moreover, there may have to be a tradeoff between the goal of avoiding discrepancies and getting the job finished quickly.¹¹³

Another solution that might seem obvious to some is to make the WTO Agreements authentic in one language only or to have one text prevail in the event of discrepancies. English would be the most likely choice under this option. However, this idea would be likely to encounter resistance, especially from the French-speaking and Spanish-speaking Members of the WTO.¹¹⁴ Moreover, making English the only authentic language, or the “master” language in the event of a discrepancy, could be perceived as providing a practical advantage to native English speakers and a superior status to English.¹¹⁵

¹⁰⁸ WTO, WTO Terminology Database, <https://wtoterm.wto.org/multiterm/index.mto?locale=en> (9 October 2009).

¹⁰⁹ United Nations, Final Report, Inter-Agency Meeting on Language Arrangements, Documentation and Publications, UN Doc. IAMLADP/2002/R.8, 4 June 2003, http://www.iamladp.org/PDFs/2002_docs/2002_Final_Report.pdf (9 October 2009).

¹¹⁰ CW Jenks, *The Common Law of Mankind* (1958), 434.

¹¹¹ While simultaneous interpretation is available in English, French and Spanish in formal WTO meetings, English tends to be used in negotiations more than the other two, particularly in informal negotiations. Informal negotiations among smaller groups of Members have become increasingly important in forging consensus at the WTO. Indeed, simultaneous drafting is not the normal practice at the United Nations or in the European Union. Cao, above n 7, at 72-73.

¹¹² Aceves, above n 6, at 210-212, citing the example of the procedures used during the drafting of UNCLOS III. The reasons errors will continue to occur include: (1) hurried drafting at the end of lengthy and intensive negotiations; (2) translation errors; (3) words and expressions that can be expressed in different ways; (4) different provisions emanate from different sources; and (5) ambiguities may be intentional in order to accommodate political compromises. Ibid at 211. In the WTO context, different agreements emanate from different sources, since the composition of the individuals in the negotiating groups for different agreements differs, particularly in the case of larger missions in which individuals specialize in different WTO subject matters (for examples, negotiations on trade in goods, trade in services, intellectual property or dispute settlement). For a more detailed discussion of terminological problems and solutions that arise in the translation process (for example, terms that sound alike in two languages but have different meanings), see Zane, above n 2.

¹¹³ In one extreme example, it took 24 years to develop the authentic trilingual texts (in English, French and Spanish) for the Convention on International Civil Aviation. GF Fitzgerald, ‘The Development of the Authentic Trilingual Text of the Convention of International Civil Aviation’ 64 *AJIL* 364 (1970).

¹¹⁴ For example, in the context of the United Nations, Spain has insisted that one language (generally English) must not be allowed to monopolize the treaty-making process. *Review of the Multilateral Treaty-Making Process*, UN Sales No. E/F.83.V.8 (1985) at 135. In the WTO context, many Spanish-speaking countries have invested time, money and political capital in establishing and maintaining Spanish as an official language.

¹¹⁵ Of course, the same argument could be made with respect to the decision to limit WTO languages to English, French and Spanish.

V. CONCLUSION

The experience to date in the WTO suggests that the plurilingual 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. Rather, the main problem in the WTO context is the failure to consider routinely all three authentic texts when interpreting WTO provisions. In addition, the Appellate Body often fails to distinguish between, or confuses, the different rules contained Article 33 of the Vienna Convention. In practice, the Appellate Body and the parties to disputes treat the English text as if it were a “master” text, even though this is not part of the rules in Article 33 and the International Law Commission did not agree on this point. In addition, the Appellate Body and the parties to disputes often refer to the French and Spanish texts to confirm their interpretation of the English text. This practice also diverges from the rules in Article 33 and the concept of equality of languages cited in the *travaux préparatoires* of the International Law Commission. It thus appears that the divergence between Article 33 and WTO practice is modifying the customary rules of treaty interpretation set out in Article 33 and analyzed in the *travaux préparatoires* of the International Law Commission.¹¹⁶

The Appellate Body has only considered more than one authentic text in 22.1 percent of Appellate Body reports. There is no apparent 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. Nor is there a correlation between the official language(s) of the Appellant or Appellee and the frequency with which one or more parties or the Appellate Body compares authentic texts. Nor is there any correlation between text comparison and the level of economic development of the main parties to the dispute. There is insufficient data to determine whether there is a correlation between the language(s) spoken by the Members of the Appellate Body that hear a particular appeal and the frequency of text comparison. Likewise, there is insufficient data to determine whether the languages spoken by the Appellate Body Secretariat staff have any influence.

The presumption in paragraph 33(3) of the Vienna Convention means that there is no obligation to compare authentic texts on a routine basis. However, there is no obligation to avoid doing so either. A rule of mandatory comparison is probably impractical for most plurilingual treaties, due to a lack of multilingual legal personnel and a multiplicity of very different authentic languages.¹¹⁷

However, the practice of routine comparison is feasible for WTO tribunals. There are only three authentic language texts of the WTO Agreements. They are relatively close in structure, which makes it relatively easy to compare the authentic texts on a routine basis. There are also sufficient human resources in the WTO Secretariat to carry out this task on a routine basis. Given the difficulties that could arise from to a systematic failure

¹¹⁶ I thank Professor Gabriela Rodríguez for this observation. Regarding the effect on interpretation of Article 33, it is important to recall that subsequent practice should carry more weight than *travaux préparatoires*, since the former forms part of the general rule of treaty interpretation (Vienna Convention Article 31(3)(b)) whereas the latter is merely a supplementary means of treaty interpretation (Vienna Convention Article 32).

¹¹⁷ Kuner, above n 22, at 962.

to consider all three texts and given the relative ease with which the comparison can be done, WTO panels and the WTO Appellate Body should consider changing their practice in this regard. In the words of Rosenne, “A good practitioner would almost automatically compare the different language versions before commencing any process of interpretation.”¹¹⁸ However, the current practice of preferring the English text in Appellate Body interpretation means that it is preferable to litigate at the WTO based on the English texts.

¹¹⁸ S Rosenne, 16 Yearbook of the International Law Commission (1966), Vol. I, part 2, 874th meeting, 209, para. 11 (accessed 29 September 2009). Sir Humphrey Waldock’s response was to say, ‘While it was true that the interpreter normally undertook such a comparison, it would be going too far to give that process the status of a criterion for the determination of an interpretation according to law.’ Ibid, 211, para. 35.