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Translation: Dispute Settlement of the World Trade Organization (WTO)

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A. Disclaimer

The opinions expressed in this article are the sole responsibility of the author and do not represent the views of the WTO. This article builds on the author's earlier research: B Condon, 'The concordance of multilingual legal texts at the WTO' (2012) 33(6) Journal of Multilingual and Multicultural Development 525-538; and B Condon, 'Lost in Translation: Plurilingual: Interpretation of WTO Law' (2010) 1(1) Journal of International Dispute Settlement 191-216.

B. Introduction

1 The legal texts of → *World Trade Organization (WTO)* [MPEPIL] are authentic in English, French and Spanish. All three languages have been used in dispute settlement proceedings before panels and are used in WTO meetings (→ *World Trade Organization, Dispute Settlement (WTO)* [MPEPIL]). Official documents are translated into all three as well, including panel and Appellate Body reports (→ *Report: Dispute Settlement of the World Trade Organization (WTO)*). Differences among the texts of laws, court decisions, and panel decisions may lead to confusion if, for example, lawyers prepare legal arguments based on the Spanish or French text of the laws while their counterparts prepare theirs in English. It is similar for the English, Spanish or French translations of panel reports. There is an additional problem when the original language of a panel report is not English, and the report is appealed. The Appellate Body has not been able to work in Spanish or French. Reviewing a panel's decision on the basis of a translation, which may have been done on a short deadline and might have not been checked by the parties, could lead to the Appellate Body taking issue with a panel on the basis of an incorrect translation. Indeed, failure to consider linguistic differences as a possible source of a dispute can represent an obstacle to resolving a dispute through negotiation. 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 1982 United Nations Convention on the Law of the Sea (Aceves, 1996, 204).

C. Issues Raised by Multilingual Processes at the World Trade Organization

2 Differences in the WTO legal texts occur for several reasons. First, time frames for translating negotiated texts are short. Second, when negotiators make last minute changes, they might not be picked up in the translation; for example, when 'should' is changed to 'shall'. Third, once negotiators have reached agreement, the legal texts become untouchable. There is no process in place at the WTO to correct translations following the approval of the legal texts. While Chile and the WTO Language Services and Documentation Division ('LSDD') each proposed a procedure for correcting errors in the legal texts, neither proposal was adopted (Condon, 2012). However, past experience has alerted WTO Members to the need for checking the text of the translations of the negotiated text before the entering into force of a given agreement. For instance, WTO Members, with the assistance of the Secretariat, have established legal scrubbing committees to review translations before the legal text enters into force. One such committee was established for the legal scrubbing of the Spanish text of the Trade Facilitation Agreement.

3 By virtue of Article 33(3) of the 1969 Vienna Convention on the Law of Treaties ('VCLT'), the terms of a plurilingual treaty are presumed to have the same meaning in each authentic text. When a comparison of the authentic texts discloses a difference in meaning that cannot be resolved through interpretation under Articles 31 and 32, Article 33 requires the adoption of the meaning that best reconciles the texts, having regard to the object and purpose of the treaty. These rules of interpretation have been applied in several WTO panel and Appellate Body reports.

4 Most panel and all Appellate Body reports have been written in English and then translated into French and Spanish. Most panel and Appellate Body hearings are conducted in English as well. The WTO Understanding on Rules and Procedures Governing the Settlement of Disputes ('DSU') leaves open the question of language rights in the dispute settlement process and provides no extra time for translation of panel and Appellate Body reports within the prescribed timetables (Petersmann, 2004, 98). In *Mexico – Anti-Dumping Measures on Rice*, the participants asked to have all written submissions made available to all participants in English and in Spanish. Following consultations with the participants, the Appellate Body Division hearing the appeal issued a Working Schedule that took into account time periods for translation of submissions by the LSDD. However, the time required for the translation of submissions made it impossible to circulate the Appellate Body Report within 90 days from the date the Notice of Appeal was filed. Therefore, the participants agreed in writing to deem the Appellate Body Report to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU (*Mexico – Anti-Dumping Measures on Rice*, Appellate Body Report, para 7). In two other cases, the Appellate Body was unable to circulate its Report within the period pursuant to Article 17.5 of the DSU, due in part to limited Spanish-speaking staff in the Appellate Body Secretariat and the need to translate documents from Spanish into English for non-

Spanish-speaking Appellate Body Members and staff (*Colombia –Textiles, Appellate Body Report*, para 1.12; *Argentina – Financial Services*, Appellate Body Report, para 1.12). Parties have the right to submit their written and oral communications in one of the official languages of the WTO. The Secretariat will then translate them for the panel in its working language. In practice, when a party announces that it will submit in an official language other than that of the panel, the panel's timetables is likely to include a series of deadlines for translation into the panel's working language. (Legal Affairs Division, 2017, 75). In *Russia – Pigs*, Russia asked for authorisation to have interpretation in Russian during the oral hearings because its experts did not speak English well enough. Russia also proposed to bear the related costs. There have also been cases in which the parties dispute the accuracy of the meaning and translation of texts in non-official languages. In *Russia – Pigs*, for example, the Panel adopted the following working procedure:

> Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation. Thereafter, the Panel will rule as promptly as possible on any objection to the accuracy of a translation (Working Procedures of the Panel, Russia – Pigs (EU), para. 9).

5 WTO panel and Appellate Body reports have become longer and more complex, but the time allowed for translation has remained the same. This means that pieces of the reports are distributed to different translators and then assembled and harmonized to produce the final version within the allotted time. There is no formal procedure in place to review and correct translations of panel and Appellate Body reports. It is done internally before circulation. An experienced reviser carefully reviews the translation as a whole. Queries from the translators or reviewers are also communicated to the Secretariat team responsible for assisting the panel or Appellate Body division while the translation or revision process is taking place. Translators seek to use consistent terminology over time. However, languages evolve over time and the terminology that panels and the Appellate Body choose may differ from past usage (→ *Translation of Reports: Dispute Settlement of the World Trade Organization (WTO)*).

6 WTO jurisprudence has become a very important part of WTO law (*US –Stainless Steel (Mexico)*, Appellate Body Report, paras 158-162). However, unlike the legal texts, there is no provision that provides that the reports are ‘authentic’ in English, French and Spanish, and there is no rule of interpretation that applies to multilingual jurisprudence. Thus, it is unlikely that differences between the original language version and translated versions of jurisprudence could be raised as a legal argument in WTO disputes in the same way as

discrepancies between authentic legal texts. Moreover, such differences can be resolved by referring to the original version of the report, rather than the translation.

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

D. Typology of Linguistic Differences in Legal Texts of the World Trade Organization

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

9 Substantive differences in translated legal texts at the WTO can be categorized as follows: (1) simple errors; (2) difficulty of translating ambiguous terms; (3) harmonization problems, ie phrases that are identical across different legal documents in one language differ in another; and (4) different placement of terms in the different languages, which creates ambiguity.

10 The category of simple errors is not as simple as its name implies. For example, there have been some discussions regarding the correct translation of 'should' and 'shall' in Spanish, among both negotiators and translators. 'Should' can be translated in Spanish as 'deberá' or 'debería'. In the WTO legal texts, translators chose to translate 'should' as 'deberá', rather than 'debería'. This choice was made because 'should' generally connotes a positive, though non-obligatory, term in English. In Spanish, 'debería' has a negative connotation, in the sense that it does not matter whether the action is taken and implies permission to do opposite. In Spanish, 'deberá' has a more positive connotation that more closely reflects the manner in which 'should' is used in the legal texts. In English, 'should' is generally not mandatory, whereas 'shall' generally is mandatory. However, Article 11 of the DSU provides that a panel 'should make objective assessment of the matter before it', which has been interpreted as a mandatory due process provision (*EC – Poultry*, Appellate Body Report, para. 133; *Chile – Price Band System*, Appellate Body Report, para. 173; *Thailand – Cigarettes (Philippines)*, Appellate Body Report, para. 147). Thus, in this context, 'should'

means 'shall'. The French text uses '*devrait*' and the Spanish text uses '*deberá*', which both mean 'should'. In this example, there is no error in translation. Rather, the issue came to light as a result of subsequent interpretations of this provision in WTO disputes, which considered that such a due process provision must be mandatory by its very nature.

11 Difficulty translating ambiguous terms differs from the preceding category, since these are not examples of errors in translation. For example, Article 4.1(c) of the Agreement on Safeguards defines the term 'domestic industry' using different terminology in Spanish (*una proporción importante*) than it does in French (*une proportion majeure*) and English (a major proportion). Another example is Article XX(g) of the General Agreement on Tariffs and Trade ('GATT') which requires that conservation measures be 'made effective in conjunction with restrictions on domestic production or consumption'. The French and Spanish equivalents of the term 'made effective' are less ambiguous: '*sont appliqués*' and '*se apliquen*'. In *China – Raw Materials*, the Appellate Body referred to the French and Spanish terms to confirm that Article XX(g) does not contain an additional requirement that the conservation measure be primarily aimed at making effective the restrictions on domestic production or consumption (*China –Raw Materials*, Appellate Body Report, para. 356).

12 In the category of harmonization problems, phrases that are identical across different WTO agreements in one language diverge in another. This category of translation problem is more closely related to the category of simple errors than to the category of ambiguous terms. For example, many agreements draw upon GATT terminology, using the same phrases in other agreements as those used in GATT to express similar obligations or exceptions. In English and French, Article 4.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights ('TRIPS') and GATT Article I:1 use the same wording to express a key part of the most-favoured-nation ('MFN') obligation: shall be accorded immediately and unconditionally/ *seront, immédiatement et sans condition, étendus*. However, the Spanish text uses different phrases in the two provisions to express the same obligation: '*será concedido inmediata e incondicionalmente*' (GATT Art I:1) and '*se otorgará inmediatamente y sin condiciones*' (TRIPS Art 4.1). The meaning is the same, but if a Spanish-speaking lawyer does not compare authentic texts, the distinct manner of expressing the obligation in different Spanish texts could give the erroneous impression that a different meaning is intended. Similarly, TRIPS Article 27.2 incorporates some language from GATT Article XX. In English and French, TRIPS Article 27.2 uses the same form of the word necessary as in GATT Article XX, but in Spanish there is a small variation: 'necesarias' in GATT and 'necesariamente' in TRIPS. Article 9.1, paragraphs (a) and (b), of the Agreement on Agriculture refers to export subsidies provided by 'governments or their agencies', in English, and by '*les pouvoirs publics ou leurs organismes*', in French. Article 1.1(a)(1) the Agreement on Subsidies and Countervailing Measures ('SCM') defines a subsidy as a financial contribution 'by a government or any public body', in English, and '*des pouvoirs publics ou de tout organisme public*', in French. However, in Spanish, Article 9.1, paragraphs (a) and (b) of the Agreement on Agriculture use the phrase '*por los gobiernos o por los organismos públicos*'. SCM Agreement Article 1.1(a)(1) uses the phrase '*de un gobierno o de cualquier organismo público*'. In *US – Anti-Dumping and*

Countervailing Duties (China), China argued that, since the same term '*organismo público*' is used in both provisions in Spanish, this term should be given the same interpretation in both. However, the Appellate Body rejected this argument, since specific terms may not have identical meanings in every agreement. Where the ordinary meaning of a term is broad, its interpretation may differ in different agreements where those agreements have different contexts and objects and purposes (*US – Anti-Dumping and Countervailing Duties (China)*, Appellate Body Report, paras 330-331).

13 In the category of different placement of words the ambiguity arises from the translation, not from the use of constructive ambiguity in the negotiation phase. However, this category is different in nature from the first and third categories, since it does not involve simple translation errors or harmonization problems. This category is more closely related to the second category, since it increases the difficulty involved in the translation process. In this case, the difficulty may arise due to structural differences between different languages. For example, in Annex 1.1 of the Agreement on Technical Barriers to Trade ('TBT'), in English the location of the word 'requirements' creates an ambiguity regarding whether the requirements refer only to labelling. In French, the equivalent word, 'prescriptions', appears to refer to packaging, marking or labelling. In Spanish, the equivalent word, 'prescripciones', refers to all of the terms in the list: terminology, symbols, packaging, marking or labelling.

14 In addition to the foregoing categories, other problems may arise as a result of the ongoing evolution of trade law and the ongoing evolution of the working languages. These other problems include: (1) generic terms that are susceptible to evolutionary interpretation; (2) terms that have special meaning in accordance with VCLT Article 31(4); (3) false cognates, ie words that appear similar but that have a different meaning in different languages, such as 'doctrine' in common law and '*doctrina*' in Spanish; (4) words in the original language that have no equivalent in the other languages, eg liability/responsibility; (5) the need to use the terms used in old laws and precedents to express the same idea in new laws.

15 In addition, differences in language usage among countries that use different terminology in the same language can be a source of debate regarding the correct choice of terminology. These 'intra-linguistic differences' can also lead to the use of different terms to express the same idea in different parts of translated texts, if the task of translating a text is distributed among different translators and there is no editing process to harmonize usage across texts (Prieto Ramos, 2011). For example, Mexican law refers to *cuota compensatoria* as an all-inclusive term for countervailing duties and antidumping duties, whereas other Spanish-speaking countries use two separate terms, as do the authentic Spanish legal texts of the WTO.

E. Linguistic Differences in Dispute Settlement System of the World Trade Organization

16 The experience to date in the WTO dispute settlement system suggests that the multilingual nature of the WTO Agreements does not make treaty interpretation significantly more difficult than it would be with a text authentic in one language only. In practice, the Appellate Body and the parties to disputes often treat the English text as if it were a 'master' text. When the Appellate Body uses dictionaries in its comparison of authentic texts, it uses dictionaries of all three languages. The practice of the Appellate Body has been to use the French and Spanish texts to confirm the interpretation of the English text, which appears to be an implicit application of supplementary means of interpretation under VCLT Article 32. Only where there is a difference of meaning between the texts has the Appellate Body applied VCLT Article 33 to reconcile the difference in meaning between the texts (*US – Countervailing and Anti-Dumping Measures (China)*, Appellate Body Report, paras 4.76-4.77).

17 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.

18 The Appellate Body has taken the view that the customary rules of treaty interpretation reflected in Article 33 of the VCLT require 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 (Condon, 2010). 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 (McNair, 1961). The presumption in VCLT Article 33(3) and the obligation in VCLT Article 33(4) to adopt the meaning that best reconciles the texts require the treaty interpreter to avoid conflicting interpretations.

19 In its commentary on the draft Article that was later adopted as VCLT Article 33(3), 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' (International Law Commission, 1966, 224). The rule in paragraph 1 dates from at least 1836 (McNair, 1961, 432). 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.

20 The plurality of the authentic texts of a treaty is 'always a material factor in its interpretation', but the International Law Commission 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 (International Law Commission, 1966, 225). 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 (Aust, 2000, 205; Villiger, 2009, 458). 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 (Kuner, 1991, 954). A duty of routine comparison would imply the rejection of this presumption (Kuner, 1991). 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 (Kuner, 1991).

21 In practice, most plurilingual treaties contain some discrepancies 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 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' (International Law Commission, 1966, 225). 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 VCLT Articles 31 and 32. The interpreter cannot just prefer one text to another (International Law Commission, 1966, 225).

22 The Appellate Body does not consider the French and Spanish texts in all cases. From 1996 to 2018, it considered more than one authentic text in only 26 of 139 Appellate Body reports, or 18.7 percent of all reports. There is no correlation between the year of the appeal and the consideration of the three authentic texts. There is no correlation between the official language/s of the appellant or appellee and the comparison of authentic texts in Appellate Body reports or between the frequency of text comparison and the level of economic development of the parties. There is insufficient data to determine whether there is a correlation between the languages spoken by Appellate Body members and staff and the consideration of the three authentic texts.

23 The presumption in VCLT 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. Nevertheless, when the Appellate Body does apply Article 33, it does so in an inconsistent fashion and fails to distinguish between the different rules contained in paragraphs 3 and 4 of Article 33. The Appellate Body frequently interprets one text by reference to another, which is permissible 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. 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, 2009, 335).

24 In panel reports issued from 1999 to 2019, one or more parties or the panel compared the authentic texts of a WTO Agreement in 74 out of 175 panel reports, or 42.3 percent of reports. Text comparison occurs in panel reports both more often and more consistently than in Appellate Body reports. Like the Appellate Body, panels and the parties to disputes

often refer to the French and Spanish texts to confirm their interpretation of the English text. However, the manner in which panels use the comparison of authentic texts is more varied than in Appellate Body reports. In some cases, the parties use only one other text to support their interpretation of the English text, while in other cases they use both of the other texts. In one case, one party used the Spanish text to support its interpretation of the English text, while the other party used the French text to support the opposite interpretation of the same English text (*US — Export Restraints*, Appellate Body Report, Footnote 60). This variation in the practice of parties also occurs before the Appellate Body.

25 If the application of VCLT 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. 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.

F. Conclusion

26 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. 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 is good practice in the WTO context, since there are several linguistic discrepancies that could affect the interpretation of WTO provisions. However, language issues also arise with respect to the accuracy of translation of documents whose original language is not an official WTO language, such as Chinese or Russian. Translation of panel and Appellate Body reports into other official languages can also be a source of discrepancies. While these discrepancies can be resolved by referring to the original language in which the report was drafted, they still have the potential to cause difficulties. Language issues also arise in dispute settlement hearings and consultations. For example, a WTO Member may wish to use its own interpreters in consultations and in dispute settlement hearings for the benefit of members of its delegation that are not fluent in the language of the meeting or hearing. However, since WTO Members are entitled to choose the members of their delegations, such procedural issues can be resolved on an ad hoc basis. In addition, when WTO Members prepare oral arguments in one official language and deliver them in a different official language, there can be disagreements regarding the manner in which interpreters translate the oral arguments. Translation issues also arise in negotiations, for example when negotiators agree on a translation but the WTO official translation diverges from the translation that negotiators agreed. Awareness of the potential for misunderstandings arising from

language and translation issues is essential to avoid unnecessary obstacles to their solution.

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Keywords

- #World Trade Organization [WTO]

- # Appellate Body

- # Panel Reports

- Translations

- Languages, regional or minority

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