RECONSIDERING MULTILINGUALISM IN EU TRADE AND INVESTMENT AGREEMENTS IN THE LIGHT OF THE *RELOCATION CASE*.

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ABSTRACT

Trade and investment agreements between the European Union and third States are concluded in 23 or 24 equally authoritative languages. Only the treaty recently concluded with Japan gives priority to the text in the language of the negotiations (English). After discussing the interpretation of multilingual treaties in international law and EU law, the article argues that the current practice should be reconsidered and identifies the advantages of the different options available to contracting parties.

I. Introduction

It is the consolidated practice of the European Union (EU) to authenticate treaties with third States in no less than 23 equally authentic texts – which means in all the official EU languages[1] – *plus* possibly the language of the partner, without giving to any of them formal priority in case of differences of meaning. Such practice parallels the ordinary linguistic regime applied to EU treaties and legislation. However, resort to such a broad multilingualism is definitely abnormal in international law: suffice it to mention that the UN Charter as well as all agreements concluded within the United Nations (193 members) are normally authentic in no more than six authentic texts (English, French, Spanish, Arabic, Russian and Chinese).[2]

The paper will focus on trade and investment treaties, as the Treaty of Lisbon conferred a new competence to the EU in the field, so that the new European (multilingual) agreements will eventually replace previous (mostly bi-lingual) BITs, concluded by single Member States. Since investment treaties do normally consist of very technical and complicated texts, linguistic problems might occur for these treaties more often than expected. Indeed, such problems were probably anticipated in the negotiations of the recent agreement with Japan, which has still been

[1] For the time being, at the exclusion of Irish, see Council Regulation 2015/2264, OJ L 322/1, 8.12.1995. Agreements and arbitral decisions referred to in this article are available, respectively, at http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements or https://investmentpolicyhub.unctad.org/IIA, and at www.italaw.com (all websites last visited on 31 December 2019).

[2] The Energy Charter Treaty (ECT) was concluded in six equally authentic texts (English, French, German, Italian, Russian and Spanish). The Comprehensive and Progressive Agreement for Trans-Pacific Partnership was concluded in English (which will prevail in the event of any divergence), French and Spanish. The agreements of the World Trade Organization (WTO) were concluded in three equally authentic texts (English, French and Spanish). The ASEAN Comprehensive Investment Agreement, on the contrary was concluded only in English.

concluded in 24 authentic texts, but provides that in case of any divergence of interpretation the text of the language in which the agreement was negotiated (English) prevails.[3]

So far, interpretation of multilingual treaties has attracted little interest in literature. This is rather surprising, given the notorious difficulties in interpreting such treaties - even when authenticated in just two or three languages – since "each language has its own genius, and it is not always possible to express the same idea in identical phraseology or syntax in different languages".[4]

Although there are no decisions yet settling disputes concerning the interpretation and application of trade and investment agreements concluded by the EU[5] – most of which have just entered into force – it is quite evident that these difficulties are unavoidably magnified when treaties are authenticated in 23 or 24 texts. A recent decision by the European Court of Justice (ECJ) – in which, it is argued, the interpretation of the Treaty on the Functioning of the EU (TFEU) is not entirely convincing[6]– is a strong reminder of these difficulties.

[3] EU-Japan Economic Partnership Agreement, concluded 17 July 2018, entered into force 1 February 2019, art. 23.8.2.

[4] International Law Commission (ILC), *YBILC* (1966-II) 100.

[5] Three disputes are currently pending. All of them have been initiated by the EU, see the requests for formal consultations under art. 77 of the Economic Partnership Agreement the Southern African Development Community Member States (SADC), Note Verbale, 14 June 2019, at https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157928.pdf; for the establishment of a panel under art. 306 of the Association agreement of 21 March 2014 with Ukraine, Note verbale 20 June 2019, at https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157943.pdf; and for the establishment of a panel of experts under art. 13.15 of the Free trade agreement with Korea, Ref. Ares(2019)4194229 - 02/07/20196 July 2019, at https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf as well as the First written submission by the EU, 20 January 2020, at https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158585.pdf.

[6] See *Slovakia* v *Council* and *Hungary* v *Council*, note 24, and Section III.

In the first part, the article deals with the principles at the root of EU multilingualism, duly taking into account the unique nature of the EU legal system (Section II), and examines how the ECJ has interpreted EU treaties (Section III). It then offers an overview of the EU practice concerning the authentication of trade and investment agreements (Section IV) and verifies whether any mandatory rule under EU law would require concluding these agreements in all EU official languages (Section V). Moving to an international law perspective, Section VI concisely discusses the interpretation of multilingual treaties under the Vienna Convention on the Law of Treaties (VCLT). Eventually, it will be possible to assess whether the current EU practice could be reconsidered (Section VII) and identify the options available to the contracting parties (Section VIII).

II. Multilingualism in EU Law

It is undisputed that the legal protection of multilingualism is an important principle and an indispensable guarantee for the functioning of the institutions of the European Union (EU) as well as for their relationships with EU citizens.[7] Multilingualism not only promotes cultural, economic and social integration; it also enhances the legitimacy and non-discriminatory nature of the entire supranational project.[8] It has been observed that

[7] See European Parliament, *Legal Aspects of EU Multilingualism*, Briefing, January 2017, at http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595914/EPRS_BRI%282017%29595914_EN.pdf. Art. 22 of the Charter of Fundamental Rights, 2004 OJ (C 310/41), commits the EU to respect linguistic diversity.

[8] European Parliament, *Framework Strategy for Multilingualism*, Resolution 1/6/2006, 2004 OJ (C 310/41). Susan Šarčević, 'Multilingual Lawmaking and Legal (Un)Certainty in the EU', 3 *Int. Journ. of Law, Language & Discourse* (2013) 16, has emphasised the "right to rely on the authentic text of the EU legislation in their own language without discriminatory effects". For Geert. Van Calster, 'The EU's Tower of Babel – Interpretation by the European Court of Justice of Equally Authentic Texts Drafted in more than one Official Language', *Yearbook of European Law* (1997) 363, 391, "[m]ultilingualism remains a consideration of decency which the Union owes its citizens."

> [a]s a supranational entity, for the sake of the achievement of the shared objectives of which Member States have relinquished part of their national sovereignty, the EU has consciously opted for the preservation of linguistic diversity, as a matter of political necessity, in the firm belief that European integration can only be achieved if this diversity is respected.[9]

The Treaty on the European Union (TEU) and the TFUE are drafted in all official languages, but each treaty remains a *single text* with a *single meaning*. Each of the 24 equally authentic texts is independent and does not derive from a principal, original one, bearing the exact meaning.[10]

As for EU legislation, a rule requiring an equally broad multilingualism was set in the very first regulation. At the time, official languages were just four, but every enlargement of the Community/Union to new member States required a corresponding amendment of the regulation.[11] Any EU act of general application has to be adopted in every official language. The complexity and length of the legislative procedure is well known.[12] Even before becoming a formal proposal, the initial draft may be changed and revised time and again, in order to accommodate requirements or suggestions by the several actors and stakeholders taking part – more or less formally – in the political debate. This is why even the first official proposal of a regulation or a directive – when transmitted by the Commission to the Council and the Parliament – may have been already translated several times (and not always by the same translators). After possibly long negotiations

[9] Phoebus Athanassiou, *The Application of Multilingualism in the EU Context*, European Central Bank, Legal Working Papers, Series 2, March 2006, at https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp2.pdf.

[10] See Isolde Burr, 'Article 55. Languages and Deposit of the Treaty', in H-J. Blanke, S. Mangiameli (eds.), *The Treaty on European Union* (Springer: Vienna, 2013) 1461; Elina Paunio, *Legal Certainty in Multilingual EU Law* (Routledge, 2013) 5.

[11] EEC Council, Regulation No 1, OJ 17, 6.10.1958, p. 385; lastly amended and consolidated by Council Reg. (EU) No. 517/2013, 13/5/2013 OJ L 158, 10.06.2013 p. 2.

[12] The ordinary legislative procedure – that applies to most general acts – is set by Art. 289 TFUE.

and discussions by the Council and the Parliament – which may lead to amendments of the original proposal - some vagueness may still remain in the final text, sometimes deliberately. As it has been sharply pointed out, "EU translators are part of the legislator."[13]

However, multilingualism is not always required in such a full version. Individual acts are officially drafted and authenticated only in the addressee's language and, then, translated for the public. In turn, individuals are entitled to use their own language when dealing with the European Institutions. According to the ECJ Statute, judgments are authentic only in the proceedings' language and are subsequently translated into all the others.

The remarkable increase in the EU official languages, however, has raised concern and multilingualism has been challenged as impractical and prohibitively expensive,[14] and ultimately threatening legal certainty.[15] It is worth noting that the Commission has conceded that multilingualism often represents an obstacle in the context of the reform of contract law and pointed out that basic terms such as "contract" or "damage" are particularly problematic.[16] Even *within* the EU, therefore, "EU multilingualism is in bad need of reform."[17]

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[13] Paunio, note 10, 18. According to the same author, moreover, "exact equivalence between different texts remains a fiction due to the very nature of natural languages".

[14] For a recent and accurate account, see Mattias Derlén, 'Multilingualism and the European Court of Justice: Challenges, Reforms and the Position after Brexit', in E. Guinchard, M-P. Granger (eds.), *The New EU Judiciary: An Analysis of Current Judicial Reforms* (Kluwer, Alphen aan den Rijn, 2018) 341

[15] See, in particular, Šarčević, note 8.

[16] Communication from the Commission to the Council and the European Parliament on European Contract Law, OJ C 255, 13.9.2001.

[17] Derlén, note 14, 356.

III. The building of an autonomous European legal language and the side effects of the linguistic regime

The European treaties are the founding charter of a new legal order, resembling a national constitution rather than an "ordinary" international treaty. Indeed, only in its very first judgment on the issue, delivered in 1963, did the Court refer to the (then) EC as a "legal order of a new kind *in the field of international law*."[18] The Court subsequently abandoned any reference to international law to strongly promote a *supranational* conception of this new legal order. The conclusion is based on the unprecedented nature of the EU, as an entity that counts as its subjects not only the member States, but also their citizens. Then, it comes as no surprise that when interpreting the EU founding treaties, the ECJ does not refer explicitly to the law of treaties, but rather relies on some specific EU principles and rules that may – but also may *not* – coincide with those set for the interpretation of "ordinary" international treaties.[19]

The reasoning of the ECJ in dealing with interpretation issues due to linguistic discrepancies will now be taken into account. Then, the reasons at the ground of the full multilingual regime will emerge. At that point, it will be necessary to assess whether those same reasons might compel to consider the full multilingualism option as essential even for EU treaties with third countries. This assessment, in turn, will require considering a peculiar EU law issue, closely linked to the *supranational* nature of the EU legal order: namely, the issue concerning the possibility for treaties with third countries to produce direct effects.

Facing interpretation issues due to linguistic discrepancies in the texts of EU treaties or legislation, the Court often disregards the meaning of a notion in one or more languages and prefers

[18] Case 26/62, *Van Gend & Loos*, C/1963:1 and Case 6/64, *Costa* v. *ENEL*, C/1964:66.

[19] Richard Gardiner, *Treaty Interpretation*, 2nd ed. (OUP, Oxford, 2012) 140, observed that "it is disappointing that the ECJ has not explicitly endorsed the application of the complete set of VCLT rules on interpretation".

a different meaning common to others, which is believed to carry the proper "European" content. The chosen meaning does not prevail just because of its being common to a majority of languages, but rather because it better fits the purposes of the act. Such an operation might require the departure from literal interpretation, to move to a more productive teleological reasoning. The opposite way may also be followed in the sense that teleological reasoning might precede literal interpretation, the latter being performed to check the outcome of the teleological reasoning.[20] Either way is equally possible, showing that interpretation of EU treaties and law does not proceed according to a hierarchy of methods, since the choice is eventually left to the Court. Such flexibility, however, affects the predictability of the outcome. The jurisprudence reveals how the language of EU law has its own *genius*, which is mostly perceivable in the "autonomous notions", construed by the Court through of the relevant legal concepts. Such an interpretation does not necessarily mirror any of the domestic law meanings of the same concept.[21]

However, some cases in the body of ECJ jurisprudence reveal remarkable side effects of teleological interpretation in such a broad multilingual context. Some decisions could not avert harming the same basic principles that multilingualism is meant to protect. This happened, for instance, when the Court ruled that the European meaning of the word *vehicle* includes not only cars (and other land means of transportation), but also boats and locomotives. The conclusion was reached even if the word used in the text under scrutiny – the Danish one – could actually include only land vehicles.

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[20] See C.J.W. Baaij, 'Fifty Years of Multilateral Interpretation in the EU', in L.M. Solan, P.M. Tiersma, *The Oxford* Handbook *of Language and Law* (OUP, Oxford, 2012) 217, 224.

[21] In Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA* v *Ministry of Health*, C:1982:335, para 19, the CJEU held that "even where the different language versions are entirely in accord with one another, […] Community law uses terminology which is peculiar to it. Furthermore, it must be emphasised that legal concepts do not necessarily have the same meaning in Community law and in the law of the various member States".

Yet, the Court recalled that "the different language versions of a Community text must be given a uniform interpretation and hence in the case of divergence between the versions the provision in question must be interpreted by reference to the *purpose and general scheme* of the rules of which it forms a part".[22] Indeed - though definitively consistent with the purpose of the relevant directive - the outcome of the interpretation runs in contrast both with the principle of equality of languages and with the fundamental guarantee of certainty and predictability of legislation.

Further controversial implications of the same method unfold in a recent decision, where the usual teleological interpretation induced by multilingualism efficiently solve the practical problem at stake, but also disclosed delicate interpretative issues concerning the very nature of the judicial function.[23]

In the joint cases *Slovakia v Council* and *Hungary v Council (Relocation Case),* decided by the Grand Chamber on 6 September 2017, the applicants challenged the validity of a decision by the EU Council concerning provisional measures for the relocation of migrants from Italy and Greece to other Member States. [24] One of the reasons adduced focused on the interpretation of art. 78.3 TFEU. Under fifteen authentic texts of the Treaty, the provision reads:

> In the event of one or more Member States being confronted by an emergency situation *characterised by* a sudden inflow of nationals of third countries, the Council, on a proposal

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[22] Case C-428/02, *Fonden Marselisborg Lystbådehavn* v *Skatteministeriet and Skatteministeriet v Fonden Marselisborg Lystbådehavn*, C:2005:126, para. 28.

[23] Teleological reasoning may – more or less inadvertently – blur the distinction between the roles of the judiciary and the legislator, letting the judge evaluate the merits of the act to be interpreted. An issue concerning possible limits to discretion of the judge in teleological interpretation might have to be explored even within the EU system, as it is presently discussed in relation to the US Supreme Court, see G. Lawson, 'Did Justice Scalia Have a Theory of Interpretation?', 92 *Notre Dame LR* (2017) 2143.

[24] Join Cases C-643/15 and C-647/15, C:2017:618. The act under scrutiny was the Council Decision 2015/601, OJ L 248 22 September 2015.

> from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament" (emphasis added).

The remaining nine authentic texts, however, do not use words meaning "*characterized* by", but terms or expressions that the Court considered equivalent to "*caused* by". The Court concluded that:

> [A]lthough a minority of the language versions of art. 78.3 TFEU do not use the word 'characterised' but rather the word 'caused', in the context of that provision and in view of its objective of enabling the swift adoption of provisional measures in order to provide an effective response to a migration crisis, *those two words must be understood in the same way*, namely as requiring there to be a *sufficiently close link* between the emergency situation in question and the sudden inflow of nationals of third countries".[25]

The Court did not undertake a true comparison of the different texts of the provision. Instead, it rapidly turned to teleological considerations and acknowledged that the decision was meant to provide "an effective response to a migration crisis". It then assumed that, to this purpose, *the two different terms could be considered as bearing the same meaning*.[26] The teleological reasoning takes into consideration the solidarity principle, grounding the relocation system that the decision in question had made mandatory for all member States.[27] The Court eventually considered and dismissed the other arguments of the applicants, and concluded that the decision was indeed valid.[28]

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[25] Joined Cases C-643/15 and C-647/15, para 125 (emphasis added). The ECJ followed the Opinion of Advocate General Bot, 26 July 2017, para 122 (emphasis added), according to whom the words "characterized" and "caused" demonstrate that "there must be *a close relationship* between the emergency situation requiring the adoption of provisional measures and the sudden inflow of nationals of third countries is expressed".

[26] Para 125.

[27] The applicant States voted against the decision, which was adopted by qualified majority. The same States, in fact, argued that the solidarity principle was to be enacted by means of voluntary measures by member States.

[28] For a full analysis, see Bruno De Witte, Evangelia Tsourdi, 'Confrontation on Relocation. The Court of Justice Endorses the Emergency Scheme for Compulsory Relocation of Asylum Seekers within the EU', 55 *CMLR* (2018)

The decision is not entirely convincing for several reasons. The first striking element is that the Court did not undertake any true comparison of the different texts of the provision. It rather placed itself in the perspective of the English language, on the assumption that terms different from "characterised" used by some other languages – such as "aufgrund" in German, or "ten gevelde" in Dutch – could be considered equivalent to "caused". The Court approach falls short of true multilingualism and does not respect the equality and the different *genius* of the EU official languages.[29]

Even more importantly, the Court unpersuasively treated the words "characterized" and "caused" as if they were synonyms. The two terms are not only semantically different, but they also imply different requirements for the adoption of provisional measures under art. 78 to tackle an emergency situation.

The *legal* term "caused" refers to the concept of causation, or, in other words, a link between a *cause* and its *effects*. Several related issues might come into consideration in order to adopt provisional measures under art. 78.3. Yet, it would be necessary to consider proximity or remoteness of causation and, on the other hand, the relevance of direct and indirect effects attributable to the same cause. The crisis enabling the Council to take a provisional decision, therefore, should be *determined* by the flow of migrants.

The term "characterized", on the contrary, describes a *factual* situation as presenting a specific feature - the sudden flow of migrants - which is decisive for the adoption of provisional measures under art. 78.3. The scenario might therefore be quite different, i.e. a crisis (originally

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1457. The Authors, however, do not discuss the linguistic issue. Without actually undermining the solidarity principle, a different solution could have ruled out the possibility of resorting to art. 78.3 as a legal basis for the decision in question, to declare that the appropriate legal basis was to be found in a different provision of the Treaty

[29] Interestingly, the term "characterized" could have been translate into German as "gekennzeichnet".

due to other reasons) that is worsened by the massive flow of migrating people. From this perspective, it is not indispensable to establish a causal link between flow of migrants and the crisis: it may be sufficient to ascertain an important impact of the former on the latter. The decision based on art. 78.3, therefore, could definitely address the situation existing at the time in Greece, in which economic and financial reasons were at the origin of the severe crisis affecting the country, while the flow of migrant worsened the already critical situation.

This case demonstrates how linguistic discrepancies can not only hide in the text of a treaty as fundamental as the TFUE, whose different authentic texts were carefully checked and compared, but also remain undetected for years. The Court's reasoning is just emblematic of how linguistic discrepancies may widen the margin for teleological interpretation, sometimes involving delicate political issues. The case sounds as a warning on the possible difficulties that a broad multilingualism could entail for EU treaties with third countries, notwithstanding all consideration and attention paid to assure consistency of the equally authentic texts.

IV. EU practice on trade and investment treaties

Keeping in mind the importance of multilingualism within the EU as well as the difficulties that the interpreter may encounter when dealing with EU treaties, it is appropriate to examine the practice of the EU related to trade and investment agreement concluded with other States. With the exception of the treaty recently concluded with Japan, the practice of the EU on the authentication of trade and investment agreements has been very consistent and paralleled the practice related to EU treaties. These agreements have been concluded in all official EU languages *plus* – when appropriate – the language of the partner, without giving to any of them formal priority in case of differences of meaning. The Free Trade Agreement (FTA) with Korea, for instance, is drawn up in duplicate in the Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, Swedish and Korean languages, each of these texts being equally authentic.[30] The FTA with Japan has still been concluded in 24 authentic texts, but departs from the well-established practice insofar as in case of any divergence of interpretation, the text of the language in which the agreement was negotiated (English) shall prevail.[31]

It must be said from the outset that the VCLT rules on treaty interpretation reflect customary international law and therefore apply to the treaties concluded between the EU and third States.[32] This has been reiterated in the text of several agreements concluded by the EU, which expressly direct the interpreter to apply them in accordance with "customary rules of interpretation of public international law, as codified in the VCLT",[33] or other expressions, which can be

[30] Art. 15.16.

[31] Note 3, art. 23.8.2.

[32] See Section VI.

[33] See, Investment Protection Agreement EU - Vietnam, concluded on 30 June 2019 and not in force yet, art. 3.21.

considered as equivalent, as demonstrated by the use of different ones in the same agreement (i.e. CETA).[34]

The following features of EU trade and investment agreements deserve to be mentioned for the purpose of the present study. To start with, the relevant final provisions of trade and investment agreements concluded by the EU occasionally indicate that "in the event of a contradiction, *reference shall be made* to the language in which this agreement was negotiated".[35] The FTA with Singapore provides that "in the event of any divergence over the interpretation of this Agreement, the arbitration panel *shall take account* of the fact that this Agreement was negotiated in English."[36]

While these expressions can be considered equivalent and the modal "shall" suggests mandatory nature, it is difficult to precisely define the meaning of the expressions "taking into account" – also used in art. 31.3 VCLT - and "reference shall be made". Both expressions hardly introduce a formal hierarchy in favour of the language in which the treaty was negotiated, as this would contradict the legal equality of all authentic languages. However, the text used during the negotiations could inform the choice between several plausible interpretations. This would at once

[34] Comprehensive Economic and Trade Agreement EU and Canada (CETA), concluded 30 October 2016 and provisionally entered into force 21 September 2017, art. 8.31 and art. 29.17. See also EU – Vietnam Free Trade Agreement, concluded on 30 June 2019 and not in force yet, art. 15.21; EU-Vietnam Investment Protection Agreement, art. 3.21 and art. 3.42.4; Agreement with Japan, note 3, arts 16.18.2 and 21.16; Free Trade Agreement EU – Korea, concluded on 6 October 2010, provisionally applied since July 2011 and ratified in December 2015, art. 14.16; Association Agreements with Ukraine (art. 320), Moldova (art. 320), Georgia (art. 265), all concluded 27 June 2014, entered into force 1 July 2016; Trade Agreement EU - Colombia and Peru, concluded 26 June 2012, entered into force 1 June 2013, art. 317; Economic Partnership Agreement with the Eastern Africa Community, concluded 16 October 2014 (not in force yet), art. 123.

[35] See, for instance, art. 120 of the FTA with the Southern Africa Development Community (SADC), concluded 10 June 2016, entered into force 10 October 2016.

[36] Signed 19 October 2018, entered into force 21 November 2019, Annex 14 A, art. 48.

respect the formal equality of all authentic texts and be expected to better reflect the intention of the contracting parties as recorded in the treaty.

Under several EU trade and investment agreements, moreover, the obligations which are identical to the obligation under the WTO Agreement shall be interpreted in accordance with any "relevant interpretation established in rulings of the WTO Dispute Settlement Body",[37] or "relevant interpretations in panel and Appellate Body reports adopted by the DSB".[38] Other agreements admit a more flexible and broader approach. CETA, for instance, states that the interpreter shall "take into account relevant interpretations in reports of Panels and the Appellate Body adopted by the WTO Dispute Settlement Body".[39] This provision is equally mandatory - as demonstrated by the modal "shall" – but the duty of the interpreter is to carefully consider in good faith the relevant decisions, without any obligation to follow them. Such a duty is not confined to identical obligations, but concerns in principle any trade provisions that has been applied and interpreted by the WTO adjudication bodies. This may explain its soft wording.

WTO languages are sometimes also relevant for the purpose of the language of proceedings before tribunals charged with settling disputes arising out of the treaties under discussion. While these treaties recognise the freedom of the contracting parties to choose the language of the proceedings, different arrangements are put in place in case the parties are unable to reach such an agreement. The treaties concluded with the former Russian Republics, for instance, provide that each Party makes its written submissions in its chosen language and provides a translation in the

[37] See, for instance, Free Trade Agreement EU – Korea, note 34, art. 14.16.

[38] See, for instance, Economic Partnership EU – Japan, note 3, art. 21.16.

[39] Note 34, art. 29.17. For other examples, see the agreement with Vietnam, note 33, art. 15.21; or Ukraine, note 34, art. 320.

language chosen by the other Party, unless its submissions are written in one of the working languages of the WTO.[40]

Interestingly, the EU-Vietnam Investment Protection Agreement provides that in investment disputes, in case of disagreement between the parties, the Tribunal determines the language to be used, after consulting the parties with a view to ensure the economic efficiency of the proceedings and avoid any unnecessary burden on the resources of the parties and the Tribunal. A footnote further specifies that "[i]n considering the economic efficiency of the proceedings, the Tribunal should take into account the costs of the disputing parties and of the Tribunal in processing case-law and legal writings which will potentially be submitted by the disputing parties".[41]

Trade and investment agreements concluded by the EU frequently contain in-built mechanisms to ensure their proper interpretation. Some of them establish joint committees of representatives of the parties that are entrusted with several functions, including the adoption of binding interpretations. Under art. 8.31.3 of CETA, for instance, where "serious concerns arise as regards matters of interpretation that may affect investment", the Joint Committee may adopt interpretations that shall be binding on investment tribunals.[42] Importantly, binding interpretations are intended "to avoid and correct any misrepresentation of CETA by Tribunals."[43]

From this perspective, the parties maintain effective control on the interpretation of the treaty and may intervene when they believe that the interpretation given by a tribunal does not

[40] See, for instance, Georgia, note 34, Annex XX, art. 42.

[41] Note 33, art. 3.50.2.

[42] Note 34.

[43] Joint Interpretative Instrument on the CETA, Doc. 13541/16, Brussels, 27 October 2016, 27 October 2016, OJ L 11/3, 14.1.2017, para 6 (e).

reflect their intentions as recorded in the treaty. This obviously presupposes the agreement amongst all parties. Joint Committees may also decide that an interpretation shall have binding effect from a specific date.[44]

Some of the treaties under discussion also expressly allow the party (or parties) not appearing before the arbitral tribunal to submit formal documents on its (or their) position(s) with regard to the interpretation of the relevant treaty provisions. According to art. 8.38.2 CETA, for instance, the investment Tribunal "shall accept or, after consultation with the disputing parties, may invite, oral or written submissions from the non-disputing Party regarding the interpretation of the Agreement". Interestingly, the treaty indicates that the non-disputing Party is either Canada, if the EU or a Member State is the respondent, or the EU, if Canada is the respondent. Accordingly, the Member States of the EU cannot submit non-disputing party submissions.

[44] See, for instance, Art. 8.31.3 CETA, note 34.

V. Does EU law require authenticating trade and investment agreements in all EU official languages?

After sketching the practice of the EU and before considering whether it could be reconsidered, it is necessary to verify whether the authentication of the treaties concluded with other States is required under EU law. The principle of equality underpinning the EU supranational system applies not only to States, but also to individuals. In fact, not only States but also legal and natural persons can be directly affected by EU treaties and legislation. For this reason, every EU provision producing direct effects – i.e. conferring rights or obligations upon individuals – has to be drafted in every official language. The Court made this very clear, to the point that a regulation was held not opposable to an individual because it had not been published in his national language, notwithstanding the evidence that the person actually concerned was all the same aware of the content of the act.[45]

A full analysis on the legal and political implications of direct effects of trade and investment agreements goes beyond the scope of this article. Nonetheless, it is necessary to assess whether the treaties under discussion produce such effects. In the affirmative, the reduction of authentic texts – favouring individuals whose languages is selected as authentic – could hardly be reconciled with the principle of equality (as applied among all the possible beneficiaries of the

[45] In Case C-161/06, *Skoma-Lux sro* v *Celní ředitelství Olomouc*, C:2007:773, para 38 (emphasis added), the Court held that "the principle of legal certainty requires that Community legislation must allow those concerned to acquaint themselves with the precise extent of the obligations it imposes upon them, which may be guaranteed only by the proper publication of that legislation in the official language of those to whom it applies (see also Case C-370/96, *Covita AVE* v *Elliniko Dimosio (Greek State)*, C:1998:567, para 27; Case C-228/99, *Silos e Mangimi Martini SpA* v *Ministero delle Finanze*, C:2001:599, para 15; and Case C-108/01, *Consorzio del Prosciutto di Parma and Salumificio S. Rita SpA* v *Asda Stores Ltd and Hygrade Foods Ltd*, C:2003:296, para. 95). It is worth noting that such conclusion was taken notwithstanding the fact that the official electronic format of regulation in question was available in the internet.

norms to whom some direct effects can be attached). In the negative, conversely, such reduction could be considered.

It is undisputed that the EU Institutions can agree with the other contracting party "what effects the provisions of the agreement are to have in the internal legal order of the contracting Parties".[46] If the treaty is silent on the issue, it is for the ECJ to assess its possible direct effects,[47] by applying the same criteria used with regard to the provisions of directives.[48] The ECJ has regularly held that a treaty is directly applicable "when, regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure".[49]

In assessing such conditions, the Court seems to be following two different approaches, which could be defined as "functionalist" and "protective",[50] with regard to bilateral agreements and GATT/WTO agreements. As for the first, the Court has been inclined to recognize direct

[46] Case C-104/81, Hauptzollamt Mainz v C.A. Kupferberg & Cie KG a.A., C:1982:362, para 17. In Joined Cases C-120706 and C-121/06, *Fabbrica Italiana Accumulatori Motocarri Montecchio Spa (FIAMM)* et al v *Council and Commission*, C:2008:476, para 108, the Court stressed the importance of "the agreement's spirit, general scheme or terms". See also Joint Cases C-404/12 P and C-405/12, *Council of the European Union and European Commission* v *Stichting Natuur en Milieu and Pesticide Action Network Europe*, C:2015:5, para 45.

[47] Case 181/73, *R. & V. Haegeman* v. *Belgium*, C:1974:41, para 3-5, concerning an Association agreement with Greece.

[48] Case C-167/17, *Volkmar Klohn* v. *An Board Plenála*, C:2018:833, para 33, relying on *Demirel*, note 49.

[49] Case 12/86, *Meryem Demirel* v. *Stadt Schwäbusch Gmünd*, C:1987:400, para 14. The ECJ has systematically referred with approval to *Demirel* as for instance in Case C-18/90, *Office national de l'emploi* v. *Bahia Kziber*, C:1991:36, para 15; Case C-366/10; *Air Transport Association of America* et al. v. *Secretary of State for Energy and Climate Change*, C:2011:864, para 33; *Klohn*, note 48, para 33.

[50] See Federico Casolari, 'The Acknowledgment of the Direct Effect of EU International Agreements: Does Legal Equality Still Matter?', in L.S. Rossi, F. Casolari (eds.), *The Principle of Equality in EU Law* (Springer, Cham, 2017) 83, 86.

effects to bilateral agreements of partnership, association and cooperation.[51] The main reason for this is that domestic courts can be called to enhance uniform implementation of the treaty throughout the UE.[52] On the other hand, by following a protective approach, the Court has systematically refused to recognize direct effects to the General Agreement on Trade and Tariffs (GATT)[53] as well as to the WTO agreements[54] and decisions of the Dispute Settlement Body.[55] Its *rationale* is that recognizing direct effects to these agreements could pave the way to the non-uniform application of WTO law by the tribunals of the Member States. Such "protective" jurisprudence has attracted a good deal of perplexity and criticism.[56]

The denial of any direct effects of WTO agreements has strongly influenced the recent EU practice related to trade and investment agreements. This is certainly due to the close relationships

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[51] See Marc Maresceau, 'The Court of Justice and Bilateral Agreements', in A. Rosas *et al*. (eds.), *The Court of Justice and the Construction of Europe* (Asser, The Hague, 2014) 693.

[52] See the opinion of GA Trabucchi in Case 87/75, *Conceria Bresciani* v. *Administrazione Italiana delle Finanze*, C:1976:3, p. 148. For a substantial list of the relevant association/partnership/cooperation agreements and the related pronouncements by the ECJ, see Casolari, note 50, 89-90. For a couple of examples, see Case 416/96, *Nour Eddline El-Yassini* v *Secretary of State for Home Department*, C:1999:107 para 32, concerning art 40 of the EEC-Morocco Agreement concluded on 26 September 1978, in which the Court expressly relied on *Demirel*, note 49; Case C-265/03, *Igor Simutenkov* v *Ministerio de Educación y Cultura and Real Federación Española de Fútbol*, C:1999:574, para concerning art. 23(1) of the Communities-Russia Partnership Agreement; Case C-97/05; *Mohamed Gattoussi* v *Stadt Rüsselsheim*, C:2006:780, para 28, concerning art. 64(1) of the Euro-Mediterranean Agreement with Tunisia.

[53] Case 21.24/72, *International Fruit Company* v *Produkschap voor Groenten en Fruit*, C:1972:115.

[54] Case C 268/94, *Portuguese Republic of Portugal* v. *Council*, C:1999:574.

[55] Joined Cases C-120706 and C-121/06, *FIAMM*, note 46. See Antonello Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order', in E. Cannizzaro, P. Palchetti, and R.A. Wessel (eds*), International Law as Law of the European Union* (Brill, Leiden-Boston, 2012) 249.

[56] See, in particular, Judson Osterhoudt Berke, 'The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting', 9 *EJIL* (1998) 626; Marco Bronckers, 'From 'Direct Effect' to 'Muted Dialogue'. Recent Developments in the European Courts' Case Law on the WTO and Beyond', 11 *JIEL* (2008) 885; Thomas Cottier, 'International Trade Law: the Impact of Justiciability and Separations of Powers in EC Law', 5 *ECLR* (2009) 307; Helen Ruiz Fabri, 'Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?', 25 *EJIL* (2014) 151.

between these agreements and WTO law, as demonstrated *inter alia* by the substantial incorporation in the former of WTO disciplines and the frequent references to WTO jurisprudence. As a result, recent trade and investment agreements explicitly and almost systematically exclude the possibility of producing direct effects.[57] The express exclusion of direct effects has been described as "a paradigm shift" that occurred around 2008.[58]

The production of direct effects of trade and investment agreements can be precluded in two main ways: by a specific provision inserted towards the end of the treaty or by a specific article included in the Council decision authorising the signing or the provisional application of the treaty.

Several agreements, including those with the South African Development Community (SADC),[59] Colombia and Peru,[60] Japan,[61] Vietnam,[62] Singapore,[63] and Central America[64] provide that nothing "shall be construed as conferring rights or imposing obligations on persons, other than those created between the Parties under public international law". The trade and investment agreement with Vietnam also recognizes that "Vietnam may provide otherwise under Vietnamese domestic law".[65]

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[57] See the useful matrix in Casolari, note 50, 109-110.

[58] Marco Bronckers, 'Is Investor–State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements', 18 *JIEL* (2015) 655, 663.

[59] Note 35, art. 122.

[60] Note 34, art. 336.

[61] Note 3, art. 23.5.

[62] Note 33, art. 17.20.

[63] Note 36, art. 16.16.

[64] Association between the European Union and its Member States, on the one hand, and Central America, signed 29 June 2012, provisionally since 1August 2013 with Honduras, Nicaragua and Panama, since 1st October 2013 with Costa Rica and El Salvador, and since 1 December 2013 with Guatemala, art. 356.

[65] Note 33, art. 4.18.

More sophisticated is the relevant provision of CETA,[66] which reads:

> Nothing in this Agreement shall be construed as conferring rights or imposing obligations on persons other than those created between the Parties under public international law, nor as permitting this Agreement to be directly invoked in the domestic legal systems of the Parties. A Party shall not provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.

The exclusion of direct effects can also be obtained, alternatively or jointly with a treaty provision, through the Council decision authorizing the negotiation, the signature or the provisional application of the agreement. The decision concerning the agreement with Korea, for instance, states that the treaty "shall not be construed as conferring rights or imposing obligations which can be directly invoked before Union or Member State courts and tribunals".[67] Similar provisions are contained in Council decisions related to the treaties with Central America,[68] Colombia and Peru,[69] Eastern Africa Community,[70] Georgia, Moldova,[71] SADC,[72] and Ukraine.[73]

When trade and investment agreements do not produce direct effects upon individuals in the EU – the overwhelming majority of those recently concluded by the EU [74] – the authentication of the treaty in all EU official languages is not indispensable. It is accordingly possible to

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[66] Note 34, art. 30.6.

[67] Note 34. Respectively Council Decision 2011/265/EU, 16 September 2010, OJ 2011 L 127/7, art. 8, and Council Decision (EU) 2015/265/2169, 1 October 2015, OJ 2015 L 307/2, art. 7.

[68] Note 34.

[69] Note 34.

[70] Note 34.

[71] Note 34.

[72] Note 35.

[73] Note 34.

[74] In literature, see Aliki Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements', 51 *CMLR* (2014) 1125; Casolari, note 50. In general, see Mario Mendez, *The Legal Effects of EU Agreements* (OUP, Oxford, 2013).

reconsider the EU practice concerning their authentication, taking into due account the relevant international law provisions on treaty interpretation, which will be sketched in the next section.

VI. Interpretation of multilingual treaties under VCLT

General international law norms on interpretation of multilingual treaties are codified in art. 33 VCLT,[75] as consistently held by the International Court of Justice (ICJ),[76] as well as several investment tribunals[77].

Art. 33 VCLT provides that all authentic texts have the same meaning and each of them is equally authoritative, unless the parties have agreed that in case of a divergence a particular one shall prevail. In the absence of a prevailing text, Art. 33.4 states that "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".

Art. 33.4 VCLT involves a comparison of the texts aimed at finding the *single meaning* of the multilingual treaty, which remains a single legal instrument with a "single set of terms."[78]

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[75] Concluded 23 May 1969, entered into force 27 January 1980 (116 Parties), 1155 UNTS 331. An identical provision appears in the VCLT between States and International Organisations or between International Organisations, concluded 21 March 1986 (not yet in force), UN Doc. A/CONF. 129/15.

[76] *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia*, Preliminary Objections, Judgment of 17 March 2016, para. 33.

[77] *Kiliç* v. *Turkmenistan*, ICSID ARB/10/1, Decision on art. VII.2 of the Turkey-Turkmenistan BIT, 7 May 2012, para 6.4. According to the WTO Appellate Body, art. 33.3 and art. 33.4 mirror customary international law: see, *US — Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, 17 February 2004, para. 59. The ILC has acknowledged that "there are significant indications in the case law that art. 33, in its entirety […] reflects customary international law", UN Doc. A/71/10, 12 August 2016, p. 127-128, para 6.

[78] *YBILC* (1966-II) 225.

Comparison can help clarifying the meaning of ambiguous or obscure terms used in one or more versions.[79] It might also reveal unexpected discrepancies due to "the different genius of the languages, the absence of a complete consensus *ad idem*, or lack of sufficient time to co-ordinate".[80]

Relying on a single text may lead to inaccurate and possibly conflicting interpretations by domestic and international tribunal alike, even when the text relied upon is crystal clear. The decision by the ECJ in *Ferriere* clearly illustrates this point.[81] The comparison of the different texts allowed the Court to detect the discrepancy and ensure uniform interpretation. Without comparison, differences between authentic texts could go undetected for years and the treaty be interpreted differently by domestic and international courts.

Art. 33 VCLT does not require the interpreter to consider *all* authentic texts,[82] although at least in theory this would be the obvious prudent course.[83] However, when the treaty is concluded in more than 20 equally authentic texts, as in the case of the treaties under discussion, such an exercise would be too cumbersome, if not impracticable. The same ICJ, having to apply the Convention on Diplomatic and Consular Relations, considered only two (English and French) of the five (at the time) equally authentic texts of the treaty, thus confirming that there is no need of taking into account all texts.[84]

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[79] *Ibidem*. In literature, see Gardiner, note 19, 354.

[80] *YBILC* (1996-II) 225.

[81] Case C-219/95, *Ferriere Nord S.p.A*. v. *The Commission of the EU*, C:1997:375, para 15. The Italian version of then art. 85 TEC, which the Court described as "clear and unambiguous", prohibits certain agreements which have as their "object *and* result" the prevention, restriction or distortion of competition. The other texts of art. 85 EC refer to the two criteria as alternative rather than cumulative ("object *or* result").

[82] See the comments of the special rapporteur Waldock, *YBILC* (1966-I) 100.

[83] Gardiner, note 19, 421.

[84] *LaGrand (Germany v. United States)*, Judgement, *I.C.J. Reports 2001*, p. 466.

When the comparison of the authentic texts reveals "differences of meaning", interpretation problems can still be solved relatively easily if one or more versions are just ambiguous, or allow for multiple interpretations, including the one attached to the other authentic texts.[85]

Alternatively, Art. 33.4 directs the interpreter to remove the difference in meaning by applying arts. 31 and 32 *cumulatively* [86] to all authentic texts, rather than to each of them, in search of a single meaning. The role of the interpreter becomes more ingenious as the exercise aims at removing differences in meaning between the authentic texts, again on the assumption that all authentic texts bear the same meaning (art. 33.3).

The interpreter must establish the meaning that best reconciles the authentic texts, having regard to the object and purpose of the treaty. The operation is called *reconciliation* of the texts. It is not a matter of selecting one or several languages deemed to express correctly the meaning of the text, but rather of extracting from the different texts "the best reconciliation of the differences".[87] Needless to say, the exercise becomes particularly arduous when the treaty is concluded in a large number of equally authoritative texts.

Furthermore, international treaty – especially in the field of trade and investment agreements – never have a "single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes".[88] In such a situation, reference to the "object and

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[85] Wadlock, 3rd Report, *YBILC* (1964-II) 62. See also *Renée Rose Levy and Gremcitel S.A.* v. *Peru*, ICSID Case ARB/11/17, Award, 15 January 2015, para 165; *Kiliç* v. *Turkmenistan*, note 77, para 9.23.

[86] See A. Papaux, R. Samson, 'Article 33', in O. Corten, P. Klein, eds. *The Vienna Convention on the Law of Treaties* (OUP, Oxford, 2011) 868, 880.

[87] Gardiner, note 19, 442-3.

[88] I. Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (MUP, Manchester, 1984) 130. The CETA preamble, for instance, refers to 12 objects. See also, with regard to the ECT, T.W. Wälde, 'Interpreting Investment

purpose" of the treaty could be puzzling[89] and the interpreter could consider *also* the specific object and purpose of that part or provision.[90]

In order to increase legal certainty, additional interpretative canons have been suggested. For some authors, when art. 33 does not lead to a persuasive interpretation, preference should be given to the text in which the treaty was negotiated.[91] However, such a canon runs against the principle of equality of authentic languages. It was not adopted within the ILC,[92] mentioned in the VCLT, or endorsed by the ICJ.[93] Unless the parties have indicated that the language in which the treaty has been negotiated would prevail in case of divergence – as done in the agreement between EU and Japan – no formal supremacy should be given to any text.

In conclusion, art. 33.4 VCLT can hardly be considered satisfactory, as regularly held in literature.[94] There is a concrete risk that reconciliation of the texts might simply prove impossible, as indeed conceded by the ILC and certain governments, even in the case of just two or three authentic texts.[95] As a last resort, "the interpretation should be left to be determined in the light of

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Treaties: Experiences and Examples', in C. Binder, U. Kriebaum, A. Reinisch, S. Wittich (eds.), *International Investment Law for the 21th Century* (OUP, Oxford, 2009) 724, 759.

[89] See J. Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', 8 *Finn. YIL* (1997) 138. For M. Fitzmaurice, 'The Practical Working of the Law of Treaties' in M. Evans (ed.), *International Law*, 5th ed. (OUP, Oxford, 2018) 166, 182, the expression is "vague and ill-defined, making it an unreliable tool for interpretation".

[90] In *LaGrand*, note 84, para 102, for instance, the Court considered the object and purpose of Art. 41 of its Statute.

[91] Verdross, *YBILC* (1966-I-2) 208, para 5; Ago, *YBILC* (1966-I-2) 210, para 22. See also D. Shelton, 'Reconcilable Differences. The Interpretation of Multilingual Treaties', 20 *Hastings Int'l & Comp. LR* (1997) 611.

[92] *YBILC* (1966-II) 226.

[93] In *LaGrand*, note 84, para 100, however, the Court had regard to the fact that the treaty had been negotiated in French.

[94] For Mala Tabory, *Multilingualism in International Law and Institutions* (Alphen aan den Rijn: Sijthoff Noordhoff, 1980), p. 213, art. 33.4 fails "to provide sufficiently firm guidelines". In the same vein, Gardiner, note 19, 419.

[95] See, in particular, the position of the United States, A/Conf.39/C.1/L.197.

all the circumstances",[96] a prospect that inevitably magnifies the subjective element inherent in the interpretation process.

VII. Is it time to reconsider current EU practice?

The problems affecting multilateralism in the EU and the difficulties encountered by the ECJ in interpreting EU treaties as well as the undisputed shortcomings of art. 33 VCLT militate in favour of reconsidering the current prevailing practice of the EU concerning the authentication of trade and investment agreements. However intuitive the case for reconsidering such practice, it is necessary to briefly discuss the advantages and disadvantages of multilingualism in trade and investment agreements.

In the first place, EU governments and citizens benefit from having the text of the agreements in their own official language. Multilingualism would enhance the legitimacy of the process leading to the conclusion of the agreements as governments may use the text of the agreement in their official language for the purpose of interacting with the EU Institutions as well as with the relevant stakeholders within their own jurisdictions. It would also make public participation and scrutiny more efficient, especially with regard to consultations during the negotiation and drafting of the agreements. Moreover, the EU, its members and the trading partners are committed throughout the entire life of the treaty to engage all stakeholders and seek their active involvement, which is obviously facilitated if the relevant documents are available in all official languages.[97]

[96] Waldock, *YBILC* (1966-I) 210-211.

[97] Joint Interpretative Instrument on the CETA, note 43, para 6 (b).

Having the treaty available in all official languages may be expected also to improve its implementation by the competent domestic authorities at all levels. It would make the adoption of the domestic legal instruments required to ensure compliance with the treaty more accurate and efficient, also with regard to the integration of these instruments in the domestic legal order and their co-ordination with relevant legislation.

Finally, the authentication of the treaty in all EU official languages may assist domestic courts as well as arbitral tribunals for they will always have the treaty in the language of both the claimant and the respondent. This is particularly important, as often they need to assess whether domestic measures are consistent with the relevant treaty. Having the treaty in the official language of the respondent may facilitate the tribunal's task, although the tribunal should not rely exclusively on one or two authentic texts of the agreement. Furthermore, several of treaties under discussion expressly provide that tribunals "shall follow" the prevailing interpretation of domestic legislation given by domestic court or authorities.[98]

To what extent the perceived advantages of multilingualism sketched above are real, however, depends directly on the true possibility of establishing the meaning of the treaty in all its authentic texts, or in other words on treaty interpretation. In other words, the challenge is ensuring sufficient legal certainty, attaching a uniform meaning to the relevant treaty provisions and, if necessary, overcoming linguistic differences between different texts.

The major disadvantage of multilingualism remains precisely the complexity and uncertainty of the interpretative process. International law rules on interpretation of multilingual treaties – as set by art. 33 VCLT – have proved rather difficult to apply, even when the number of

[98] See, for instance, CETA, note 34, art. 8.31.2.

languages was much smaller (never more than six languages). In particular, the rule providing for ultimate reliance on the object(s) and purpose(s) of the treaty remains extremely problematic.[99]

Furthermore, from the standpoint of EU Law, "the requirement of full multilingualism is practically impossible for all actors, except the ECJ itself".[100] Indeed, only the ECJ is equipped to deal with the daunting task of dealing with 24 languages. Yet, it is regrettable that the ECJ engages in multilingual interpretation only in relatively few cases[101] and not always deliveres entirely convincing interpretations of multilingual treaties, as clearly showed in *Slovakia v Council* and *Hungary v Council*.[102]

Trade and investment tribunals are not equipped to deal with a large number of authentic texts and could hardly be expected to consider several, not to mention all authentic texts. Suffice here to recall that some investment tribunals dealing with treaties authenticated in Russian decided to use the non official English text as none of its members could speak Russian. Time, language skills and resources restraints might well induce these tribunals to deal only with a very few authentic texts (including the language(s) of the proceedings). A partial comparison could lead to an inaccurate interpretation and fail to detect possible incongruences. The risk would always be impending that subsequent tribunals - by taking into account all authentic languages or just a different selection of them - adopt diverging interpretations.

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[99] See Section VI. At the Vienna Conference, the United States pointed out that "[t]he difficulties were particularly serious when the treaty dealt with legal problems and two or more systems of law were involved. It often happened that there was no legal concept in one system which corresponded to a legal concept in the other. An equivalent term was employed, but it rarely expressed the legal concept in question", Doc. A/CONF.39/CI/SR34, 189, para 41. See also note 16.

[100] Derlén, note 14, 343.

[101] Derlén, note 14, footnote 16, relying on Cornelis J.W. Baaij, note 20, 219.

[102] See Section III.

The risks are amplified by the nature of the mechanism for the settlement of trade and investment disputes. In agreements such as CETA, trade disputes are settled by sovereign panels constituted for the settlement of specific disputes. They deliver a final decisions outside any institutional structure designed to maintain coherence, as within the WTO either through guidance and assistance by the secretariat during the proceedings, or by the authoritative resolution of conflicts between diverging interpretation by the Appellate Body.[103] Moreover, diverging interpretations of an EU trade agreement may not only generate legal uncertainty within the agreement, but also undermine the authority of the WTO Appellate Body.

Likewise, investment disputes are settled by sovereign tribunals that may retain "a different solution for resolving the same problem".[104] Indeed, inconsistency of investment decisions has attracted a good deal of concern and criticism.[105] The risk of inconsistent decisions might be reduced, but not removed altogether, with the creation of permanent investment courts and appeal mechanisms such as those envisaged for CETA.[106] Furthermore, the interpretation of investment

[103] See S.W. Schill, G. Vidigal, *Reforming Dispute Settlement in Trade: The Contribution of Mega-Regionals*, IBD – ICTSD, April 2018, at http://e15initiative.org/publications/reforming-dispute-settlement-in-trade-the-contribution-of-mega-regionals, 5.

[104] *AES Corporation* v. *Argentina*, ICSID ARB/02/17, Jurisdiction, 26 April 2005, paras 30. In literature, see E. de Brabandere, *Investment Treaty Arbitration and Public International Law* (CUP, Cambridge, 2015), esp. pp. 93-98.

[105] See in particular IBA, Arbitration Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration*, October 2018, at file:///C:/Users/prd17cfu/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/InvestmentTreatyArbitrationReport2018%20(1).pdf.

[106] In Opinion 1/17, 30 April 2019, the ECJ confirmed that the CETA Investment Court is consistent with EU Law, at http://curia.europa.eu/juris/document/document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4976548.

treaties requires a "particular duty of caution"[107] since in investor-State arbitration the parties to the treaties do not coincide with the parties to the dispute. Investment disputes, finally, not infrequently tend to be rather acrimonious.[108]

During the proceedings, the parties to a dispute – especially foreign investors – could dig in the different authentic texts of the treaty in search of the most convenient wording and exploit any possible discrepancies. This exercise would be entirely legitimate given the equal standing of each authentic text. It can even be argued that it would eventually do a good service to legal certainty by revealing discrepancies, which could possibly be addressed by joint committees,[109] if not directly by the States themselves, in accordance with the law of the treaties.

The crux of the matter inexorably remains that interpretation of treaties concluded in large numbers of equally authentic texts unavoidably becomes more complex, expensive and time consuming. The poor drafting of multilingual investment treaties may further exasperate the difficulties of interpretation as confirmed in arbitration practice. In *Kılıç* v. *Turkmenistan*, for instance, the Tribunal and the dissenting arbitrator described the wording used in the English authentic text of the relevant treaty provision, respectively as "grammatically incorrect"[110] and "undisputedly defective".[111]

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[107] Frank Berman, dissenting opinion in *Lucchetti* v *Peru*, ICSID ARB/03/4, Annulment, 5 September 2007, para 9.

[108] In *Yaiguaje* v. *Chevron Corporation*, 2013 ONCA 758, para 74, the Court of Appeal of Ontario quoted the following declaration by the respondent: "We're going to fight this until hell freezes over. And then we'll fight it out on the ice." See also Emmanuel Gaillard, 'Abuse of Process in International Arbitration', 32 *ICSID Review* 17 (2017).

[109] See Section IV.

[110] *Kılıç* v. *Turkmenistan*, note 77, para 9.14.

[111] *Kılıç* v. *Turkmenistan*, note 77, Dissenting opinion W.W. Park, para 8.

Furthermore, differences in the authentic texts of both trade and investment provisions contained in EU agreements may go undetected for years. It is worth recalling that in *Slovakia v Council* and *Hungary v Council* the difference in the authentic texts of a treaty as fundamental as the TFEU went unnoticed until 2017. Undetected differences would unavoidably erode the perceived advantages mentioned above with regard to the implementation of the treaty.

A party to the treaty may well rely on the authentic text in its own official language and possibly incorporate it into domestic legislation. If later it turns out that that specific authentic text does not reflect the proper meaning of the treaty, serious problems may arise with regard to the liability of a State that has complied in good faith with the defective authentic text and could not have detected the discrepancy by using due diligence. Besides, the difference in meaning may have been reproduced in the domestic legal order of the concerned State, possibly causing a distorted interpretation of the treaty by domestic courts. A normative intervention as well as a pronouncement by the competent domestic courts may be required.

It is quite clear that interpreting trade and investment treaties concluded in a high number of equally authoritative texts is fraught with difficulties. The serious and concrete risk of legal uncertainty arguably overweighs the perceived advantages of full multilingualism. Accordingly, the current EU practice should be reconsidered.

The difficulties concerning the interpretation of multilingual treaties may be attenuated by several mechanisms to correct possible divergences between authentic texts or clarify their meaning. Firstly, the correction of the texts would always be possible as expressly provided for in art. 79 VCLT. The mechanism has proved efficient on a number of occasions, for instance in relation to the Spanish version of the EU Association Agreement with Centro-America.[112] The

[112] Letter from the Commission, Ref. Ares(2018)772788 - 09/02/2018, on file with authors.

procedure can be triggered at any time, even after the entry into force of the treaty, and with regard to any type of errors.[113]

Yet, relying on art. 79 VCLT for correcting substantive errors might just be too optimistic, as the positive outcome of a correction procedure would eventually require the consent of all the parties. The higher the number of parties and of authentic texts, the higher the risk of objections. If the difference is as serious and political sensitive as in the case of art. 78.3 TFEU (see section III), an agreement may indeed be rather difficult to reach. Furthermore, since the line separating corrections from amendments is not always clear,[114] the risk of disguised alterations of the agreement cannot be excluded.

Likewise, authoritative interpretations by Joint Committee requires the consent of the parties, which could prove difficult and the risk exists that the agreement could actually been amended rather than just interpreted.[115] The problem is particularly acute in the case of investor-State arbitration due to the hybrid character of this mechanism for dispute settlement,[116] as demonstrated by the interpretative note on art. 1105 NAFTA.[117] Limiting the binding effect of interpretation adopted by joint committees to future disputes, however, would neutralise such a

[113] See Robert Kolb, 'Article 79', in O. Corten, P. Klein (eds.), note 86, 1770.

[114] See George Korontzis, 'Making the Treaty', in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (OUP, Oxford, 2012) 177, 191.

[115] In *Enron Corporation and Ponderosa Assets, LP* v *Argentina*, ICSID ARB/01/3, Award, 22 May 2007, para 337, the Tribunal held that "States are of course free to amend the Treaty by consenting to another text, but this would not affect rights acquired under the Treaty by investors or other beneficiaries".

[116] See Z. Douglas, 'The Hybrid Foundation of Investment Treaty Arbitration', 74 *BYIL* (2003) 151.

[117] Free Trade Commission, *Notes of Interpretation of Certain Chapter XI Provisions*, 31 July 2001, available at www.naftaclaims.org. For a sharp critique, see Second Opinion of Jennings in *Methanex* v. *US*, UNCITRAL (NAFTA), at https://www.italaw.com/sites/default/files/case-documents/ita0983.pdf.

risk.[118] Nevertheless, the Joint Committees cannot escape the difficulties inherent in the interpretation of treaties concluded in an abnormally high number of equally authentic texts. They too may eventually be unable to overcome linguistic discrepancies.

VIII. Options available

The analysis conducted in the previous sections validates the proposition to reconsider the dominant current EU practice to authenticate trade and investment agreement in all official languages without any of them prevailing in case of differences. But what would be the options available to contracting parties?

i. Conclusion of the agreement in one single language

The first option could be concluding these agreements in one single language, as in the case of ASEAN, or some bilateral investment treaties.[119] However, this option would immediately be dismissed as too drastic a departure from the principle of multilingualism that underpins EU law.

ii. Conclusion of the agreement in all official languages with one of them prevailing in case of differences

The second option is introducing the formal supremacy of one text, as it has already occurred with regard to the agreement with Japan.[120] Making a text of the treaty prevailing in case

[118] See text note 44.

[119] See, for instance, the BITs between Switzerland and Uzbekistan, concluded on 20 February 1993, entered into force on 5 November 1993 (with French translation at https://www.admin.ch/opc/fr/classified-compilation/19983459/index.html); Pakistan and Australia, concluded on 7 February 1998, entered into force on 14 October 1998; Argentina and Japan, concluded on 1 December 2018, not entered into force yet.

[120] Note 3.

of linguistic differences would provide a clear and predictable solution to overcome differences. If the prevailing text is the one in the language in which the negotiations were conducted, an additional advantage would be the more efficient and accurate use of preparatory works, if appropriate.

As pointed out by the ILC, however, it remains unclear at which point during the interpretative process the provision giving priority to a particular text operates.[121] The ILC confined itself to rise – but left answered – two questions: "Should the 'master' text be applied automatically as soon as the slightest difference appears in the wording of the texts? Or should recourse first be had to all, or at any rate some, of the normal means of interpretation in an attempt to reconcile the texts before concluding that there is a case of 'divergence'?"[122]

Both alternatives presuppose that the interpreter considers some, if not all, authentic texts. The first one suggests that textual differences (as opposed to differences of meaning) would trigger the priority given to a particular text. It may therefore be suitable even in case of large number of authentic texts as the interpreter needs just to compare the different texts of the agreement. The second option is much more sophisticated as the interpreter goes through the entire interpretive process before eventually relying on the priority given to a particular text. Although such priority may provide a workable solution and reduce the dependence on teleological considerations, the entire exercise remains cumbersome, if not impracticable, in case of a large number of authentic texts.

When the number of authentic texts is particularly high, however, the interpreter may be tempted to focus immediately on the text that would prevail in case of differences. Keeping in

[121] 18 *YBILC* (1966-II) p. 224.

[122] *Ibidem*.

mind the presumption that all authentic texts bear the same meaning – which applies also when the parties have indicated a prevailing text – the interpreter may decide to consider other authentic texts to overcome *lacunae*, uncertainty or ambiguities, or just to confirm the meaning attached to the prevailing text. Such an approach would significantly reduce the value of multilingualism of the treaty, if not make it largely meaningless.

iii. Conclusion of the agreements in the WTO official languages

A third option is limiting the official texts to the official languages of the WTO (English, French and Spanish), plus (if different) the language of the counter-part. The three WTO languages are spoken within the EU by roughly 130 million (25.5 % of the population). They are also the UN official languages spoken in the EU. Incidentally, the UN recommends the conclusion of treaties only in the UN official languages in order to facilitate their registration under art. 102 of the UN Charter.[123]

This option would allow facilitate the interpreter in the application of the VCLT rules on treaty interpretation, in detecting incongruences and in delivering coherent and persuasive decisions. The particularly broad discretion that any interpreter could exploit when it is necessary to turn to teleological reasoning would be reduced.

This option would also improve the interpretation of provisions of the treaties under discussion that incorporate WTO disciplines and often need to be considered in the light of WTO

[123] Art. 4.3 of the Secretary General's Bulletin (ST/SGB/2001/7) reads: "Every endeavour shall be made to ensure that the texts of treaties and international agreements to be deposited with the Secretary-General are concluded only in the official languages of the UN," at https://treaties.un.org/doc/source/publications/THB/English.pdf.

jurisprudence.[124] Such an interpretation would be more efficient, accurate and predictable were the languages of the relevant legal texts and related decisions the same.

This would also be beneficial from the standpoint of the coherence of decisions concerning trade between EU agreements as well as between them and WTO agreements, and respect the authority of the WTO Appellate Body. It may finally enhance the correspondence between the authentic texts and the language of proceedings, which may be expected to simplify the settlement of disputes, ensure a better use of resources, and ultimately contribute to the creation of a clear, stable and predictable legal framework.[125]

Incidentally, the WTO official languages coincide with the official languages of the International Labour Organisation (ILO), whose conventions and declarations are referred to in some of the agreements under discussion, including in the FTA with Korea. It is worth noting that the current dispute between the EU and Korea concerns compliance with the obligation under art. 13.4(3) of the treaty to respect, promote and realise the principles concerning fundamental rights "in accordance with the obligations deriving from membership in the ILO and the 1998 ILO Declaration on Fundamental principles and rights at Work and its follow up".[126]

Last but not least, it may be expected that the all members of tribunals settling the disputes arising out of the treaties under discussion master one or more of the languages in which the treaties have been authenticated.

[124] See Section IV.

[125] See text notes 40 and 41.

[126] See note 5.

iv. Conclusion of the agreements in the WTO official languages plus one or two additional languages

A fourth option is authenticating the agreements in the official languages of the WTO plus some other languages as well as in the language of the other party, if appropriate.[127] The combination including German and Italian, for instance, will cover roughly 280 million persons living in the EU (roughly 55.5 % of the population). Incidentally, these languages would coincide with those of the ECT, apart obviously from Russian.

This option offers the same advantages – although to a lesser extent – mentioned above with regard with the reduction of the authentic texts to the WTO official languages. The comparative advantage of this option is that it would better reflect the main languages spoken in the EU and require a less draconian departure from the principles of multilingualism and equality. From this perspective, the promotion of multilingualism, possibly ensuring that more than half of the EU population has access to the treaty in its own official language, still remains at a manageable level. The reasonable number of authentic texts would thus allow the interpreter to embark in an interpretative process respectful of the legal equality of the authentic texts.

This option requires a political decision motivated by considerations of efficiency and legal certainty. It would not infringe the principle of equality as EU law does not impose the authentication of trade and investment agreements in all EU official languages. This has been confirmed by the Commission,[128] and is hardly surprising considering that the WTO agreements are concluded in three languages and the ECT in six languages (5 of which are EU official languages).

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[127] A combination excluding any WTO official language would be counterproductive for the consideration made in the previous sub-section.

[128] Letter from the Commission, note 112.

v. Conclusion of the agreements in a limited number of authentic texts with one of them prevailing in case of differences

The last option combines the reduction of the number of authentic texts and the priority given to one of them in case of differences. This option would provide an appealing response to the two main problems related to the interpretation of multilingual treaties discussed above. On the one hand, it would recognize the importance of multilingualism while keeping it within manageable levels. Interpreters would thus be able to proceed to a real comparison of a reasonable number of authentic and truly respect their equality. On the other hand, it would offer the interpreter a clear solution when differences of meaning of the authentic texts cannot be reconciliated under art. 33.4 VCLT. The balance struck in this option would enhance the predictability and certainty of treaty interpretation while preserving a manageable yet still meaningful multilingualism.

IX. Conclusions

The traditional practice of the EU to authenticate trade and investment agreements with third States in 23 or 24 equally authentic languages needs to be reconsidered. This is possible when they expressly exclude any direct effects, as it almost systematically happens in the case of all major agreements concluded in the last decade.

Multilingualism in the current scale is problematic within the EU as well as in its relationships with third States. The recent *Relocation Case* is emblematic of how difficult interpretation of multilingual treaties can be even for the ECJ, which possesses resources and expertise that trade and investment tribunals clearly lack. Furthermore, the VCLT rules on interpretation of multilingual treaties are far from perfect.

The novelty introduced by the agreement recently concluded with Japan, which gives priority to the language in which the agreement was negotiated, is a welcome development as it introduces a clear and predictable solution to overcome possible differences between the different texts.

It is furthermore argued that the number of authentic texts could be drastically reduced. One suitable option is to authenticate these agreements in the official languages of the WTO (English, French and Spanish) – which coincide with the UN languages spoken in the EU – plus possibly the official language of the third State. This option appears particularly appropriate as the agreements under discussion frequently refer to or incorporate WTO disciplines and often direct tribunals to consider WTO jurisprudence. If contracting parties are reluctant to cut the number of languages so drastically, they can add some other EU official languages, tentatively German and Italian.

A final option, arguably the most appropriate one, combines the reduction of the number of authentic texts and the priority accorded to one of them in case of differences. This option would strike a balance between promoting a manageable level of multilingualism and enhancing legal certainty, efficiency and predictability.