Comparative Interpretation of Multilingual Law in International Courts: Patterns and Implications for Translation

Prieto Ramos, Fernando; Pacho Aljanati, Lucie

How to cite

PRIETO RAMOS, Fernando, PACHO ALJANATI, Lucie. Comparative Interpretation of Multilingual Law in International Courts: Patterns and Implications for Translation. In: Institutional Translation for International Governance: Enhancing Quality in Multilingual Legal Communication. London : Bloomsbury, 2018. p. 181–201. doi: 10.5040/9781474292320.0023

This publication URL: https://archive-ouverte.unige.ch/unige:100815
Publication DOI: 10.5040/9781474292320.0023

13

Comparative Interpretation of Multilingual Law in International Courts: Patterns and Implications for Translation

Fernando Prieto Ramos and Lucie Pacho Aljanati

1 Introduction

In an increasingly globalized and digitalized world, transnational law has achieved new prominence. The need for greater international cooperation has prompted a proliferation of multilingual legal instruments. The analysis of these texts and their genesis calls for interdisciplinary approaches involving both legal and linguistic aspects. Since multilingual legal instruments are predominantly produced through translation, legal translation plays a key role in the development, application and interpretation of international and supranational law. When law is produced in multiple offi al languages, it is equally authentic in all of them and presumably entails multilingual interpretation, that is, consideration of the different language versions when ruling on a certain provision.

Articles 31 and 32 of the Vienna Convention on the Law of Treaties (1969) (VCLT) set out, respectively, the general rule and the supplementary means of interpretation of international treaties. Article 33 deals with the interpretation of treaties authenticated in two or more languages. The unity of the treaty is 'safeguarded' by both the principle of equal authenticity and 'the presumption that the terms are intended to have the same meaning in each text' (United Nations [UN] 1967b: 225). As also highlighted by the International Law Commission of the United Nations (ILC), 'the existence of more than one authentic text clearly introduces a new element – comparison of the texts – into the interpretation of the treaty' (ibid.). However, as suggested by previous studies (e.g. Bengoetxea 2011; Condon 2010; Kuner 1991), multilingual comparison does not seem to be systematically or consistently carried out by international courts. Some authors (e.g. the latter two) argue that this can lead to the risk of textual divergences and the subsequent perpetuation of disputes.

In practice, the existence of authentic texts in two or more languages can either complicate or facilitate the interpretation of a multilingual instrument. As reported by the ILC to the General Assembly, 'the different genius of the languages, the absence of a

complete *consensus ad idem*, or lack of sufficient time to coordinate the texts may result in minor or even major discrepancies in the meaning of the texts' (UN 1967b: 225). At the same time, when the meaning of terms is ambiguous or obscure in one language but it is clear in another, the multilingual character of the legal instruments can facilitate interpretation. Considerable scholarly attention has been devoted to the subject of treaty interpretation in general (e.g. Gardiner 2015; Linderfalk 2007; Pauwelyn and Elsig 2012) and also, to varying degrees, to multilingual interpretation at specific organizations, particularly the European Union (EU) (e.g. Baaij 2012; Derlén 2009; Solan 2009). However, systematic comparison of multilingual interpretation between international courts remains limited.

Against this background, our study first provides an overview of the intrinsic relationship between legal interpretation and translation (Section 2). The legal framework for the interpretation of multilingual international treaties and EU legal instruments will then be examined (Section 3) with a view to exploring the practice of multilingual interpretation in three contexts: the International Court of Justice (ICJ, the main judicial organ of the UN); the World Trade Organization's Appellate Body (AB); and the Court of Justice of the European Union (CJEU). These three multilingual bodies (called 'international courts' for the purposes of this study) were chosen as part of a larger project on institutional legal communication* because: (1) they are representative of adjudicative bodies within the multilateral and the EU legal orders; and (2) despite their differences, they share the principle of equal authenticity, as well as concomitant challenges to ensure legal certainty and uniform interpretation in the application of multilingual legal instruments (e.g. Prieto Ramos 2014a).

More particularly, we delve into the following questions: To what extent are legal provisions compared in different languages in proceedings before the three courts? How often do they resort to Article 33 of the VCLT? Are there any remarkable differences in the patterns of comparative interpretation, particularly between intergovernmental and EU judicial organs? To answer these questions, we will analyse instances of comparison, as well as their initiators and motivation, in all case-law involving multilingual interpretation in each institution until 15 July 2016. Before reaching initial conclusions on the implications of these patterns for institutional language professionals, we expect to establish correlations between the complexity of each language regime, the nature of court proceedings, and the level and features of comparative interpretation at each institution.

2 Legal interpretation and translation

The nature of interpretation can be perceived in a broad or narrow sense. Interpretation *lato sensu* means 'the process of understanding and applying a given text', a piece of legislation (Conway 2012: 13). In this sense, every time we deal with a text to which we attach a meaning (either consciously or unconsciously), we are engaged in an act of interpretation (Linderfalk 2007: 10). Interpretation *stricto sensu* refers to the process

* 'Legal Translation in International Institutional Settings' (LETRINT), supported by the Swiss National Science Foundation through a Consolidator Grant.

of 'understanding and applying the meaning of a text' when that meaning is obscure and requires 'more considerable input from the interpreter than ordinary textual apprehension' (Conway 2012: 13). In *stricto sensu*, it is only when we read a text and the text proves to be unclear that we can consider that we interpret it (Linderfalk 2007: 10).

However, even when the meaning of a legal instrument is clear, it is the result of having determined a certain meaning. 'It may have been a simple task, certainly easier than the case of expounding the meaning of abstruse words' but, in every case, meaning must be assigned to terms (Gardiner 2015: 29) because meaning is dynamic and created in context. 'Legal texts are not immediately palpable but only come to life in acts of interpretation' (Venzke 2014: 1).

As active players in multilingual law production, translators fi d themselves in the middle of these processes. The relevance of hermeneutics in legal translation has been noted by several authors (see e.g. Piecychna 2013: 145; Prieto Ramos 2011: 208; Šarčević 1994: 304; Stolze 2002). Translators must not only conduct interpretation *lato sensu* to reformulate any text, an activity described as an 'art of interpreting' by Gémar (1995), but they are also exposed to issues of interpretation *stricto sensu*. In dealing with these issues in institutional contexts in particular, they may contribute to clarifying obscure text and to enhancing the quality of a multilingual legal instrument (see strategies to tackle ambiguity in Prieto Ramos 2011). Interpretation issues initially confronted (or overlooked) by translators may lead to semantic divergences between different language versions of a text. These divergences then may become the subject of argumentation in court proceedings.

Considering the risks involved, international organizations can only benefit from measures aimed at the application of predictable principles of interpretation by both legal drafters and legal translators. Th s entails integrating such principles in legal translation methods (ibid.: 212). Institutional legal translators should be familiar with the general rules of interpretation of the law they translate and also, whenever possible, with any interpretation patterns that may help them detect and solve new interpretation problems, and prevent divergence between language versions. While 'the interpretation of documents is to some extent an art, not an exact science' (UN 1967b: 218), and this could also be said about translation, as pointed out by Shabtai Rosenne, the law can indicate 'the nature of the rules governing the process by which this art is applied in a particular case, the kind of intellectual discipline with which an interpreter must gird himself' (2007: 454). Translators can learn from comparative interpretation of multilingual law by authoritative interpreters in each legal order.

3 Rules of interpretation of multilingual law

3.1 Interpretation of multilingual multilateral treaties

Customary principles of treaty interpretation were codifi d by the ILC in the VCLT. In principle, they apply to all international courts, 'irrespective of their institutional setup, subject matter, or geographical scope' (Pauwelyn and Elsig 2012: 445). When the ILC completed its fi st reading of the draft articles on the law of treaties in 1964, its

chairman Roberto Ago recalled that 'the reason why the UN had entrusted it with the codifi ation of international law, and in particular the law of treaties, was that the main objective was certainty of the law; and certainty of the law of treaties depended mainly on certainty of the rules of interpretation' (UN 1965: 23).

With regard to the 'General rule of interpretation' (Article 33 of the VCLT), the Commission explained that by referring to 'rule' in the singular, it intended to highlight that 'the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule' (UN 1967b: 220). The application of the means of interpretation would be a 'single combined operation'. In addition, the Commission acknowledged that the article 'cannot properly be regarded as laying down a legal hierarchy of norms for the interpretation of treaties' (ibid.: 219). The 'elements of interpretation' had to 'be arranged in some order', but 'logical considerations' rather than 'any obligatory legal hierarchy … guided the Commission in arriving at the arrangement proposed in the article' (ibid.: 220). 'The starting point of interpretation' should be 'the meaning of the text.' Then logic implies that fi st consideration should be given to the 'ordinary meaning' of a treaty's terms, in their specific c ntext and in light of the treaty's 'object and purpose' (ibid.).

If Article 31 is applied and the meaning needs to be ascertained, Article 32 provides that one can resort to 'supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion'. Article 32 may also be employed when 'the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable'.

Moreover, certain difficulties may arise that are unique to the interpretation of multilingual treaties. Article 33(3) safeguards 'the unity of the treaty' by the presumption that the terms of a treaty are intended to have the same meaning in the authentic text in each language, which results in the right to rely on a single text. In case of doubt, this presumption is refuted and the different authentic texts need to be compared in an effort to fi d their 'common meaning … before preferring one to another' (ibid.: 225). From the records of their discussions, some members of the ILC thought that the proper approach would be for an interpreter to investigate the treaty in all of its languages before deciding on the meaning. However, this was seen as too demanding, and a proposal requiring language comparison in every case was rejected (UN 1967a: 211).

According to Article 33(4), if the texts are compared and there is a difference in meaning that the application of Articles 31 and 32 does not resolve, 'the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted'. 'Teleological interpretation, therefore, is the fi al resort in the assignment of meaning to multilingual treaty texts' (Labuschagne 1999: 327). The following graph (Figure 13.1) summarizes the basic principles of interpretation.

With this in mind, as noted by Gardiner (2015), it can be concluded that an interpreter 'may legitimately use a single language for "routine" interpretation', but a cautious interpreter must acknowledge that linguistic divergences may exist, and comparison may actually help to clarify the meaning of a provision without necessarily complicating the process of interpretation (ibid.: 421). In the words of Shabtai Rosenne, 'a good practitioner would almost automatically compare the different language versions before commencing any process of interpretation' (UN 1967a: 209). The question would be to what extent, why and how comparison is conducted in practice in international court proceedings.

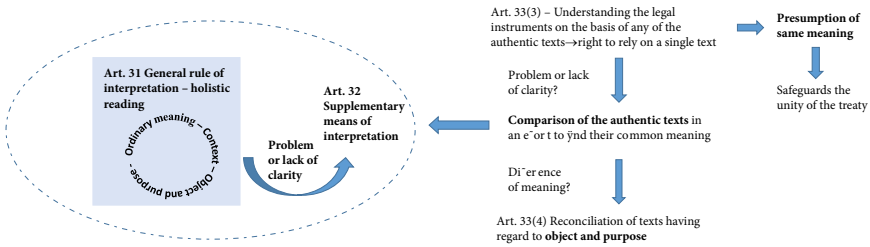

Figure 13.1 Interpretation of multilingual treaties (Art. 31–33 of the VCLT).

Previous studies have highlighted the flex ble and non-exhaustive nature of the VCLT principles as guidance for treaty interpretation, as well as the resulting divergence in the application of interpretative methods by different international adjudicators (Pauwelyn and Elsig 2012; Weiler 2010). The ICJ and the AB have traditionally applied a more text-oriented approach (see e.g. Abi-Saab 2010; Torres-Bernárdez 1998; Van Damme 2009), while the CJEU's hermeneutic practice has been predominantly teleological (see Section 3.2) and 'activist' or 'gap-filling', which contributes to the CJEU 'gradually coming closer to being a domestic rather than a truly international tribunal' (Pauwelyn and Elsig 2012: 458).

The AB is regarded as particularly formalistic and systematic in its analysis of 'the ordinary meaning' of the terms of the World Trade Organization (WTO) covered agreements, often using contextualized dictionary defin tions as the starting point of interpretation (see Van Damme 2009). Article 3.2 of the WTO's *Understanding on Rules and Procedures Governing the Settlement of Disputes* (*Dispute Settlement Understanding* or DSU) states that the WTO's dispute settlement mechanism serves 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law', and the AB has invoked Articles 31 to 33 of the VCLT as having attained the status of customary international law.[1] Its reports do not establish binding precedents and its interpretations are only applicable to the relevant dispute, but, in practice, they are relied upon in subsequent disputes. According to Article IX:2 of the WTO Agreement, the Ministerial Conference and the General Council of the WTO have the 'exclusive authority to adopt interpretations' that are binding on all WTO Members (although this authority has rarely been exercised).

3.2 Interpretation of multilingual EU law

As an autonomous legal order of international law (see *Van Gend & Loos* and *Costa v. ENEL* cases),[2] EU multilingual law interpretation deserves specific attention. Since EU law contains no explicit interpretation rules (see e.g. Itzcovich 2009), in principle, the CJEU has the discretion to apply the methods of interpretation that it deems appropriate.

[1] See e.g. reports in *US — Gasoline*, WT/DS2/AB/R, pp. 16–17; *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 104; *US — Softwood Lumber IV*, WT/DS257/AB/R, para. 59).

[2] Case 26/62, *Van Gend en Loos v. Administratie der Belastungen*, EU:C:1963:1; and Case 6/64, *Flaminio Costa v. ENEL*, EU:C:1964:66.

However, international agreements to which the EU is a party, as well as EU secondary legislation implementing international obligations, must be interpreted by the EU in the light of international law. The CJEU has held that 'even though the Vienna Convention does not bind either the Community or all its Member States, a series of provisions in that convention refl ct the rules of customary international law which, as such, are binding upon the Community institutions and form part of the Community legal order' (Case C-386/08, *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen*, para. 42).[3]

In his analysis of the CJEU's application of the VCLT, Pieter Jan Kuijper concluded that the Court is 'rather unselfconscious about applying the rules of interpretation of Article 31' and 'never makes clear *why* it feels bound to have recourse to these rules'; for the CJEU, 'they are simply the proper rules to apply when interpreting an international agreement without it being clearly stated that the Community, and therefore its institutions, are bound to apply these rules of interpretation as a matter of customary international law' (Kuijper 1998: 22–3).

As regards the VCLT's rules of interpretation, the same author and other scholars (e.g. Dengler 2010; Šarčević 2013) have highlighted the strong teleological orientation of the Court's interpretative practice. Th s is often combined with literal and contextual interpretation methods also present in the VCLT but with an overall 'functional perspective' driven by the main objective of 'practical effectiveness of EU law' (see, for example, Rösler 2012: 979).

What about inter interlinguistic comparison as part of legal interpretation? The CJEU's case-law soon moved beyond the subsidiary rule of comparison set out in Article 33(3) of the VCLT, which it vaguely followed when it called for consultation of the different language versions only in 'cases of doubt' in the *Van der Vecht* case of 1967.[4] Since the *Stauder* case of 1969 (i.e. almost six months after conclusion of the VCLT), the CJEU has reiterated that consideration of all language versions is mandatory when interpreting EU law.[5] Th s was confi med with regard to national courts' interpretation in the *CILFIT* judgment of 1982, in which the CJEU established that all language versions of EU secondary legislation are equally authentic and have the same weight; 'an interpretation of a provision of Community law thus involves a comparison of the different language versions.'[6]

It is worth noting that the CJEU's case-law has been systematic in referring to the 'language versions' rather than the 'authentic texts' of a legal instrument as in Article 33 of the VCLT. In line with the principle of equal authenticity, the 'vanishing original'

[3] According to Article 81, only States can be parties to the VCLT. Its rules of interpretation, however, have been applied by different bodies (such as the European Court of Human Rights or the European Patent Offi 's Enlarged Board of Appeal) to cases to which the VCLT does not strictly apply.

[4] 'The need for a uniform interpretation of Community regulations necessitates that this passage should not be considered in isolation, but that in cases of doubt, it should be interpreted and applied in the light of the versions existing in the other three languages' (Case 19/67, *Bestuur der Sociale Verzekeringsbank v. J. H. van der Vecht*, EU:C:1967:49, p. 353).

[5] 'When a single decision is addressed to all the Member States the necessity for uniform application and accordingly for uniform interpretation makes it impossible to consider one version of the text in isolation but requires that it be interpreted on the basis of both the real intention of its author and the aim he seeks to achieve, and in the light in particular of the versions in all four languages' (Case 29/69, *Erich Stauder v. City of Ulm – Sozialamt*, EU:C:1969:57, para. 3).

[6] Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v. Ministry of Health*, EU:C: 1982:335, para. 18.

(Dollerup 2004) is not acknowledged in EU texts. In the CILFIT landmark judgment, the CJEU also referred to two important aspects of EU law interpretation: the fact that 'legal concepts do not necessarily have the same meaning in Community law and in the law of the various Member States' (para. 19) and the prominence of teleological interpretation mentioned above: 'every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objectives thereof and to its state of evolution at the date on which the provision in question is to be applied' (para. 20).

Advocate General Francis Jacobs, at a lecture delivered in 2003, described the CJEU's approach to interpretation as 'consistent over the years'; 'teleological, taking account of the purpose of the legislation'; and 'contextual, taking account of the scheme of the legislation and its place in the framework constituted by the Treaties and European law in general' (European Commission 2003: 1). He referred to the VCLT in connection with two aspects: (1) 'Refl cting the involvement of different States in European law – and Article 31 of the [VCLT] – the ECJ may have regard to the travaux préparatoires, such as the Commission proposal and the explanatory memorandum' (ibid.: 1); (2) 'Because of the multilingual nature of Community law, the ECJ may take an approach inspired by Article 33 of the [VCLT]: if comparison of different language versions reveals differences, the interpretation should be chosen which best reconciles the text and the purpose' (ibid.: 1–2). He added that the approach 'may be compared with, but is not the same as, other bodies confronted with multilingual texts such as the European Court of Human Rights and the World Trade Organization' (ibid.: 2). Th s practice will be quantifi d and comparatively analysed in the next section.

4 Patterns of comparison

4.1 Methodology

Corpus analysis was used to compare the level of explicit comparison of language versions at the institutions under review. The corpus is composed of all case-law involving multilingual interpretation from the establishment of each organization until 15 July 2016. The relevant decisions were compiled using search engines of different databases: (1) Westlaw Next (ICJ), (2) WTO Documents Online (AB)[7] and (3) CVRIA (CJEU). These decisions include documents issued under several denominations in both advisory and contentious cases (except for the AB, with no advisory function): ICJ's judgments, orders or advisory opinions; AB's reports; and CJEU's judgments in contentious cases (direct actions) and references for a preliminary ruling (indirect actions). Exhaustive searches were carried out using keywords and keyword phrases, including 'Article 33 of the Vienna Convention' (and variants), 'language version/s',

[7] In order to test the reliability of sources and select the databases, search results were also verifi d in the ICJ's repository, Cambridge Law Reports/International Law Reports, WorldLII and LexisNexis in the case of the ICJ; and the Dispute Settlement Gateway and the Trade Law Guide in the case of the WTO.

'various languages' and references to the offi al languages in each organization followed by 'text/s' or 'version/s' (e.g. 'English text', 'French text', 'Spanish version', 'Greek version'). The lists of documents retrieved through the different searches were merged into a single list for each organization, duplicates were removed and instances of explicit comparison were carefully verifi d in order to establish the fi al consolidated lists.

As this research deals with publicly accessible ICJ and CJEU documents and AB's dispute settlement reports, our study can only account for instances of comparison that are acknowledged in texts. It cannot determine whether comparative interpretation was actually conducted more frequently than it may have surfaced in the texts. For the purpose of the study, however, it is presumed that explicit references to comparison provide a reliable indicator of the frequency of this practice in each court.

4.2 Frequency of explicit comparison

Given the potentially higher margin of error in detecting instances of comparison (i.e. instances potentially overlooked) in the extensive judicial activity of the CJEU (by far the most productive of the three bodies),[8] a sample period of three years (2013–2016)[9] was used in order to double-check the validity of the overall results for this Court and also to facilitate the subsequent analysis of comparative interpretation as carried out in recent years. The overall results (Table 13.1 and Figures 13.2 and 13.3) confi m that there is no signifi ant difference between the frequency of comparison over the whole period[10] (3.12 per cent of cases) and in the sample period (3.59 per cent of cases). Th s contrastive exercise also shows that the level of comparison in EU law interpretation in CJEU cases has remained stable (and proportionally low) despite a dramatic increase in the number of both court cases and EU languages of applicable legislation.

During the sample period, the CJEU issued a total of 2,785 judgments. The search using 'language versions' retrieved almost all instances of comparison. After verifi ation of all occurrences of this keyword (104), only four documents were excluded for not including comparison, while the other 100 comprised all the judgments retrieved through searches with other keywords. If extrapolated to the whole period (510 documents retrieved with 'language versions' out of a total of 16,327 judgments), the margin of error in the detection of explicit comparison would be negligible (+/–0.14 per cent). Cases include interpretation or advisory proceedings initiated by national courts (868 references for a preliminary ruling and nine cases of preliminary reference urgent procedure) and 1,908 direct actions (including actions for annulment, actions for damages and actions for failure to fulfil an obligation).

In the case of the ICJ, with the lowest productivity and the second-lowest level of comparison of the three settings, the tool primarily used, WestLaw Next, retrieved

[8] For the purpose of this study, the CJEU sub-corpus includes all judgments issued by the CJEU bodies or courts under its different denominations since the establishment of the Court, in both advisory and adjudicative cases.

[9] The sample period covers three years from 1 July 2013, date of Croatia's accession, until 1 July 2016.

[10] The whole period covers from 1 January 1954 until 15 July 2016.

Table 13.1 Instances of explicit comparison

	Period	Languages	Total no. of cases	Average of cases adjudicated per year	Cases including instances of comparison between languages
ICJ	1947–2016	6 UN languages (5 until 1980)	163 137 contentious (84.05%) 26 advisory (15.95%)	2.36	19 (11.66%) 14 contentious (10.22% of subgroup) 5 advisory (19.23% of subgroup)
AB	1995–2016	3 WTO languages	137	6.37	37 (27.01%)
CJEU	1954–2016	24 EU languages (initially 4)	16,327	263.34	510 (3.12%)
CJEU sample period	2013–2016	24	2,785 1908 direct actions (68.51%) 877 preliminary rulings (31.49%)	928.33	100 (3.59%) 35 direct actions (1.83% of subgroup) 65 preliminary rulings (7.41% of subgroup)

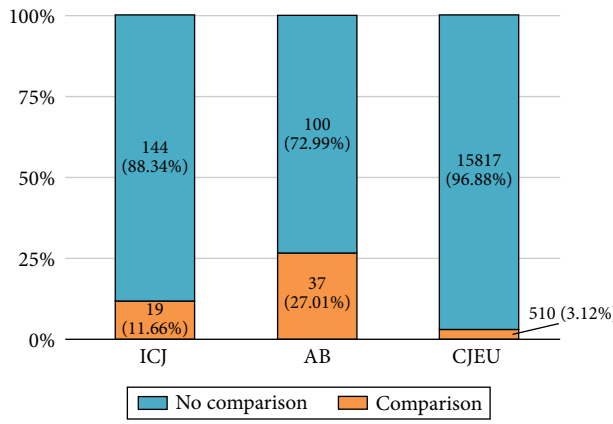

Figure 13.2 Proportion of explicit comparison in entire corpus (all bodies).

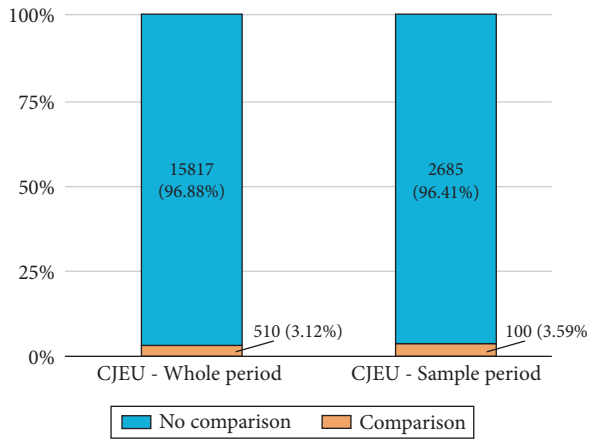

Figure 13.3 Proportion of explicit comparison in CJEU judgments (whole and sample periods).

full documents from the Court, including separate or dissenting opinions of judges. Out of a total of 163 cases retrieved through searches,[11] thirty-five were confi med as referring to comparison. In turn, in sixteen of these cases, comparison was only found in separate or dissenting opinions. Therefore, there remained nineteen cases in which comparison is explicit, that is, 11.66 per cent of the total of 163 cases in the whole period (1947–2016): five cases of comparison in advisory opinions (19.23 per cent of twenty-six advisory proceedings) and fourteen cases of comparison in judgments

[11] Westlaw Next covers from 1947 until 2005 and additional opinions until 2010, including a total of 149 cases (123 contentious cases and 26 advisory proceedings). These results were double-checked and completed with searches in the ICJ's repository in particular: http://www.icj-ICJ.org/docket/index.php?p1=3&p2=2 (accessed 30 July 2016).

or orders (10.22 per cent of 137 contentious cases). The proportion of comparison is therefore signifi antly higher in the case of advisory cases.

If separate and dissenting opinions were included, cases of comparison would increase to thirty-four or 20.86 per cent of the total, including eleven in advisory proceedings (42.31 per cent of this subgroup) and twenty-three in contentious proceedings (16.79 per cent of the subgroup). While these opinions are relevant as an indication of when interpretative comparison was individually considered during the deliberations, they are treated separately for the sake of comparability if the comparison was not part of the Court's fi al decision.

In instances of comparison, 'text' by authentic language was by far the term most commonly used, in line with the terminology found in the VCLT. It is also worth noting that, in the case of the ICJ, comparisons might refer to the interpretation of bilateral or plurilateral treaties that are authentic in languages other than UN languages but brought to the Court in accordance with international law provisions in the UN languages. Th s was the case in four disputes: *Border and Transborder Armed Actions (Nicaragua v. Honduras)* of 1988 (disputed provision: Article II of the Pact of Bogota in English, French, Portuguese and Spanish); *Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy)* of 1989 (Article V (2) of the 1948 Treaty of Friendship, Commerce and Navigation in Italian and English); *Kasikili/Sedudu Island (Botswana/Namibia)* of 1999 (Article III of the Anglo German Treaty of 1 July 1890 in English and German); and *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* of 2001 (involving Article IV of the 1891 Convention between Great Britain and the Netherlands in Dutch and English). Otherwise, the ICJ tends to focus on its working languages, English and French, when conducting comparison (see also Kuner 1991: 957), especially on its own initiative. A breakdown of the specific languages compared in each case is beyond the scope of this study.

Finally, out of the 137 reports issued by the AB in the entire period (1995–2016),[12] thirty-seven, or 27.01 per cent of the total, included explicit comparison.[13] In fact, if we have a closer look at the cases and when the comparison is actually carried out by the AB and not only mentioned as part of the parties' argumentation, the frequency of comparison is signifi antly lower, down from thirty-seven to twenty-two cases (16.06 per cent of the total), as opposed to only three cases of comparison by a referring court or the parties not elaborated on by the CJEU (down to a total proportion of 3.48 per cent of comparison in the sample period) and two cases of this kind at the ICJ (and a proportion of 10.43 per cent of comparison) (see Section 4.4). The fi dings for the WTO are consistent with those obtained by Condon (2010: 204), who detected comparison in 22.1 per cent of the eighty-six reports issued by the AB until 7 October 2009, including a very marked increase of comparison practice between 2003 and 2005, also found in our corpus. The lower level of comparison in the past few years, after the 2003–5 peak (with comparison in more than 50 per cent of cases), explains the lower average for the period up to 2016 in this study.

Interestingly, at the WTO, 'version' was more frequently used than 'text' in instances of comparison, particularly in the case of French ('French version' found in seventeen

[12] The period covers from 1 January 1995 until 15 July 2016.
[13] Only three of the forty reports retrieved through the searches were excluded.

reports versus 'French text' in three reports) and, to a lesser extent, Spanish ('Spanish version' in twenty-four documents as opposed to 'Spanish text' in fourteen reports). This can be linked to the fact that English was the language indicated as 'original' at the beginning of all AB reports and the 'English text' (explicitly referred to in these terms in eight cases of comparison versus 'English version' in nine cases) tends to be used as the 'master' text to compare the Spanish and French texts. However, the fact that English is the working language of the AB and the main language of negotiations and original texts of the WTO's covered agreements does not mean that it is the authoritative language in the context of comparison.

At first sight, the above quantitative findings depict an almost perfect correlation between the number of official languages potentially considered and the frequency of explicit comparison of language versions in court proceedings. Applying the same methodology to all institutions, and regardless of the number of languages actually compared in each case, the result of 11.66 per cent of comparison at the ICJ (six official languages of UN law-making) roughly doubles in the case of the WTO, with half the number of official languages and a much more productive dispute settlement body. Inversely, the proportion found at the ICJ drops dramatically in the case of the CJEU, with exactly four times more official languages than the UN in the sample period, although, in instances of explicit comparison, these courts tend to focus on a few languages (most often those involved in divergence) and not all their official languages (as is more often the case at the WTO).

Another interesting finding is the higher proportion of comparison in advisory proceedings as opposed to contentious proceedings at the ICJ (almost double proportion) and the CJEU (four times higher proportion), whereas the outstanding proportion of comparison at the AB corresponds entirely to contentious cases and is marked by the abovementioned 2003–5 peak.

Do these results mean that the level of comparison is directly related to its practical feasibility depending on the number of languages? Our figures seem to point to that pattern. Nonetheless, the proportionality of the correlation may respond to multiple factors and raises new questions. Do CJEU judges conduct more 'routine' comparison without referring to it but tend to only address it explicitly in judgments when the case raises questions of possible divergence between language versions? In other words, does the CJEU follow the flexible approach set out in Article 33 of VCLT, adapting it to its own needs? Is there a connection between the level of comparison and the initiators of comparison by type of proceedings? To address these questions, we will focus on further analysis of two aspects: the explicit recourse to Article 33 of the VCLT and the initiators and motivation of comparison by type of proceedings.

4.3 References to Article 33 of the VCLT

This section examines the instances of comparison in which explicit reference was made to Article 33 since the VCLT entered into force on 27 January 1980 (a period that covers all cases of comparison of the corpus except for four instances at the ICJ). In this Court, four explicit references (26.67 per cent of cases of comparison) were found in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*; *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*; *LaGrand*

(Germany v. United States of America); and *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*. The most prominent reference to Article 33 and the only one raised by the Court rather than a party or a judge is found in the *LaGrand* case, in which the Court compared the different texts and, since there was a difference of meaning, it resorted to the object and purpose of the Statute. It held that

> In cases of divergence between the equally authentic versions of the Statute, neither it nor the Charter indicates how to proceed. In the absence of agreement between the parties in this respect, it is appropriate to refer to paragraph 4 of Article 33 of the Vienna Convention on the Law of Treaties, which in the view of the Court again refl cts customary international law.[14]

In WTO appellate proceedings, Article 33 of the VCLT or one of its paragraphs were cited in twelve reports or 32.43 per cent of cases of comparison, the highest proportion of the three contexts analysed. For instance, in *Canada – Renewable Energy / Canada – Feed-In Tariff Program* (WT/DS412/AB/R; WT/DS426/AB/R, 6 May 2013), the Panel's interpretation of the term 'governmental purposes' in Article III:8(a) of the GATT 1994 was called into question. The fi st explicit reference to Article 33(3) of the VCLT was made by the EU. It claimed that the terms in English, French and Spanish were not entirely identical and the provision had to be interpreted in light of Article 33(3) VCLT (ibid.: para. 2.125). The AB compared the three language versions and stated that the words *besoins* or *necesidades* could not be 'read harmoniously' with the defin tion of the term *purpose* as 'objectives' or 'aims' of the government, because 'neither the word *besoins* in French, nor the word *necesidades* in Spanish, encompasses the notion of an aim or objective' (ibid.: para. 5.67). To address the problem of interpretation, the AB resorted to the context of the provision. It examined another article of the GATT 1994 and also the immediate context of the terms (ibid.: para. 5.68).

Finally, we found only one case in which Article 33 of the VCLT was mentioned in CJEU case-law during the sample period,[15] *Kik v. OHIM*, but it was referred to by one of the interveners rather than by the Court: 'the Greek Government … points out that Article 33 of the [VCLT] of 23 May 1969 … establishes the general rule of equivalence for different language versions of treaties where the text is authentic in two or more languages.'[16] Th s lack of reference is not surprising, considering the autonomy of EU law and its case-law on the matter. Over the period 1998–2010, Kuijper (2011) found approximately forty cases in which the CJEU explicitly referred to the VCLT, mostly in connection with the interpretation of international agreements to which the EU is a party, as well as its founding treaties, which again is consistent with the distinction between applicable international customary law and the EU's own approach to the interpretation of its secondary legislation.

The above quantitative data (see Table 13.2) also corroborate the conclusions of previous studies on the international courts' explicit reliance on VCLT rules, particularly as regards the AB's tendency towards more systematic adherence to these rules. Isabelle

[14] *LaGrand (Germany v. United States of America)*, Judgment, I.C.J. Reports 2001, p. 502, para. 101.
[15] The sample period is also used for the rest of the quantitative analysis in this chapter.
[16] Case T-120/99, *Kik v. OHIM,* EU:T:2001:189, p. 2255, para. 43.

Table 13.2 Explicit references to Article 33 of the VCLT in cases of explicit comparison

	Cases including instances of comparison between languages (after the entry into force of the VCLT)	Reference to Art. 33 of the VCLT
ICJ	15	4 (26.67%)
AB	37	12 (32.43%)
CJEU	100	1 (1%)

Van Damme (2009) notes, however, that this trend, which was instrumental for the AB 'in making acceptable its early choice to function as a court and to build its judicial identity' (ibid.: 606), is on the decline. Likewise, Pauwelyn and Elsig (2012: 467) point to the need for legitimacy of 'young tribunals' like the early AB as a factor contributing to the more explicit sequencing of VCLT-based interpretative steps. The opposite trend was found by Torres-Bernárdez (1998) in the case of the ICJ, while Gardiner (2015) suggests that this trend has gradually changed into a more explicit interpretative approach. As regards references to Article 33, while our results on the ICJ are too limited to identify this kind of pattern statistically, two of the four instances found in those proceedings are from the shorter period that followed the first of the two studies.

4.4 Who resorts to comparison and why?

Three questions were posed in connection with the origin and agents of comparison: (1) who initiates comparison?; (2) why was comparison conducted?; and (3) when comparison is initiated by a referring court (in the case of the CJEU) or panel (in the case of the AB) or by the parties, do the international courts also compare?

We identified three groups of initiators: (a) the international courts (or judges or advocates general [AG] in the case of the CJEU); (b) the referring national courts (in CJEU proceedings) or panels (in AB proceedings); and (c) the parties. As reflected in Figure 13.4, in the ICJ and the CJEU, comparison was mostly initiated by the Court (in 78.95 per cent and 54 per cent of cases, respectively), while in the context of AB proceedings, it originated most often from the parties (54.05 per cent of cases, as opposed to 30 per cent in the CJEU and only 21.05 per cent in the ICJ). AB reports in which the dispute panel (the first instance dispute settlement body) is the initiator of comparison account for 10.81 per cent of cases at the WTO, whereas in the CJEU, referring national courts initiated comparison in 16 per cent of cases (or 24.62 per cent of the 65 cases of comparison in requests for a preliminary ruling). For example, in *Michael Timmel v. Aviso Zeta AG*, it was the referring court that highlighted a divergence 'between the various language versions of Article 14(2)(b) of the Prospectus Directive in relation to whether the obligation to make the prospectus available to the public' had to be 'performed at both the registered office of the issuer and the office of the financial intermediaries or only at one of those two places'.[17]

[17] Case C359/12, *Michael Timmel v. Aviso Zeta AG*, EU:C:2014:325, para. 25.

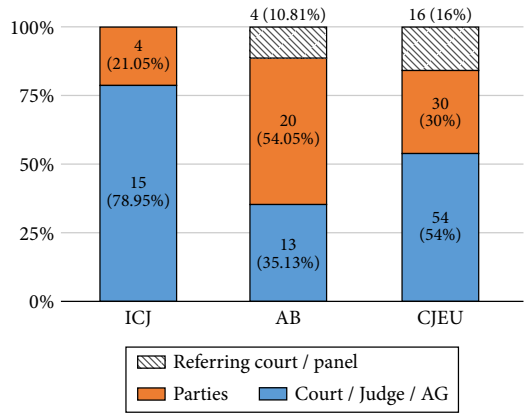

Figure 13.4 Who initiated comparison?

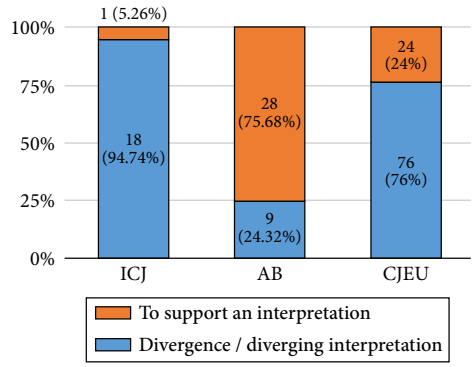

Figure 13.5 Motivation for comparison.

Table 13.3 Correlation between initiators and motivation of comparison

	Cases including comparison between languages	Comparison initiated by the Court	Comparison initiated by parties	Comparison initiated by referring court / panel	Divergence / diverging interpretations as reason for comparison	Comparison in support of interpretation
ICJ	19 (11.66%)	15 (78.95%)	4 (21.05%)	–	18 (94.74%)	1 (5.26%)
AB	37 (27.01%)	13 (35.14%)	20 (54.05%)	4 (10.81%)	9 (24.32%)	28 (75.68%)
CJEU	100 (3.59%)	54 (54%)	30 (30%)	16 (16%)	76 (76%)	24 (24%)

The results obtained regarding the motivation for comparison (see Figure 13.5 and Table 13.3) reveal a strong relationship with the most common initiators in each institution. In 94.74 per cent of cases at the ICJ and 76 per cent at the CJEU, comparison was initiated in connection with instances of divergence or diverging interpretations. Th s includes cases in which the parties argued that certain

language versions would lead to different results, even if, strictly speaking, this was not referred to as divergence. However, in AB proceedings, the trend is exactly the reverse: comparison was primarily used to support an interpretation (in 75.68 per cent of cases). For instance, in *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, Norway submitted that 'a restrictive interpretation of "proceedings" is also supported by the Spanish and French versions of the DSU referring to the term "*actuaciones*" in Spanish and the term "*travaux*" in French, in accordance with Article 33 of the *Vienna Convention*'.[18] It is interesting to note that,

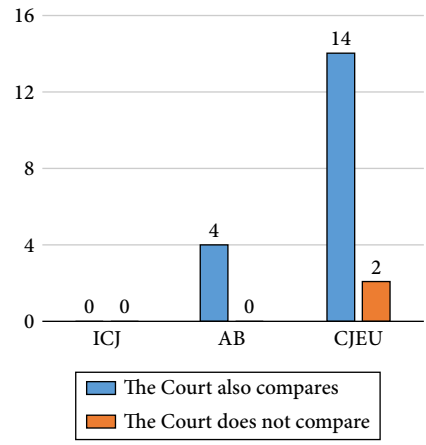

Figure 13.6 Comparison initiated by referring court or panel: consideration by the Court.

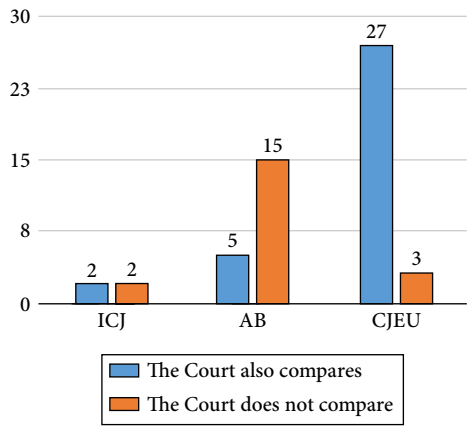

Figure 13.7 Comparison initiated by the parties: consideration by the Court.

[18] *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, 16 October 2008, p. 105, para. 255.

Table 13.4 Correlation between the Court's consideration of comparisons not initiated by it and the motivation for comparison

	Comparison initiated by the referring court / panel	**The Court also compares**	**Divergence / diverging interpretations**	**To support an interpretation**	**The Court does not compare**	**Divergence / diverging interpretations**	**To support an interpretation**
ICJ	–	–	–	–	–	–	–
AB	4	4	4	–	–	–	–
CJEU	16	14	14	–	2	1	1
	Comparison initiated by the parties	**The Court also compares**	**Divergence / diverging interpretations**	**To support an interpretation**	**The Court does not compare**	**Divergence / diverging interpretations**	**To support an interpretation**
ICJ	4	2	2	-	2	2	-
AB	20	5	1	4	15	3	12
CJEU	30	27	23	4	3	2	1

if we examine the total proportion of cases of divergence as percentage of each sub-corpus of case-law, it is not the AB (6.57 per cent of cases) but the ICJ (11.04 per cent) that presents the highest frequency of explicit challenges to semantic unity, with the EU showing the lowest proportion (2.73 per cent).

Finally, as regards the third question, that is, whether the Court also compares when comparison is initiated by a referring court (in CJEU proceedings) or a panel (in the case of the AB) or by the parties, the answer is positive in the first two scenarios (Figure 13.6), and we observe different patterns when comparison is initiated by the parties (Figure 13.7). In two of the four cases of comparison initiated by the parties in the ICJ, the Court does not find it relevant to address a potential divergence, and states: 'The Court does not find it necessary to resolve the controversy regarding the text … of this early treaty';[19] and 'the Court's reasoning does not require the resolution of the problem posed by this textual discrepancy, and it will therefore not rehearse all the arguments that have been put forward by the Parties'.[20] The CJEU does not compare in only three of the thirty cases of comparison that originated from the parties (10 per cent). This contrasts with 75 per cent of cases in AB proceedings (fifteen of twenty cases). These are generally cases in which the parties compare to support an interpretation but no other mention is made about comparison (Table 13.4), while the courts tend to systematically elaborate on the comparisons initiated by the referring court or panel to address divergences. This pattern aligns with the interpretative steps of the VCLT.

5 Discussion and implications for translation

This study has empirically confirmed significant variations in comparative interpretation of multilingual law in rulings of the ICJ, the AB and the CJEU, with the highest frequency of explicit comparison found in AB proceedings (27.01 per cent), the lowest in the CJEU (3.59 per cent) and the ICJ occupying the middle ground (11.66 per cent). This points to a correlation between the number of languages of each institutional language regime and the feasibility of comparison, particularly in the case of EU law, not only because it is the most multilingual and (in principle) the most exposed to comparison as directly-applicable law, but also because the CJEU's case-law itself has confirmed that comparison is mandatory as a tool for the uniform interpretation of EU law. However, this approach seems difficult to implement, particularly by national courts, as illustrated by our results: in only sixteen of sixty-five CJEU preliminary rulings featuring comparisons of language versions, these comparisons were initiated by the referring national court.

Further comparative analysis of references to Article 33 of the VCLT, and of the origin and purpose of comparison, has led to new correlations and provided a more nuanced understanding of the commonly held view that international courts do not systematically compare language versions. One important factor explaining

[19] *Western Sahara*, Advisory Opinion, 1.C.J. Reports 1975, p. 12.
[20] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69.

comparison patterns is found in the correlation between the type of proceedings and the initiators and motivation of comparisons: the frequency of comparison is higher in advisory than in contentious proceedings in courts with this double function (almost double proportion in the ICJ and more than triple in the case of preliminary rulings as opposed to direct actions at the CJEU). In turn, these comparisons are more often initiated by the Court itself in connection with instances of divergence. The opposite applies to WTO dispute settlement, where parties are more often the initiators of comparison in order to support a particular interpretation, and these comparisons are frequently not further addressed by the AB itself. However, it is in this context that explicit references to Article 33 of the VCLT are the most frequent, as opposed to a marginal reference found in the CJEU.

These results are congruent with the interpretative approaches traditionally taken by the courts surveyed in this study, that is, a more textual orientation in the multilateral contexts of the ICJ and particularly the AB, and a more teleological autonomous approach at the CJEU. Nevertheless, in practice, all these courts seem to be consistent with VCLT rules and resort to comparison to resolve multilingual interpretation issues, even if VCLT provisions are not always explicitly mentioned.

The case of the ICJ is particularly telling, as the Court itself is the initiator of comparison in most cases (78.95 per cent) and deals with the highest proportion of divergences (94.74 per cent of cases of comparison and 11.04 per cent of all its case-law). If we consider instances of comparison as part of separate or dissenting opinions, it becomes apparent that comparative interpretation is not rare in the framework of ICJ deliberations (42.31 per cent of advisory proceedings, 16.79 per cent of contentious proceedings, and 20.86 per cent of total cases). Th s would be expected of a judicial organ of reference in international law, and can also be associated with the lower caseload of the ICJ. Yet, this Court refers to Article 33 of the VCLT in only 26.67 per cent of cases that include comparison.

Conversely, in AB proceedings, if we only consider cases of comparison actually elaborated on by the adjudicative body, the frequency of comparison drops from 27.01 per cent to 16.06 per cent of AB reports. Likewise, cases of divergence raised are less frequent than at the ICJ (6.57 per cent). It is the parties' argumentation in trade disputes that explains the high number of comparisons found in the AB sub-corpus. In the context of highly contentious disputes, where the issues at stake may have signifi ant economic implications, it is not surprising to fi d that the parties scrutinize WTO agreements in their three authentic languages in search of support for their interpretations. As to the manner in which the comparisons are conducted, the AB's formalistic approach, including its more routine recourse to dictionary defin tions, may partly respond to the general need to gain legitimacy as a young adjudicative body (Pauwelyn and Elsig 2012: 467).

Finally, the lower frequency of comparison and cases of divergence addressed in CJEU proceedings (3.49 per cent and 2.73 per cent, respectively, and up to 7.41 per cent of instances of comparison in preliminary rulings) must also be viewed in a holistic way. Apart from the reduced practicability of comparing a larger number of languages, other factors may contribute to explain the apparent contradiction between mandatory comparison (according to EU case-law) and proportionally low levels of explicit comparison. The fi st potential factor is the higher productivity of this Court.

The actual number of cases of comparison addressed at the CJEU in three years (100), albeit proportionally low, represented a volume almost three times higher than that of the AB in eleven years and five times higher than that of the ICJ in almost sixty years of existence. It would be justifi d to hypothesize that a certain threshold might naturally emerge in the detection of divergences depending on the volume and diversity of cases, the types of proceedings and the dynamics of different parties dealing with an ever-expanding body of law. In fact, the proportion of comparisons in CJEU case-law has remained remarkably stable according to our analysis of the overall and the sample periods of Court activity, which would support the idea of a certain historical threshold. These averages also suggest that the addition of languages may have two mutually counterbalancing effects: greater risk of divergence but lower feasibility of comparison.

Second, while more languages usually entail higher risk of divergence and more difficulties in detecting them, the Court's teleological approach itself may be less prone to highlighting differences of meaning between language versions unless it is absolutely imperative to address them. Th s does not necessarily mean, however, that the Court does not conduct more 'routine' comparative interpretation than explicitly mentioned in its decisions, even if the comparison does not involve all offi al languages. In other words, its conciliatory interpretative practice may well lead the CJEU to problematize textual differences less frequently than multilateral courts, and to deliberately adopt a less positivist stance on the intrinsic diversity of EU legal acts and the predictability of their meaning.

Last but not least, the linguistic limitations of national courts may also play a role. As mentioned above, they do not resort to comparison on a regular basis (see also Paunio 2007: 398 and Derlén 2009: 350), especially in contrast with the parties to WTO disputes. As pointed out by Advocate General Francis Jacobs (European Commission 2003) before the important 2004 enlargement, it is the national courts that actually interpret EU legislation most often. For him, it would be advisable that they follow the CJEU's purposive interpretative approach, as language divergence 'can rarely be resolved just by comparison of different versions' and it is 'a fi tion to say that the legislature has considered all the language versions' in the fi st place (ibid.: 2). In the same vein, two decades earlier, Tabory (1980: 228) had referred to 'the inability of delegations to verify translations in several totally unfamiliar languages' in the context of the UN.

Th s kind of assertion can trigger other related questions: What are the limitations of effective multilingualism from a legal perspective? To what extent is equal authenticity truly respected in the way multilingual law is interpreted and applied? What are the best ways to ensure legal certainty in the integral development of multilingual law, from its conception to its interpretation? Can States and citizens rely on just one version of multilingual legal instruments?

The data and factors discussed in this chapter provide some preliminary replies on the multilingual character of interpretative patterns in the three courts through the lens of explicit instances of comparison. In order to answer more fully, further analysis would be required on the specific languages and problems examined in comparison, and on the hermeneutic techniques applied. Based on our analysis, it can be concluded that the English version is normally perceived as the leading text for the defin tion of the ordinary meaning of WTO agreements and for comparison with the other two offi al languages of this organization. As for the ICJ, the tendency is to focus on English and

French for the interpretation of international law provisions, but this Court might be required to resolve cases of divergence involving other non-UN languages of particular treaties (four cases detected in our corpus). Finally, proceedings at the CJEU are the most unpredictable in terms of languages of comparison, as the original language of the texts is not acknowledged and potential differences of meaning may arise between a wide myriad of language pairs. Nonetheless, the fact that most EU legislation is fi st drafted in English and that the CJEU itself uses French as internal working language places these languages in a prominent position. Scholars such as Derlén (2011) and Šarčević (2013) even argue for a more predictable interpretative approach to acknowledge this reality and reinforce legal certainty by keeping English and French as languages for mandatory consultation, together with the language of each case. Th s issue has attracted increasing attention in light of the dramatic increase in EU languages since 2004.

Regardless of the variations in language regimes and multilingual interpretation frequencies and approaches, one commonality is clear when it comes to reconciling multilingualism and legal certainty: the vital role of translation. Although interpretation problems cannot be totally prevented, the incidence of divergences between different language versions can be minimized by ensuring accuracy and interlinguistic concordance in processes of multilingual text production. From a systemic perspective, this entails acknowledging the time and expertise required for quality translation, the need for appropriate concordance control mechanisms and close cooperation between translators, legal drafters and other professionals involved in the production workfl w. Furthermore, language experts can be key allies in assisting international and national courts with the comparative analysis of different language versions. Th s kind of cooperation can only be benefic al in the pursuit of institutional goals of quality multilingual communication: the translation process can help to spot and improve unclear passages or correct mistakes, and the multiple texts of an instrument can subsequently help to defi e its meaning, as illustrated by cases in which one or several versions were used to confi m a particular interpretation.

Of course, the above should be coupled with measures to update translation expertise and tailor it to the needs of each organization in various ways: by raising awareness of the relevance of coordinating solutions with other translators and drafters, and also, critically, by learning from hermeneutic practices and instances of divergence in the translator's language combination in order to better identify and handle similar problems of interpretation and reformulation in the future. Th s could contribute to enhancing the quality of multilingual texts, especially in terms of accuracy and ambiguity problem-solving. Translators of court documents are also expected to master the translation of texts in which defin tions and semantic differences are discussed in languages beyond his or her language pairs as part of argumentation. In some cases, they deal with translation problems previously encountered in the translation of the disputed provisions. Translators of case-law thus tend to be the most sensitive to these matters. Translators of legislation and treaties would equally have an interest in learning from the courts' interpretation of the texts they translate. In short, all language professionals, from the early stages of law-making, can contribute to weaving a safety net based on the concordance of multilingual texts. Th s is a collective matter of quality that, albeit laborious, yields dividends in terms of legal certainty.