

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

Alessandra Pietrobon* and Tarcisio Gazzini**

Trade and investment agreements between the European Union (EU), its Member States and third states are currently concluded in 23 or 24 equally authoritative texts. Only the treaty recently concluded with Japan gives priority to the text in the language of the negotiations (English). The article argues that the interpretation of a treaty concluded in such large number of equally authentic texts is fraught with difficulties both in international law and in EU law, as demonstrated in the Relocation Case. It suggests that the EU and its Member States should reconsider the current practice and identifies the different options available and their respective advantages. The crux of the matter is how to strike a balance between the principle of multilingualism, which is fundamental in the European project, and the need to ensure the predictability and coherence of treaty interpretation. It is argued that such a balance may be struck by significantly reducing the number of authentic texts and giving priority to one of them.

Keywords: Multilingual treaties, Investment treaties, Trade agreements, Treaty interpretation, Vienna Convention on the Law of Treaties, European Union

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 – all the official EU languages¹ – *plus* possibly the language of the partner, without giving to any

* Professor of International Law, University of Padova.

** Professor of International Law, University of East Anglia.

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, <<http://ec.europa.eu/trade/policy/countries-and-regions/negotiations-and-agreements>> or <<https://investmentpolicyhub.unctad.org/IIA>>, and <www.italaw.com> (last accessed 31 March 2020).

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: for example, the UN Charter as well as all agreements concluded within the United Nations (193 members) are normally authenticated in no more than six authentic texts (English, French, Spanish, Arabic, Russian and Chinese respectively).²

The paper attempts to answer the question of whether the EU and its Member States should reconsider their practice on treaty authentication and, if appropriate, to assess what the different options available are. It will focus on trade and investment treaties, especially since, under the Treaty of Lisbon, foreign investments fall within the exclusive competence of the EU. This means that the new European (multilingual) agreements will eventually replace previous (mostly bi-lingual) bilateral investment treaties (BITs), concluded by single Member States. Since investment treaties 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. This has still been 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, namely English, prevails.³

The interpretation of multilingual treaties is notoriously difficult – 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

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.

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

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 EU⁵ – 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 languages. A recent decision by the Court of Justice of the European Union (CJEU, formerly 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 convincing⁶ – is a strong reminder of these difficulties.

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 CJEU 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). Finally, it will be possible to assess whether the current EU practice

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 <https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157928.pdf> (accessed 29 February 2020); for the establishment of a panel under art. 306 of the Association agreement of 21 March 2014 with Ukraine, Note verbale 20 June 2019, <https://trade.ec.europa.eu/doclib/docs/2019/june/tradoc_157943.pdf> (accessed 29 February 2020); 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, <https://trade.ec.europa.eu/doclib/docs/2019/july/tradoc_157992.pdf> (accessed 29 February 2020) as well as the First written submission by the EU, 20 January 2020, <https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158585.pdf> (accessed 29 February 2020).

⁶ See *Slovakia v Council* and *Hungary v Council*, note 25, and Section III.

should be reconsidered (Section VII) and identify the options available to the contracting parties if this were to be done (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

[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

⁷ See European Parliament, *Legal Aspects of EU Multilingualism*, Briefing, January 2017 <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/595914/EPRS_BRI%282017%29595914_EN.pdf> (accessed 29 February 2020). 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', (2013) 3 *Int. Journ. of Law, Language & Discourse* 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', (1997) *Yearbook of European Law* 363, 391, '[m]ultilingualism remains a consideration of decency which the Union owes its citizens.'

⁹ Phoebus Athanassiou, *The Application of Multilingualism in the EU Context*, European Central Bank, Legal Working Papers, Series 2, March 2006 <<https://www.ecb.europa.eu/pub/pdf/scplps/ecblwp2.pdf>> (accessed 29 February 2020).

The Treaty on European Union (TEU) and the TFEU 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, assumed to bear 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 enacted 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 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 subsequently translated for the public. In turn, individuals are entitled to use their own language when dealing with the European Institutions. According to

¹⁰ See Isolde Burr, 'Article 55. Languages and Deposit of the Treaty', in Hermann-Josef Blanke, Stelio Mangiameli (eds), *The Treaty on European Union* (Springer 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, 2.

¹² The ordinary legislative procedure – that applies to most general acts – is set by art 289 TFEU.

¹³ Paunio (n 10) 18. According to the same author, moreover, 'exact equivalence between different texts remains a fiction due to the very nature of natural languages'.

the CJEU's rules of procedure, set out in Articles 39-41 of the Statute of the CJEU, judgments are authentic in the language of the case 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 expensive¹⁴, 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

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) EEC 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 CJEU does not refer explicitly to the law of treaties, but rather relies on some

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 Emmanuel Guinchard, Marie-Pierre Granger (eds), *The New EU Judiciary: An Analysis of Current Judicial Reforms* (Kluwer 2018) 341

¹⁵ See, in particular, Šarčević (n 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 (n 14) 356.

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

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 CJEU in dealing with interpretation issues due to linguistic discrepancies will now be considered. Then, the reasons underpinning the full multilingual regime will emerge. At that point, it will be necessary to assess whether those same reasons might compel us 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: the issue concerning the possibility for treaties with third countries to produce direct effects.²⁰

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 a different meaning common to others, which is believed to carry the proper "European" content. The chosen meaning does not prevail just because of it 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.²¹ Either way is

¹⁹ Richard Gardiner, *Treaty Interpretation*, 2nd ed. (Oxford University Press 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'.

²⁰ Literature on the nature of the EU legal order is huge, only some references will be made here, to works where further bibliography will be found: as for the some first comments, see Jan A. Winter, 'Direct Applicability and Direct Effect – Two Distinct and Different Concepts in Community Law', in (1972) 9 *Common Market Law Review* 425. On further developments, see B. de Witte, 'Direct effect, primacy and the nature of the legal order' in Paul Craig, Gráinne De Burca (eds) *The evolution of EU Law* (Oxford University Press 2011) 323.

²¹ See Cornelis J.W. Baaij, 'Fifty Years of Multilateral Interpretation in the EU', in Peter M. Tiersma and Lawrence M. Solan, *The Oxford Handbook of Language and Law* (Oxford University Press 2012) 217, 224.

equally possible, showing that the interpretation of EU treaties and law does not proceed according to a hierarchy of methods, since the choice is eventually left to the CJEU. Such flexibility, however, affects the predictability of the outcome. The jurisprudence reveals how the language of EU law has its own *genius*. This is mostly perceivable in the 'autonomous notions', construed by the Court by giving to some legal concepts a specific "European" interpretation, which does not necessarily mirror any of the domestic law meanings of the same concept.²²

However, certain cases in the body of CJEU 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. The Court held 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.²³

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, at least for the Danish addressees of the act.

Further controversial implications of the same method unfolded in a recent decision, where the usual teleological interpretation induced by multilingualism

²² 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'.

²³ Case C-428/02, *Fonden Marselisborg Lystbådehavn v Skatteministeriet and Skatteministeriet v Fonden Marselisborg Lystbådehavn*, C:2005:126, para 28.

efficiently solved the practical problem at stake, but also disclosed delicate interpretative issues concerning the very nature of the judicial function.²⁴ 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.²⁵ One of the reasons adduced focused on the interpretation of Article 78.3 TFEU. In 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 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

although a minority of the language versions of Article 78(3) TFEU do not use the word 'characterized' 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.²⁶

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- ²⁴ 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 Gary Lawson, 'Did Justice Scalia Have a Theory of Interpretation?' (2017) 92 *Notre Dame Law Review* 2143.
- ²⁵ *Slovakia v Council* and *Hungary v Council*, Join Cases C-643/15 and C-647/15, C:2017:618. The act under scrutiny was the Council Decision 2015/1601, OJ L 248 24 September 2015.
- ²⁶ 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

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*.²⁷ 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.²⁸ The Court eventually considered and dismissed the other arguments of the applicants, and concluded that the decision was indeed valid.²⁹

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 'characterized' used by some other languages – such as 'aufgrund' in German, or 'ten gevelde' in Dutch – could be considered equivalent to 'caused'. The Court's approach falls short of true multilingualism and does not respect the equality and the different *genius* of the EU official languages.³⁰

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'.

²⁷ Ibid, para 125.

²⁸ The applicant states argued that relocation measures could not be established by a decision adopted by qualified majority, but only by a decision taken unanimously or "in the form of voluntary allocations agreed by Member States": *ibid.*, para 136 ff.

²⁹ 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' (2018) 55 *Common Market Law Review* 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.

³⁰ Interestingly, the term 'characterized' could have been translated into German as 'gekennzeichnet'.

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 grounds for the adoption of provisional measures under Article 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 when adopting provisional measures under Article 78.3. Yet, it would be necessary to consider proximity or remoteness of causation on the one hand and the relevance of direct and indirect effects attributable to the same cause on the other. 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 Article 78.3. The scenario might therefore be quite different, i.e. a crisis (originally 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 Article 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 migrants worsened the already critical situation.

This case demonstrates how linguistic discrepancies can not only hide but also remain undetected for years, even in the text of a treaty as fundamental as the TFEU, whose different authentic versions were meticulously checked and compared. 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 stands as a warning for 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 agreements 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 other 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, was concluded in Bulgarian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, Swedish and Korean, each of these texts being equally authentic.³¹ 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.³²

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.³³ 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'³⁴, or other expressions which can be

³¹ EU – Korea Free Trade Agreement, concluded on 6 October 2010, provisionally applied since July 2011 and ratified in December 2015, art 15.16.

³² EU-Japan Economic Partnership Agreement (n 3) art 23.8.2.

³³ See Section VI.

³⁴ 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 (e.g. CETA).³⁵

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'.³⁶ 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'.³⁷

While these expressions can be considered equivalent and the modal 'shall' suggests a mandatory nature, it is difficult to precisely define the meaning of the expressions 'taking into account' – also used in Article 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 respect the formal equality of all authentic

³⁵ Comprehensive Economic and Trade Agreement EU and Canada (CETA), concluded 30 October 2016 and provisionally entered into force 21 September 2017, at the exclusion of the chapter on investment, arts 8.31 and 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 (n 34) art. 3.21 and art. 3.42.4; Agreement with Japan (n 3) arts 16.18.2 and 21.16; EU – Korea FTA (n 31), 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.

³⁶ 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.

³⁷ Signed 19 October 2018, entered into force 21 November 2019, Annex 14 A, art 48.

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'³⁸, or 'relevant interpretations in panel and Appellate Body reports adopted by the DSB'.³⁹ 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'.⁴⁰ 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 Soviet Republics, for instance, provide that each party makes its written submissions in its chosen language and provides a translation in the language chosen by the other party, unless its submissions are written in one of the working languages of the WTO.⁴¹

Interestingly, the EU-Vietnam Investment Protection Agreement provides that in investment disputes, in case of disagreement between the parties on the

³⁸ See, for instance, Agreement EU – Korea (n 31) art 14.16.

³⁹ See, for instance, Agreement EU – Japan (n 3) art 21.16.

⁴⁰ Agreement EU – Korea (n 31) art 29.17. For other examples, see the agreement with Vietnam (n 34) art 15.21; or Ukraine (n 35) art 320.

⁴¹ See, for instance, Georgia (n 35) Annex XX, art 42.

language of the proceedings, the Tribunal determines the language to be used. This shall be done 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.⁴²

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 Article 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.⁴³ Importantly, binding interpretations are intended 'to avoid and correct any misrepresentation of CETA by Tribunals.'⁴⁴

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 reflect their intentions as recorded in the treaty. This obviously presupposes agreement amongst all parties. Joint Committees may also decide that an interpretation shall have binding effect from a specific date.⁴⁵

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 positions with regard to the interpretation of the relevant treaty provisions. According to Article 8.38.2 CETA, for example, the investment Tribunal 'shall

⁴² Investment Protection Agreement EU - Vietnam (n 34) art 3.50.2.

⁴³ CETA (n 35).

⁴⁴ 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).

⁴⁵ See, for instance, CETA (n 35) Art 8.31.3.

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.

V. DOES EU LAW REQUIRE AUTHENTICATING TRADE AND INVESTMENT AGREEMENTS IN ALL EU OFFICIAL LANGUAGES?

After sketching the practice of the EU and before assessing whether it could be reconsidered, it is necessary to verify whether the authentication of the treaties concluded with other states in all official languages 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.⁴⁶

⁴⁶ 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 the regulation in question was available in the internet.

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 can 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 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'.⁴⁷ If the treaty is silent on the issue, it is for the CJEU to assess its possible direct effects,⁴⁸ by applying the same criteria used with regard to the provisions of directives.⁴⁹ The CJEU 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.⁵⁰

⁴⁷ 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 Motocarrri 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.

⁴⁸ Case 181/73, *R. & V. Haegeman v. Belgium*, C:1974:41, paras 3-5, concerning an Association agreement with Greece.

⁴⁹ Case C-167/17, *Volkmar Klohn v. An Board Plenála*, C:2018:833, para 33, relying on *Demirel* (n 50).

⁵⁰ Case 12/86, *Meryem Demirel v. Stadt Schwäbusch Gmünd*, C:1987:400, para 14. The ECJ has systematically referred with approval to *Demirel* (n 50) 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* (n 49) para 33.

In assessing such conditions, the Court seems to be following two different approaches, which could be defined as 'functionalist' and 'protective'⁵¹, with regard to bilateral agreements and GATT/WTO agreements. As for the first, the Court has been inclined to recognize direct effects to bilateral agreements of partnership, association and cooperation.⁵² The main reason for this is that domestic courts can be called to enhance uniform implementation of the treaty throughout the EU.⁵³ 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)⁵⁴, as well as to the WTO agreements⁵⁵ and decisions of the Dispute Settlement Body.⁵⁶ Its *rationale* is that recognizing direct effects to these agreements could pave the way to a non-uniform

⁵¹ See Federico Casolari, 'The Acknowledgment of the Direct Effect of EU International Agreements: Does Legal Equality Still Matter?', in Lucia S. Rossi, Federico Casolari (eds), *The Principle of Equality in EU Law* (Springer 2017) 83, 86.

⁵² See Marc Maresceau, 'The Court of Justice and Bilateral Agreements', in Allen Rosas *et al.* (eds), *The Court of Justice and the Construction of Europe* (Asser 2014) 693.

⁵³ See the opinion of GA Trabucchi in Case 87/75, *Conceria Bresciani v. Amministrazione Italiana delle Finanze*, C:1976:3, 148. For a substantial list of the relevant association/partnership/cooperation agreements and the related pronouncements by the ECJ, see Casolari (n 51) 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* (n 50); 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.

⁵⁴ Case 21.24/72, *International Fruit Company v Produktschap voor Groenten en Fruit*, C:1972:115.

⁵⁵ Case C 268/94, *Portuguese Republic of Portugal v. Council*, C:1999:574.

⁵⁶ Joined Cases C-120706 and C-121/06, *FLAMM* (n 47). See Antonello Tancredi, 'On the Absence of Direct Effect of the WTO Dispute Settlement Body's Decisions in the EU Legal Order', in Enzo Cannizzaro, Paolo Palchetti, and Ramses A. Wessel (eds), *International Law as Law of the European Union* (Brill 2012) 249.

application of WTO law by the tribunals of the Member States. Such 'protective' jurisprudence has attracted a good deal of perplexity and criticism.⁵⁷

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 between these agreements and WTO law, as demonstrated *inter alia* by the substantial incorporation into 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.⁵⁸ The express exclusion of direct effects has been described as 'a paradigm shift' that occurred around 2008.⁵⁹

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 authorizing the signing or the provisional application of the treaty.

⁵⁷ See, in particular, Judson Osterhoudt Berke, 'The European Court of Justice and Direct Effect for the GATT: A Question Worth Revisiting', (1998) 9 *European Journal of International Law* 626; Marco Bronckers, 'From 'Direct Effect' to 'Muted Dialogue'. Recent Developments in the European Courts' Case Law on the WTO and Beyond', (2008) 11 *JIEL* 885; Thomas Cottier, 'International Trade Law: the Impact of Justiciability and Separations of Powers in EC Law', (2009) 5 *European Constitutional Law Review* 307; Hélène Ruiz Fabri, 'Is There a Case – Legally and Politically – for Direct Effect of WTO Obligations?', (2014) 25 *European Journal of International Law* 151.

⁵⁸ See the useful matrix in Casolari (n 51) 109-110.

⁵⁹ Marco Bronckers, 'Is Investor–State Dispute Settlement (ISDS) Superior to Litigation Before Domestic Courts? An EU View on Bilateral Trade Agreements', (2015) 18 *Journal of International Economic Law* 655, 663.

Several agreements, including those with the South African Development Community (SADC)⁶⁰, Colombia and Peru⁶¹, Japan⁶², Vietnam⁶³, Singapore⁶⁴, and Central America⁶⁵ 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'.⁶⁶

More sophisticated is the relevant provision of CETA⁶⁷, 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'.⁶⁸ Similar

⁶⁰ Agreement EU and SADC (n 36) art 122.

⁶¹ Agreement EU and Colombia-Peru (n 35) art 336.

⁶² Agreement EU and Japan (n 3) art 23.5.

⁶³ Investment Protection Agreement EU – Vietnam (n 34) art 17.20.

⁶⁴ Agreement EU – Singapore (n 37) art 16.16.

⁶⁵ Association between the European Union and its Member States, on the one hand, and Central America, signed 29 June 2012, provisionally in force since 1 August 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.

⁶⁶ Agreement EU – Vietnam (n 34) art 4.18.

⁶⁷ CETA (n 35) art 30.6.

⁶⁸ Agreement EU – Korea (n 31). 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.

provisions are contained in Council decisions related to the treaties with Central America⁶⁹, Colombia and Peru⁷⁰, Eastern Africa Community⁷¹, Moldova⁷², SADC⁷³, and Ukraine.⁷⁴

When trade and investment agreements do not produce direct effects upon individuals in the EU – the overwhelming majority of those recently concluded by the EU⁷⁵ – the authentication of the treaty in all EU official languages is not indispensable. It is accordingly possible to reconsider the EU practice concerning their authentication, taking due account of 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 Article 33 VCLT,⁷⁶ as consistently held by the International Court of Justice (ICJ),⁷⁷ as well as several investment tribunals.⁷⁸

⁶⁹ Agreement EU – Central America (n 65).

⁷⁰ Agreement EU – Colombia and Peru (n 35).

⁷¹ Agreement EU and EAC (n) 35.

⁷² Agreement EU and Moldova (n 35).

⁷³ Agreement EU – SADC (n 36).

⁷⁴ Agreement EU – Ukraine (n 35).

⁷⁵ In literature, see Aliko Semertzi, 'The Preclusion of Direct Effect in the Recently Concluded EU Free Trade Agreements', (2014) 51 *Common Market Law Review* 1125; Casolari (n 51). In general, see Mario Mendez, *The Legal Effects of EU Agreements* (Oxford University Press 2013).

⁷⁶ 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.

⁷⁷ *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia*, Preliminary Objections, Judgment of 17 March 2016, para 33.

⁷⁸ *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, arts

Article 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, Article 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.

Article 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'.⁷⁹ Comparison can help clarifying the meaning of ambiguous or obscure terms used in one or more versions.⁸⁰ 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'.⁸¹

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 CJEU in *Ferriere* clearly illustrates this point.⁸² The comparison of the different texts allowed the Court to detect the discrepancy and ensure uniform interpretation. Without comparison,

33.3 and 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, 127-128, para 6.

⁷⁹ International Law Commission, *Commentary to Article 31*, YBILC (1966-II) 225.

⁸⁰ Ibid. In literature, see Gardiner (n 19) 354.

⁸¹ International Law Commission (n 79) 225.

⁸² 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').

differences between authentic texts could go undetected for years and the treaty be interpreted differently by domestic and international courts.

Article 33 VCLT does not require the interpreter to consider *all* authentic texts⁸³, although at least in theory this would be the obvious prudent course.⁸⁴ However, when the treaty is concluded in more than 20 equally authentic languages, 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 to take into account all texts.⁸⁵

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.⁸⁶

Alternatively, Article 33.4 directs the interpreter to remove the difference in meaning by applying Articles 31 and 32 *cumulatively* to all authentic texts, rather than to each of them, in search for a single meaning.⁸⁷ 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 (Article 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

⁸³ See the comments of the special rapporteur Waldock, *YBILC* (1966-I) 100.

⁸⁴ Gardiner (n 19) 421.

⁸⁵ *La Grand (Germany v. United States)*, Judgement, *I.C.J. Reports* 2001, 466.

⁸⁶ 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* (n 78) para 9.23.

⁸⁷ See Alain Papaux, Rémi Samson, 'Article 33', in Olivier Corten, Pierre Klein, eds. *The Vienna Convention on the Law of Treaties* (Oxford University Press 2011) 868, 880.

extracting from the different texts 'the best reconciliation of the differences'.⁸⁸ Needless to say, the exercise becomes particularly arduous when the treaty is concluded in a large number of equally authoritative texts.

Furthermore, an international treaty – especially in the field of trade and investment – never has a 'single, undiluted object and purpose but a variety of differing and possibly conflicting objects and purposes'.⁸⁹ In such a situation, reference to the 'object and purpose' of the treaty could be puzzling⁹⁰ and the interpreter could consider *also* the specific object and purpose of that part or provision.⁹¹

To increase legal certainty, additional interpretative canons have been suggested. For some authors, when Article 33 does not lead to a persuasive interpretation, preference should be given to the text in which the treaty was negotiated.⁹² However, such a canon runs against the principle of equality of authentic languages. It was not adopted within the ILC⁹³, mentioned in the

⁸⁸ Gardiner (n 19) 442-3.

⁸⁹ Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester University Press 1984) 130. The CETA preamble, for instance, refers to 12 objects. See also, with regard to the ECT, Thomas W. Wälde, 'Interpreting Investment Treaties: Experiences and Examples', in Christina Binder, Ursula Kriebaum, August Reinisch, Stephan Wittich (eds), *International Investment Law for the 21st Century* (Oxford University Press 2009) 724, 759.

⁹⁰ See Jan Klabbers, 'Some Problems Regarding the Object and Purpose of Treaties', (1997) 8 *Finn. YIL* 138. For Malgosia Fitzmaurice, 'The Practical Working of the Law of Treaties' in Malcolm Evans (ed.), *International Law*, 5th ed. (Oxford University Press 2018) 166, 182, the expression is 'vague and ill-defined, making it an unreliable tool for interpretation'.

⁹¹ In *LaGrand* (n 85) para 102, for instance, the Court considered the object and purpose of Art 41 of its Statute.

⁹² Verdross, *YBILC* (1966-I-2) 208, para 5; Ago, *YBILC* (1966-I-2) 210, para 22. See also Dinah Shelton, 'Reconcilable Differences. The Interpretation of Multilingual Treaties', (1997) 20 *Hastings Int'l & Comp. Law Review* 611.

⁹³ *YBILC* (1966-II) 226.

VCLT, nor endorsed by the ICJ.⁹⁴ 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, Article 33.4 VCLT can hardly be considered satisfactory, as regularly held in the literature.⁹⁵ 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.⁹⁶ As a last resort, 'the interpretation should be left to be determined in the light of all the circumstances'⁹⁷, 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 CJEU in interpreting EU treaties as well as the undisputed shortcomings of Article 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

⁹⁴ In *LaGrand* (n 85) para 100, however, the Court had regard to the fact that the treaty had been negotiated in French.

⁹⁵ For Mala Tabory, *Multilingualism in International Law and Institutions* (Sijthoff Noordhoff 1980) 213, art 33.4 fails 'to provide sufficiently firm guidelines'. In the same vein, Gardiner (n 19) 419.

⁹⁶ See, in particular, the position of the United States, A/Conf.39/C.1/L.197.

⁹⁷ Waldock, *YBILC* (1966-I) 210-211.

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.⁹⁸

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 coordination 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 the treaties under discussion expressly provide that tribunals 'shall follow' the prevailing interpretation of domestic legislation given by domestic courts or authorities.⁹⁹

To what extent the perceived advantages of multilingualism sketched above are real, however, depends on the true possibility of establishing the meaning of the treaty in all its authentic texts, or in other words on treaty interpretation. 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.

⁹⁸ Joint Interpretative Instrument on the CETA (n 44) para 6 (b).

⁹⁹ See, for instance CETA (n 35) art 8.31.2.

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 Article 33 VCLT – proved rather difficult to apply, even when the number of 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.¹⁰⁰

Furthermore, from the standpoint of EU Law, 'the requirement of full multilingualism is practically impossible for all actors, except the CJEU itself'.¹⁰¹ Indeed, only the CJEU is equipped to handle the daunting task of dealing with 24 languages. Yet, it is regrettable that the CJEU engages in multilingual interpretation only in relatively few cases¹⁰² and not always delivers entirely convincing interpretations of multilingual treaties, as clearly showed in *Slovakia v Council* and *Hungary v Council*.¹⁰³

Trade and investment tribunals are not equipped to deal with large numbers 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.¹⁰⁴ Time, language skills and resource restraints might well induce these tribunals to deal only with a very few authentic texts (including the language or languages of the proceedings). A partial comparison could lead to an inaccurate interpretation and fail to detect

¹⁰⁰ 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 Communication from the Commission (n 16).

¹⁰¹ Derlén (n 14) 343.

¹⁰² Derlén (n 14) footnote 16, relying on Baaij (n 21) 219.

¹⁰³ See Section III.

¹⁰⁴ *Kılıç v. Turkmenistan* (n 78).

possible incongruences. The risk would always be that subsequent tribunals – by taking into account all authentic languages or just a different selection of them – adopt diverging interpretations.

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 final decisions outside any institutional structure designed to maintain coherence, as it is the case in 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.¹⁰⁵

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'.¹⁰⁶ Indeed, inconsistency of investment decisions has attracted a good deal of concern and criticism.¹⁰⁷ 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.¹⁰⁸ Furthermore, the

¹⁰⁵ See Stephan W. Schill, Geraldo Vidigal, *Reforming Dispute Settlement in Trade: The Contribution of Mega-Regionals*, IBD – ICTSD, April 2018 <<http://e15initiative.org/publications/reforming-dispute-settlement-in-trade-the-contribution-of-mega-regionals>> (accessed 29 February 2020) 5.

¹⁰⁶ *AES Corporation v. Argentina*, ICSID ARB/02/17, Jurisdiction, 26 April 2005, para 30. In literature, see Eric de Brabandere, *Investment Treaty Arbitration and Public International Law* (Cambridge University Press 2015), especially 93-98.

¹⁰⁷ See in particular IBA, Arbitration Subcommittee on Investment Treaty Arbitration, *Consistency, Efficiency and Transparency in Investment Treaty Arbitration*, October 2018 <[file:///C:/Users/prd17cfu/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/InvestmentTreatyArbitrationReport2018%20\(1\).pdf](file:///C:/Users/prd17cfu/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/InvestmentTreatyArbitrationReport2018%20(1).pdf)> (accessed 29 February 2020).

¹⁰⁸ In Opinion 1/17, 30 April 2019, the ECJ confirmed that the CETA Investment Court is consistent with EU Law <<http://curia.europa.eu/juris/document/>

interpretation of investment treaties requires a 'particular duty of caution'¹¹⁰⁹ since in investor-state arbitration the parties to the treaties do not coincide with the parties to the dispute. Last but not least, investment disputes tend to be rather acrimonious.¹¹⁰

During the proceedings, the parties to a dispute, especially foreign investors, can dig into 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 committees¹¹¹, if not directly by the states themselves, in accordance with the law of the treaties.

The crux of the matter inexorably remains that the larger the number of authentic texts of a treaty, the more their interpretation becomes 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'¹¹² and 'undisputedly defective'.¹¹³

Furthermore, differences in the authentic texts of 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

document.jsf?text=&docid=213502&pageIndex=0&doclang=EN&mode=lst&dir=&oc
c=first&part=1&cid=4976548> (accessed 29 February 2020).

¹⁰⁹ Frank Berman, dissenting opinion in *Lucchetti v Peru*, ICSID ARB/03/4, Annulment, 5 September 2007, para 9.

¹¹⁰ 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', (2017) 32 *ICSID Review* 17.

¹¹¹ See Section IV.

¹¹² *Kılıç v. Turkmenistan* (n 78) para 9.14.

¹¹³ *Ibid.* Dissenting opinion W.W. Park, para 8.

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, if necessary, reproduce or incorporate it into domestic law. Then, domestic authorities would just act accordingly. If later it turns out that the text does not reflect the proper meaning of the treaty, serious problems may arise with regard to the liability of the concerned state, which may have complied with the defective text in good faith, while being unable to detect the discrepancy by using due diligence. Moreover, the difference in meaning may be reproduced in the domestic law of the concerned state, leading to distorted interpretation of the treaty by domestic courts. Then, a further intervention by the judiciary or even by the legislator may become necessary.

It is quite clear that interpreting trade and investment treaties concluded in a high number of equally authoritative texts is fraught with difficulties. The risk of legal uncertainty arguably outweighs 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 Article 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 Central-America.¹¹⁴ The procedure can be triggered at any time, even after the entry into force of the treaty, and with regard to any type of errors.¹¹⁵

Yet, relying on Article 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

¹¹⁴ Letter from the Commission, Ref. Ares(2018)772788 - 09/02/2018, on file with authors.

¹¹⁵ See Robert Kolb, 'Article 79', in Corten, Klein (eds) (n 87) 1770.

is as serious and political sensitive as in the case of Article 78.3 TFEU (see section III) an agreement may be difficult to reach. Furthermore, since the line separating corrections from amendments is not always clear¹¹⁶, the risk of disguised alterations of the agreement cannot be excluded.

Likewise, authoritative interpretations by a Joint Committee requires the consent of all the parties, which could prove difficult to obtain, and the agreement might eventually be amended rather than just interpreted.¹¹⁷ The problem is particularly acute in the case of investor-state arbitration due to the hybrid character of this mechanism for dispute settlement¹¹⁸, as demonstrated by the interpretative note on Article 1105 NAFTA.¹¹⁹ Nevertheless, 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?

¹¹⁶ See George Korontzis, 'Making the Treaty', in Duncan B. Hollis (ed.), *The Oxford Guide to Treaties* (Oxford University Press 2012) 177, 191.

¹¹⁷ 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'.

¹¹⁸ See Zachary Douglas, 'The Hybrid Foundation of Investment Treaty Arbitration', (2003) 74 *British Year Book of International Law* 151.

¹¹⁹ Free Trade Commission, *Notes of Interpretation of Certain Chapter XI Provisions*, 31 July 2001, available <www.naftaclaims.org>. For a sharp critique, see Second Opinion of Jennings in *Methanex v. US*, UNCITRAL (NAFTA) <<https://www.italaw.com/sites/default/files/case-documents/ita0983.pdf>> (accessed 29 February 2020).

1. 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.¹²⁰ However, this option would immediately be dismissed as too drastic a departure from the principle of multilingualism that underpins EU law.

2. Conclusion of the Agreement in All Official Languages with One of them Prevailing in Case of Differences

The second option is to provide for the formal supremacy of one text, as done in the agreement with Japan.¹²¹ This rule would provide a clear and predictable solution to overcome differences. If the prevailing text is in the same 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 should apply.¹²² The ILC confined itself to raise – but left unanswered – 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?"¹²³

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 rule. The interpreter just needs

¹²⁰ See, for instance, the BITs between Switzerland and Uzbekistan, concluded on 20 February 1993, entered into force on 5 November 1993 (with French translation <<https://www.admin.ch/opc/fr/classified-compilation/19983459/index.html>>) (accessed 29 February 2020); 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.

¹²¹ Agreement between the EU and Japan (n 3).

¹²² International Law Commission (n 79) 224.

¹²³ Ibid.

to compare the different texts of the agreement. The second option is much more sophisticated as the interpreter would go through the entire interpretive process, before eventually relying on the priority rule.

The priority rule option may provide a practically workable solution and reduce the dependence on teleological considerations, but the entire exercise remains cumbersome, if not impracticable, in case of large number of authentic texts. In such a case, the interpreter may be tempted to focus immediately on the text that would prevail in case of differences. By so doing, the interpreter might consider the other authentic texts only to overcome *lacunae*, uncertainty or ambiguities, or just to confirm the meaning attached to the prevailing text. This approach would significantly undermine the value of multilingualism and possibly overstretch the presumption that all authentic texts bear the same meaning, that applies also when the treaty provides for a priority rule.

3. 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 counterpart. The three WTO languages are spoken within the EU by roughly 130 million people, 25.5 per cent 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 Article 102 of the UN Charter.¹²⁴

This option would allow the interpreter to promptly detect incongruences, carefully consider the meaning of the treaties in the different languages and ultimately deliver coherent and persuasive decisions. The particularly broad

¹²⁴ 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' <<https://treaties.un.org/doc/source/publications/THB/English.pdf>> (accessed 29 February 2020).

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 jurisprudence.¹²⁵ In such cases, interpretation would be even more efficient, accurate and predictable when the languages of both the relevant texts and the related decisions were the same.

This option should also be beneficial from the standpoint of the coherence of decisions rendered in relation to trade disputes under EU agreements and under WTO agreements. It would also enhance the authority of the WTO Appellate Body in the settlement of trade disputes. 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.¹²⁶

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 precisely concerns compliance with the obligation to respect, promote and realize 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'.¹²⁷

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

¹²⁵ See Section IV.

¹²⁶ See text (n 41) and text (n 42).

¹²⁷ Article 13.4(3) of the Agreement between the EU and Korea (n 31).

4. 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 EU counterpart, if appropriate.¹²⁸ The combination including German and Italian, for instance, will cover roughly 280 million persons living in the EU, roughly 55.5 per cent of the population. Incidentally, these languages would coincide with those of the ECT, apart obviously from Russian.

Although to a lesser extent, this option offers the same advantages mentioned above with regard to the reduction of the authentic texts to the WTO official languages. The specific 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. This option would strike a fair balance between the goal of a full EU multilingualism and the practical needs of external relations, ensuring that more than half of the EU population had access to the treaty in its own official language.

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 Commission¹²⁹, and is hardly surprising considering that the WTO agreements are concluded in three languages and the ECT in six languages (five of which are EU official languages).

5. 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

¹²⁸ A combination excluding any WTO official language would be counterproductive for the consideration made in the previous sub-section.

¹²⁹ Letter from the Commission (n 114).

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 texts 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 reconciled under Article 33.4 VCLT.

IX. CONCLUSIONS

Multilingualism in its 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 CJEU, which possesses resources and expertise that trade and investment tribunals clearly lack.

It is argued that the practice of authenticating EU trade and investment agreements in all official languages of the Member States should be reconsidered. This is possible as these treaties exclude direct effects, as expressly provided by all major agreements concluded in the last decade.

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 facilitates a clear and predictable solution to overcome possible differences between the different texts.

From this perspective, the number of authentic texts could be drastically reduced. One suitable option is to authenticate these agreements in the official languages of the WTO – 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. As an alternative, should Member States be 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.