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Plurilingual Interpretation in WTO Panel and Appellate Body Reports

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Abstract

This article analyzes the extent to which the Appellate Body and WTO panels compare the authentic texts in their examination of the WTO Agreements and the extent to which the parties themselves do so in their 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.

1. Introduction [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 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]

While the rules of treaty interpretation set out in Article 33 of the Vienna Convention are capable of reconciling discrepancies among the English, French and Spanish texts, [5] 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. [6] Thus, as long as there were no problems with the English

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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 remain unresolved. [7]

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 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. [8]

In addition to the potential for problems in the international arena, discrepancies between different authentic texts have implications in domestic legal systems. [9] Countries tend to adopt and implement treaties in their official languages. [10] 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. [11]

This article begins by examining the rules of Article 33 of the Vienna Convention. 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, [12] and reflects the customary rules of treaty interpretation. [13] This article then examines the practice of WTO panels and compares it to the practice of the Appellate Body. The article concludes that WTO panels and the Appellate Body should apply Article 33 of the Vienna Convention more systematically. [14]

2. Article 33 of the Vienna Convention

Most treaties are bilingual or plurilingual. [15] Article 33 of the Vienna Convention on the Law of Treaties [16] reflects customary international law regarding the interpretation of treaties authenticated in two or more languages. It provides as follows: [17]

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.

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. [18] 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. [19] 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, [20] 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". [21] 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. [22]

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. [23] 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. [24] 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. [25] A duty of routine comparison would imply the rejection of this presumption. [26] 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. [27]

In practice, most plurilingual 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 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". [28] Regardless of the source of the ambiguity, "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. [29]

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 [30] and rejected creating a legal presumption in favour of the language in which the treaty was drafted. [31] In doing so, the Commission rejected the approach taken by the Permanent Court in the *Mawommatis Palestine Concessions* case. [32]

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. [33]

Linderfalk argues that the process of harmonization in Article 33 must take place in a predetermined order. [34] First, the treaty interpreter must determine whether the difference in meaning can be removed through the application of Articles 31 and 32. 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. [35] 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. [36]

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 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). [37]

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. [38] Some expressions may be difficult to translate into another language. [39] Differences between legal systems and legal cultures further complicate the task of translating legal concepts. [40] 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. [41] In the case of the WTO, English, French and Spanish are not that far apart, relatively speaking. [42] 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 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.

3. wto APPELLATE BODY Jurisprudence

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. [43]

The Appellate Body has cited Article 33 in the following seven reports: (1) *EC — Asbestos* (2000) (Article 33(1)); [44] *Chile — Price Band System* (2002) (Article 33(4)); [45] *EC — Bed Linen (Article 21.5 — India)* (2003) (Article 33(3)); [46] *US — Softwood Lumber IV* (2003) (Article 33(3)); [47] *US — Countervailing Duty Investigation on DRAMs* (2005) (Article 33(3)); [48] *US — Upland Cotton* (2005) (Article 33(3)); [49] and *US — Stainless Steel (Mexico)* (2008) (Article 33(3)). [50] 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 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), [51] *EC — Tariff Preferences* (2004), [52] *US — Oil Country Tubular Goods Sunset Reviews* (2004), [53] *US — Softwood Lumber V* (2004), [54] *US — Softwood Lumber IV (Article 21.5 — Canada)* (2005) [55] and *US — Customs Bond Directive/US — Shrimp (Thailand)* (2008) [56] 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, [57] but the Appellate Body used the French and Spanish texts to support a different conclusion. [58] 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. [59] The Appellate Body found that all three language versions were grammatically ambiguous, so the mere presence or absence of a comma was not determinative of the issue. [60] The Appellate Body used the English text and supplementary means of interpretation (*travaux préparatoires*) to uphold the Panel's finding. [61] 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). [62]

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. [63] The Appellate Body based its conclusion on the text, context, and object and purpose, not the French or Spanish texts. [64] 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. [65] 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. [66] In *India — Quantitative Restrictions* (1999), the United States argued that its reading was supported by the French and Spanish texts. [67] 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, [68] but the Appellate Body based its analysis on the ordinary meaning of the terms and the context, without considering the Spanish and French texts. [69] In *US — FSC* (1999), the United States and the European Communities each argued that their interpretation was confirmed by the French and Spanish texts [70] The Appellate Body found it unnecessary to address the issue. [71] In *EC — Tube or Pipe Fittings* (2003), Brazil argued that the Spanish text supported its argument. [72] The Appellate Body found that it need not resolve this question in the appeal and did not consider this aspect of Brazil's

argument. [73] 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. [74] 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. [75] The Appellate Body did not find it necessary to examine the issue. [76] 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. [77] In *Canada — Continued Suspension* (2008), the European Communities and Norway referred to the French and Spanish texts to support their arguments. [78] 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. [79] 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. [80] Figures 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.

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. [81] 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. [82] 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. [83] In addition, the Appellate Body frequently interprets one text by reference to another, which is permissible [84] 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. [85]

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.

Figure 3:

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

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.

4. wto Panel Jurisprudence

This section examines panel reports in which one or more parties or the panel compared the authentic texts of a WTO Agreement, in panel reports issued from 1999 to 2009. [86] The following review of these reports uses the year the panel report was circulated. [87]

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. In contrast, this occurred in only 22 percent of Appellate Body reports. Moreover, parties and panels employ the comparison of authentic texts every year, ranging from a high of 56 percent (2003 and 2008) to a low of 25 percent (2009). In contrast, the percentage of Appellate Body reports in which comparison of authentic texts occurs ranges from 0 percent (1996, 1997, 1998, 1999, 2006, 2007) to 100 percent (2004). Thus, text comparison occurs in panel reports both more often and more consistently. Figure 4 shows the number of reports in which the panels compare the authentic texts, by year. Figure 5 compares the percentage of panel and Appellate Body reports in which the parties or the tribunals compare the authentic texts, by year. As is the case with Appellate Body reports, there is no apparent correlation between the year of the panel report and the consideration of the three authentic texts.

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, authentic text comparison arises several times in the same panel report, but the manner in which it is used varies within the same panel report. For this reason, some cases are cited in more than one category.

In some cases, only the parties compare texts. In others, only the panel compares texts. Yet in other cases, both the parties and the panel compares texts, sometimes regarding the same provisions and sometimes not. In sixteen cases, one or more parties presented arguments based on a comparison of authentic texts, but the panel did not address this aspect of their arguments. [88] In twelve cases, the panel compared authentic texts even though the parties did not do so in their arguments. [89] In sixteen cases, both the panel and one or more parties compare authentic texts for the same provision. [90] In six cases, the panel refers to the text comparison argument of parties, but considers it either irrelevant or unnecessary to compare texts to settle the issue in question. [91] In other cases in which the panel finds the text comparison arguments of the parties relevant, the panel sometimes agrees with the parties' argument and sometimes not. In five cases, both the panel and one or more parties compare authentic texts, but they undertake the comparison for different provisions and the panel does not address the parties' text comparison argument. [92] Thus, whether and how panels will address parties arguments regarding text comparison, or lack thereof, is no more predictable than it is in the case of the Appellate Body.

In sixteen cases, the panel uses one or more other authentic texts to confirm its interpretation of the English text. [93] In this regard, panel practice resembles Appellate Body practice. However, in contrast to the Appellate Body, panels often use text comparison as a means to resolve ambiguities in one of the authentic texts. In thirteen cases, the panel resolves the meaning of an ambiguous term in one text by referring to clearer expressions of the term in the other authentic texts. In eight of these cases, the panel resolves an ambiguity in the English text by referring to the Spanish and French texts. [94] In two of these cases, the panel resolves an ambiguity in the Spanish text by referring to the English and French texts. [95] In one of these cases, the panel resolves an ambiguity in the French text by referring to the English and Spanish texts. [96] In two of these cases, the panel resolves an ambiguity in the English text by referring to the French text only. [97] In three cases, the panel has found the text to be ambiguous in all three authentic texts. [98]

In three cases, panels have cited the Spanish and French texts of a provision for no apparent purpose. [99]

In the majority of cases in which panels compare authentic texts, they do so without any explicit reference to Article 33. In contrast, when the Appellate Body compares texts, it cites Article 33 just over half of the time. Sometimes panels cite Article 33 as an applicable rule of treaty interpretation, but then do not go on to compare authentic texts. [100] In one case, a panel misapplied the presumption in Article 33(3) and cited the Appellate Body as authority for doing so; the panel interpreted Article 33(3) to require a harmonious interpretation where there was a divergence between the authentic texts. [101] In only one case did the panel explicitly apply Article 33(4) to resolve a divergence between the authentic texts. [102]

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. [103]

This variation in the practice of parties also occurs in the Appellate Body.

5. 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 issue in the WTO context is the lack of a consistent approach in the manner in which panels and the Appellate Body use the 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. This happens less often in panel reports, perhaps because panels are less likely to indicate which aspect of Article 33 they are applying when they compare texts. 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. 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 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. [104]

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. [105] 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 (although the time constraints that the Appellate Body faces present a challenge). Given the difficulties that could arise from to a systematic failure 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." [106] Indeed, comparison of the authentic texts is part of due diligence. Practitioners, governments and WTO tribunals may compare texts more routinely than the panel and Appellate body reports suggest. Practitioners might choose not to raise arguments based on the three authentic texts when doing so would not benefit their case. Similarly,

governments might be aware of discrepancies among the texts and choose the text that best supports their arguments. In turn, panels and the Appellate Body might decide not to address discrepancies among the texts because it is not necessary to do so in order to resolve the dispute. It is not possible to determine the reasons why text comparison does not occur more frequently. However, the objective of this article is to raise the issue and to highlight the importance of examining all three texts when formulating legal arguments in WTO law.

6. Endnotes

[1] I am grateful for the support of the Asociación Mexicana de Cultura y del Instituto Tecnológico Autónomo de México. I also thank my colleagues who offered helpful comments when I presented an earlier version of this article at the Society of International Economic Law Conference in Barcelona, particularly Henry Gao, Holger Hestermeyer and Amelia Porges.

[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 specified to be only authentic in one or two languages. For example, some Members have specified that their 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). The legal effect of these declarations is not clear.

[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 Tabory, M. (1980). Multilingualism in International Law and Institutions. 170-71; Zane, E. B. 2008. 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.*

[4] *Paragraph 1 refers to 'divergence', while paragraph 4 refers to 'difference'. These terms appear to be interchangeable. Mössner, J. M. (1972). Die Auslegung mehrsprachiger Staatsverträge. Bemerkungen zu Artikel 33 der Winer Konvention über das Recht der Vertäge vom 23. 15 AVR 15 300, n 130. Villiger, M. E. (2009). Commentary on the 1969 Vienna Convention on the Law of Treaties. Leiden: Brill. 459, n 38.*

[5] *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. 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] *The first panel hearing to be conducted in Spanish was in the case of Mexico — Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala, DS331, before panelists Mr. Julio Lacarte-Muró, Mr. Cristian Espinosa Cañizares and Mr. Álvaro Espinoza.*

[7] *For some examples of discrepancies that have yet to be addressed in the jurisprudence, see Condon, B. J. (2010). Lost in Translation: Plurilingual: Interpretation of WTO Law. Journal of International Dispute Settlement, 1 (1) 191-216.*

[8] *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.*

[9] *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*

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

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

[11] *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 7, at 228, n 176.*

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

[13] *LaGrand (Germany/US) Case, ICJ Reports, 2001 502, para. 101. Villiger, above n 3, 461. For a more detailed analysis of the application of customary rules of treaty interpretation in WTO law, see Van Damme, I. (2009). Treaty Interpretation by the WTO Appellate Body.. New York: Oxford University Press.*

[14] An earlier version of this research, which examined only Appellate Body jurisprudence, was published in 1:1 Journal of International Dispute Settlement 191-216 (2010); doi: 10.1093/jnlids/idp007. This article incorporates new research examining the jurisprudence of WTO panels, compares the practice in the Appellate Body and WTO panels and eliminates much of the general discussion in the earlier article, in order to avoid duplication. Where the discussion from the earlier article is relevant to this article, is it either incorporated briefly or referred to in a footnote. This article appears

in Spanish in the Revista de Derecho Económico Internacional, http://dei.itam.mx/, DOI 10.5347.

[15] *Aust, A. (2000). Modern Treaty Law and Practice, Cambridge, U. K.: Cambridge University Press202. 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 3, 279. Villiger, above n 3, 454. Also see 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.*

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

[17] *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.*

[18] *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.*

[19] *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.*

[20] *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.

[21] *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 17, 432. It is interesting to note that the working language of the Commission was English.*

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

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

[24] *Aust, above n 12, 205. Villiger, above n 3, 458-459.*

[25] *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, above n 2, at 177, and Germer, above n 13.*

[26] *Ibid.*

[27] *Kuner, above n 23, at 955-957; Germer, above n 13, at 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.*

[28] *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 3, 458.*

[29] *Ibid.*

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

[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] *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).*

[33] *Linderfalk, above n 4, 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.

[34] *Linderfalk, above n 4, 357-358.*

[35] *Ibid, 361.*

[36] *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. Shelton, D. (1997). Reconcilable Differences? The Interpretation of Multilingual Treaties. Hastings International and Comparative Law Review, 20, 611-638, at 630-631.*

[37] *Tabory, above n 2, 177.*

[38] *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). 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. Judgment, 13 July 2009, http://www.icj-cij.org/docket/files /133/15321.pdf?PHPSESSID=b51c86918987ffb9d3478faf043a742f, paras. 43-45, 51- 56. The Court found 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.*

[39] *See Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment, 20 April 2010, http://www.icj-cij.org/docket/files/135/15877.pdf, para. 81. In that case, the original Spanish text and the French translation of Article 7 of the 1975 Statute distinguished between the obligation to inform ("comunicar") and the obligation to notify ("notificar"). However, the English translation used the same verb "notify" in respect of both procedural obligations. In order to conform to the original Spanish text, the International Court of Justice distinguished between the obligation to inform and the obligation to notify in both linguistic versions of the judgment.*

[40] *Condon, B. J. (1997). 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. Canada-United States Law Journal, 23, 347-367.*

[41] *Aceves, above n 7, at 206-207. Grossfeld, B. (1985). Language and the Law. Journal of Air. L. & Com. 50, 793-803 at 801.*

[42] *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.

[43] *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.*

[44] *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.*

[45] *WTO Appellate Body Report, Chile — Price Band System, above n 16, paras. 265-271, 273.*

[46] *WTO Appellate Body Report, EC — Bed Linen (Article 21.5 — India), above n 16, para. 123, n 153.*

[47] *WTO Appellate Body Report, US — Softwood Lumber IV, above n 16, para. 59, n 50.*

[48] *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.*

[49] *WTO Appellate Body Report, US — Upland Cotton, above n 16, para. 424, n 510.*

[50] *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.*

[51] *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.*

[52] *WTO Appellate Body Report, EC — Tariff Preferences, above n 16, paras. 145-148.*

[53] *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.*

[54] *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.*

[55] *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.*

[56] *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.*

[57] *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.*

[58] *Ibid, para. 89, n 93, n 97.*

[59] *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.*

[60] *Ibid, para. 245.*

[61] *Ibid, paras. 246-252.*

[62] *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.*

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

[64] *Ibid, pp. 33-34.*

[65] *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.*

[66] *Ibid, paras. 112-124.*

[67] *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.*

[68] *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.*

[69] *Ibid, para. 112.*

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

[71] *Ibid, para. 132.*

[72] *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.*

[73] *Ibid, para. 176.*

[74] *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.*

[75] *Ibid, para. 57.*

[76] *Ibid, para. 132.*

[77] *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.

[78] *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.*

[79] *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.*

[80] *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.*

[81] *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 17 and accompanying text.*

[82] *See Kuner, above n 23.*

[83] *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, above n 12, 333.*

[84] *McNair, above n 17, 433.*

[85] *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 12, 335.*

[86] *For several reports issued from 1996-1998, the wordperfect files are corrupt. As of writing, only one panel report has been circulated in 2010. These constraint provide incomplete data for these years.*

[87] *On the WTO website, the panel reports are arranged according to the year the case was filed, which does not necessarily correspond to the year the report was circulated or adopted. The calculations in the figures, below, are based on the year the report was circulated, as do the citations of the reports in the footnotes.*

[88] *Brazil – Aircraft, 14 April 1999, WT/DS46/R, para. 4.40; US – Shrimp (Article 21.5 – Malaysia), 15 June 2001, WT/DS58/RW, para. 4.87; Guatemala — Cement I, 19 June 1998, WT/DS60/R, paras. 4.63, 4.64, 4.176; Canada — Aircraft, 14 April 1999, WT/DS70/R, para. 5.58; Korea — Alcoholic Beverages, 17 September 1998, WT/DS75/84/R, paras. 6.58, 6.152, 6.166; Thailand — H-Beams, 28 September 2000, WT/DS122/R, ANNEX 3-7; Mexico — Corn Syrup, 28 January 2000, WT/DS132/R, para. 5.21, note 15; US — Lead and Bismuth II, 23 December 1999, WT/DS138/R, Note 30; US — Export Restraints, 29 June 2001, WT/DS194/R, note 60; US —*

Offset Act (Byrd Amendment), 16 September 2002, WT/DS217/234/R, paras 4.356, 4.357, 4.989, 4.1255, 4.1256, 4.1284, 4.1285; US — Softwood Lumber III, 27 September 2002, WT/DS236/R, paras. 4.308, 5.4; EC — Tariff Preferences, 1 December 2003, WT/DS246/R, paras. 4.227, 4.243, 4.244, 4.306, 7.68; 107, Korea — Certain Paper, 28 October 2005, WT/DS312/R, para. 5.63; US — Continued Suspension, 31 March 2008, WT/DS320/R, para. 4.4; Canada — Continued Suspension, 31 March 2008, WT/DS321/R, para. 4.4; US — Zeroing (Japan), 20 September 2006, WT/DS322/R, paras. 5.46, 6.50.

[89] *Turkey – Textiles, 31 May 99, WT/DS34/R, note 351; Brazil – Aircraft, 14 April 1999, WT/DS46/R, note 228; India — Quantitative Restrictions, 6 April 1999, WT/DS90/R, paras. 4.24, 5.193, 5.196; US — FSC (Article 21.5), 20 August 2001, WT/ DS108/RW, para. 894, note 192; EC — Asbestos, WT/DS135/R, 18 September 2000, paras. 8.92, 8.94; Canada — Autos, 11 February 2000, WT/DS139/142/R, paras. 6.604, 7.264; US — Section 211 Appropriations Act, 6 August 2001, WT/DS176/R, paras. 8.74-8.79, 8.108; Argentina — Ceramic Tiles, 28 September 2001, WT/DS189/R, para. 4.993; US — Cotton Yarn, 31 May 2001, WT/DS192/R, para. 7.127; US — Upland Cotton, 8 September 2004, WT/DS267/R, para. 7.115; China — Auto Parts, 18 July 2008, WT/DS339/340/342/R, paras. 7.159-7.167, 7.413, 7.166-7.167; Mexico — Olive Oil, 4 September 2008, WT/DS341/R, paras. 7.67, 7.204.*

[90] *Canada — Dairy, 17 May 1999, WT/DS103/113/R, paras. 4.193, 4.369, note 457; Argentina — Footwear (EC), 25 June 1999, WT/DS121/R, paras. 5.90, 5.156, 5.162, 5.163, 5.186, 8.148, 8.166, notes 395, 530; EC — Trademarks and Geographical Indications, 15 March 2005, WT/DS174/R, paras. 7.470, 7.492, 7.607, 7.628, 7.633, 7.634; Mexico — Telecoms, 2 April 2004, WT/DS204/R, paras. 5.55, 7.167; US — Steel Plate, 4 October 2000, WT/DS206/R, 6.14-6.16; Chile — Price Band System, 3 May 2002, WT/DS207/R, paras. 4.84, 7.51; EC — Sardines, 29 May 2002, WT/DS231/R, paras. 4.45, 4.54, 5.54, 6.7, 7.108, 7.109 [comparing English, French and Spanish versions of Codex]; Argentina — Preserved Peaches, 14 February 2003, WT/DS238/R, para. 7.34; Argentina — Poultry Anti-Dumping Duties, 22 April 2003, WT/DS241/R, paras. 7.165, 7.169, 7.341; US — Textiles Rules of Origin, 20 June 2003, WT/DS243/R, paras. 3.21, 3.22, 6.204; US — Upland Cotton, 8 September 2004, WT/DS267/R, paras. 7.115, 7.304, 7.308-7.311, 7.474, 7.524, 7.527-7.529; US — Zeroing (EC), 31 October 2005, WT/DS294/R, paras. 7.190, 7.191, 9.17-9.19; US — Countervailing Duty Investigation on DRAMs, 21 February 2005, WT/DS296/R, para. 7.14, note 53; Mexico — Taxes on Soft Drinks, 7 October 2005, WT/DS308/R, paras. 4.271, 4.350, 6.15, 8.193, note 419; EC — Selected Customs Matters, 16 June 2006, WT/DS315/R, paras. 4.324, 7.96, 7.110-7.112, 7.513; Japan — DRAMs (Korea), 13 July 2007, WT/DS336/R, paras. 5.97, 7.427.*

[91] *Canada — Dairy, 17 May 1999, WT/DS103/113/R, paras. 4.193, 4.369, note 457; Mexico — Telecoms, 2 April 2004, WT/DS204/R, paras. 5.55, 7.167; US — Steel Plate, 4 October 2000, WT/DS206/R, 6.14-6.16; Argentina — Preserved Peaches, 14 February 2003, WT/DS238/R, para. 7.34; US — Countervailing Duty Investigation on DRAMs, 21 February 2005, WT/DS296/R, para. 7.14, note 53; Mexico — Olive Oil, 4 September 2008, WT/DS341/R, para. 7.204.*

[92] *Brazil – Aircraft, 14 April 1999, WT/DS46/R, note 228 and para. 4.40; US — Textiles Rules of Origin, 20 June 2003, WT/DS243/R, paras. 3.21, 3.22, 6.204; US — Softwood Lumber IV, 29 August 2003, WT/DS257/R, paras. 5.2, 7.48; EC – Countervailing Measures on DRAM Chips, 17 June 2005, WT/DS299/R, para. 7.19, note 167; China — Intellectual Property Rights, 26 January*

2009, WT/DS362/R, paras. 7.249, 7.666, notes 130-132.

[93] *Turkey – Textiles, 31 May 99, WT/DS34/R, note 351; US — FSC (Article 21.5), WT/ DS108/RW, 20 August 2001, para. 894, note 192; Argentina — Ceramic Tiles, 28 September 2001, WT/DS189/R, para. 4.993; US — Cotton Yarn, 31 May 2001, WT/DS192/R, para. 7.127; Chile — Price Band System, 3 May 2002, WT/DS207/R, para. 7.51; EC — Sardines, 29 May 2002, WT/DS231/R, paras. 4.45, 4.54, 5.54, 6.7, 7.108, 7.109 [comparing English, French and Spanish versions of Codex]; Argentina — Poultry Anti-Dumping Duties, 22 April 2003, WT/DS241/R, paras. 7.165, 7.169, 7.341; US — Softwood Lumber IV, 29 August 2003, WT/DS257/R. para. 7.48; US — Upland Cotton, 8 September 2004, WT/DS267/R, paras. 7.115, 7.304, 7.308-7.311, 7.474, 7.524, 7.527-7.529; US — Gambling, 10 November 2004, WT/DS285/R, paras. 6.60, 6.61; US — Gambling, 21.5, 30 March 2007, WT/DS285/R, paras. 6.12, 6.13, 6.49, 6.51; US — Zeroing (EC), 31 October 2005, WT/DS294/R, paras. 9.17-9.19; EC – Countervailing Measures on DRAM Chips, 17 June 2005, WT/DS299/R, para. 7.19, note 167; Mexico — Taxes on Soft Drinks, 7 October 2005, WT/DS308/R, para. 8.193; EC — Selected Customs Matters, 16 June 2006, WT/DS315/R, paras. 7.110-7.112; Mexico — Steel Pipes and Tubes, 8 June 2007, WT/DS331/R, para. 7.226; Mexico — Olive Oil, 4 September 2008, WT/DS341/R, paras. 7.67, 7.204.*

[94] *Brazil – Aircraft, 14 April 1999, WT/DS46/R, note 228; India — Quantitative Restrictions, 6 April 1999, WT/DS90/R, para. 5.196; EC — Trademarks and Geographical Indications, 15 March 2005, WT/DS174/R, para. 7.492; US — Textiles Rules of Origin, 20 June 2003, WT/DS243/R, 6.204; US — Upland Cotton, 8 September 2004, WT/DS267/R, paras. 7.474, 7.528; US — Gambling, 10 November 2004, WT/DS285/R, paras. 6.343, 6.344; China — Auto Parts, 18 July 2008, WT/DS339/340/342/R, paras. 7.159-7.167, 7.413, 7.166-7.167; China — Intellectual Property Rights, 26 January 2009, WT/DS362/R, para. 7.249.*

[95] *Argentina — Footwear (EC), 25 June 1999, WT/DS121/R, note 530; US — Upland Cotton, 8 September 2004, WT/DS267/R, para. 7.310.*

[96] *EC — Asbestos, WT/DS135/R, 18 September 2000, paras. 8.92, 8.94.*

[97] *US — Section 211 Appropriations Act, 6 August 2001, WT/DS176/R, paras. 8.74-8.79; US — Textiles Rules of Origin, 20 June 2003, WT/DS243/R, para. 3.22.*

[98] *EC — Trademarks and Geographical Indications, 15 March 2005, WT/DS174/R, paras. 7.633-7.664; US — Section 211 Appropriations Act, 6 August 2001, WT/DS176/R, para. 8.108; EC — Trademarks and Geographical Indications, 15 March 2005, WT/DS290/R, paras. 7.633-7.664.*

[99] *Canada — Autos, 11 February 2000, WT/DS139/142/R, paras. 6.604, 7.264; Mexico — Anti-Dumping Measures on Rice, 6 June 2005, WT/DS295/R, note 139; India — Additional Import Duties, 9 June 2008, WT/DS360/R, para. 7.155, note 200.*

[100] *US — Section 110(5) Copyright Act, 15 June 2000, WT/DS160/R, note 204; US — 1916 Act (Japan), 29 May 2000, WT/DS162/R, note 561; EC — Export Subsidies on Sugar, 15 October 2004, WT/DS265/266/R, para. 7.148; US — Zeroing (Japan) (Article 21.5), 24 April 2009, WT/DS322/R, para. 7.9.*

[101] *China — Auto Parts, 18 July 2008, WT/DS339/340/342/R, para. 7.165.*

[102] *US — Gambling, 10 November 2004, WT/DS285R, para. 6.344.*

[103] *US — Export Restraints, 29 June 2001, WT/DS194/R, note 60.*

[104] *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).

[105] *Kuner, above n 23, at 962.*

[106] *Rosenne, S. 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.*