Title:

Building bridges: some notes apropos of the Spanish translation of the Model European Rules of Civil Procedure

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Abstract:

In this article, the author discusses the challenges encountered during the translation of the ELI-UNIDROIT Model European Rules of Civil Procedure into Spanish. This prompts some reflections on the connection between law and language, concluding that any legal translation constitutes an exercise in comparative law.

Contents:

1. A casual meaning of 'philology'

Translation is one of the branches of philology. And philology is one of the great sciences. We lawyers are at best modest amateurs in it. We must openly admit this.

But it is no less true that the use of the term 'philology' as a technical term for the 'science of language,' 'linguistics,' only appeared in the eighteenth century and is therefore relatively recent. It has a much older meaning, perhaps less precise, but closer to the original meaning of the Greek lexemes that form the word. The term philology is derived from the Greek φιλολογία (philología), from the terms φίλος (phílos), meaning 'love, affection, loved, beloved, dear, friend', and λόγος (lógos), meaning 'word, articulation, reason'.

In this sense, it was already used in Rome to denote not something *scientific* (an anachronistic paradigm), but simply the 'fondness and care for letters' (Cicero) or the 'care in the choice of words' (Seneca).

The word 'philologist' even appears as a synonym for 'advocate' or 'rhetor': a reminiscence of the classical *vir bonus dicendi peritus* definition.

From this more casual, more vulgar perspective, most of us lawyers are, to some extent, 'philologists'. '*Nos enim ita philologi sumus'*, Cicero wrote to a friend.[1] Some have even suggested that law is the study of texts, not facts—of *uerba*, not *facta*—, and that it belongs to the humanities, not the social sciences.[2]

Nothing other than that 'care in the choice of words' is what we wanted for the Spanish translation of the ELI/UNIDROIT Model European Rules of Civil Procedure.

2. Legal translation as an exercise in comparative law

Like the Roman pontiffs—the Latin term for priest, *pontifex*, seems to come from *pontes facere*, to build bridges—, every legal translator wants to build a bridge between legal systems, each of which operates with a specific language. On this side of the stream, the translator must first interpret the text in its context; then decode it from the legal

[1] Letter to Marcus Quintus VIII, mense Maio a.u.c. 699, available at https://www.thelatinlibrary.com/cicero/fratrem2.shtml, accessed 7 April 2025.

[2] D'ORS, Á., *Nueva introducción al estudio del derecho*, Madrid: Civitas, 1999, pp. 18-20.

system in which it operates as an active element; and then re-encode it to be understood in the new context on the other side of the stream.[3]

It is therefore necessarily a comparative law activity. The relationship between legal translation, legal interpretation, and comparative law is substantial and intertwined.[4] To achieve a reliable translation, we need to look beyond the four corners of a text[5] and think in terms of a comparativist or, more precisely, a structuralist perspective—a dynamic, structural perspective.[6]

One of the main themes of structuralist theory is the concept of function. As comparativists, we look for functional equivalence in the specific structure of a legal system.[7] And functional equivalence is often at the antipodes of literal equivalence. It is more about transcreation: the re-creation of a text for a particular audience.[8]

In doing so, however, we may be tempted to *improve* the law by adding our own views to its content or even to its wording.[9] For example, in our efforts to understand the

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[3] See CURRAN, V. G., 'Comparative Law and Language', in REIMANN, M., ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press, 2019, pp. 682-710, at 686; MOUSOURAKIS, G., *Comparative Law and Legal Traditions. Historical and Contemporary Perspectives*, Cham: Springer, 2019, p. 109.

[4] See CURRAN, V. G., 'Comparative Law and Language', in REIMANN, M., ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press, 2019, pp. 682-710, at 686. See also DE BENITO, M., JEULAND, E., 'Translation', in DE BENITO, M. (ed.), *Colloquies on European Civil Procedure*, The Hague: Brill, 2025 (forthcoming).

[5] GASCÓN, F., 'Traducción jurídica y sistemas procesales algunas reflexiones acerca de las características de los procesos civiles en los sistemas de derecho continental', in *Seminarios Complutenses de Derecho Romano: Revista Complutense de Derecho Romano y Tradición Romanística (En memoria de José María Coma Fort),* 28 (2015), pp. 417-434, at 422.

[6] HUSA, J., *Interdisciplinary Comparative Law. Rubbing Shoulders with the Neighbours or Standing Alone in a Crowd*, Cheltenham: Edward Elgar, 2022, p. 52.; ENGBERG, J., 'Comparative Law for Legal Translation: Through Multiple Perspectives to Multidimensional Knowledge', *International Journal for the Semiotics of Law*, 33:2 (2020), pp. 263-282, at 270.

[7] DE GROOT, G.-R., VAN LAER, C. J. P., 'The Dubious Quality of Legal Dictionaries', *International Journal of Legal Information*, 34:1 (2006), pp. 65-84, at 68; DULLION, V., 'Droit comparé pour traducteurs : de la théorie à la didactique de la traduction juridique', *International Journal for Semiotics of Law*, 28:1 (2015), pp. 91-106, at 96.

[8] DURO, M. 'Ordenamientos jurídicos y traducción (common law y civil law)', in DURO, M., MARTÍNEZ, A. B., SAN GINÉS, P. (eds.), *Introducción a la traducción jurídica y jurada (inglés-español). Orientaciones doctrinales y metodológicas*, Granada: Comares, 1997, pp. 41-59, at 58; HUSA, J., *Interdisciplinary Comparative Law. Rubbing Shoulders with the Neighbours or Standing Alone in a Crowd*, Cheltenham: Edward Elgar, 2022, p. 53.

[9] ŠARCEVIC, S., 'Legal Translation and Translation Theory: A Receiver-Oriented Approach', paper presented at *La traduction juridique: Histoire, theorie(s) et pratique / Legal Translation: History, Theory/ies,*

source accurately, we may be tempted to make an ambiguous rule more precise, charitably sparing the reader our own headaches. As a result, however, the rule is distorted, 'lost in translation'.[10] We must put aside our own inner Tribonian or Portalis, accept the original as it is, and make sure that the translated rule says what the original intended.

There is no doubt that a translator cannot simply translate words literally. This is not just a principle that applies to legal translation. Translators of poetry or fiction have always stressed that the target text should express the same energy, emotion, even rhythm and colour; and an excessive insistence on literal fidelity will not necessarily produce the same effect in another language.[11] Blindly copying from dictionaries ignores the peculiarities of the language and risks degrading the text. Any translation, whether of a foreign language or a foreign law, is an act of comparing systems and contexts.[12]

Moreover, legal translation is full of *faux amis*. Indeed, it is typical for legal systems to use structurally different institutions to achieve the same result; think of the common law doctrine of estoppel and the civil law doctrine of *uenire contra factum proprium* or abuse of rights. Moreover, the vicissitudes of each people have left a dense, non-transferable semantic residue on some of the legal terms: 'propriété' and 'property'.[13]

An interdisciplinary approach is beneficial in this respect. Semiotics posits the use of a conceptual frame consisting of 'slots' and 'fillers', namely structure and content. Effective communication depends on the alignment of frames with those of the interlocutor. The frame approach differs from lexical approaches in that it focuses on universal

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Practice, Bern/Geneva: ASTTI/ETI, 2000, available at https://www.tradulex.com/Actes2000/sarcevic.pdf, p. 5, accessed 7 April 2025.

[10] See DE BENITO, M., JEULAND, E., 'Translation', in DE BENITO, M. (ed.), *Colloquies on European Civil Procedure*, The Hague: Brill, 2025 (forthcoming).

[11] See BOCQUET, C., *La traduction juridique. Fondement et méthode,* Louvain-la-Neuve: De Boeck, 2008; MONJEAN-DECAUDIN, S., *Traité de juritraductologie : Épistémologie et méthodologie de la traduction juridique*, Villeneuve d'Ascq: Septentrion, 2022.

[12] See CURRAN, V. G., 'Comparative Law and Language', in REIMANN, M., ZIMMERMANN, R. (eds.), *The Oxford Handbook of Comparative Law*, Oxford: Oxford University Press, 2019, pp. 685-686; MONJEAN-DECAUDIN, S., POPINEAU-LAUVRAY, J., 'How to Apply Comparative Law to Legal Translation. A New Juritraductological Approach to the Translation of Legal Texts", in BIEL, L., ENGBERG, J., MARTÍN, R., SOSONI, V. (eds.), *Research Methods in Legal Translation and Interpreting. Crossing Methodological Boundaries*, London: Routledge, 2019, pp. 115-129.

[13] See DE BENITO, M., JEULAND, E., 'Translation', in DE BENITO, M. (ed.), *Colloquies on European Civil Procedure*, The Hague: Brill, 2025 (forthcoming).

concepts and offers new insights.[14] This method is particularly effective because it allows us to deconstruct the concept and then reconstruct it in a way that suits the mentality of another culture.

The translation of arbitration clauses from or into Russian is a good example of how a literal translation can have the opposite legal effect. There are a few cases where the term 'arbitration court' is translated into Russian as Арбитражный суд (*arbitrazhniy sud*), which is a State court that deals with commercial disputes. This specific terminology is a result of the uniqueness of socialist arbitration institutions, which were part of the State system. Although the word арбитражный (*arbitrazhniy*) is correctly translated as 'arbitration', the legal effect of the clauses is the opposite: in English, people are required to submit their disputes to arbitration, while, in Russian, a State court is given jurisdiction to hear the case. In a recent case, a New York court admitted, after a detailed comparison, that the English version was 'awkward'.[15] The parties used similar 'slots' without realizing that they had different 'fillers'.

3. Challenges in translating the Model Rules into Spanish

Stendhal liked to read a few articles of the *Code Napoléon* to get the tone before he started writing. Indeed, good legislation often shows a certain literary preoccupation. The translation process is therefore incomplete without the effort to respect and not sacrifice what we might call idiomaticity, the elusive style or genius of each language.[16]

To make the translated Model European Rules of Civil Procedure sound natural and coherent in Spanish, we chose a simple, unadorned style familiar to native speakers. A *castizo* Spanish, if you like, to use the words of the *Real Academia Española*: 'Said of

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[14] ENGBERG, J., 'Comparative Law for Legal Translation: Through Multiple Perspectives to Multidimensional Knowledge', *International Journal for the Semiotics of Law*, 33:2 (2020), pp. 263-282, at 271.

[15] *LaRubInt Corp. v. Joint Stock Company Studio Soyuzmultfilm*, case № 22-cv-4461 (HG) (E.D.N.Y. Apr. 20, 2023). See also the award of the International Commercial Arbitration Court for Russian Chamber of Commerce (ICAC) 06.09.2002 № 217/2001. See also POPKOVA, E. M., 'Arbitrazh vs Arbitration: Terminology Traps in the Russian-English Translation of the Russian Judiciary System', *Philological Sciences at MGIMO Collection of Scientific Papers*, 61:46 (2011), pp. 98-109.

[16] PRIETO, F., 'International and Supranational Law in Translation: From Multilingual Lawmaking to Adjudication', *The Translator*, 20:3 (2014), pp. 313-331, at 322. See also DE BENITO, M., JEULAND, E., 'Translation', in DE BENITO, M. (ed.), *Colloquies on European Civil Procedure*, The Hague: Brill, 2025 (forthcoming).

the language: without a mixture of voices or strange turns of phrase'.[17] *Voices* and *turns of phrase*—that is, words and sentence structures, the overall flow and rhythm of speech.

We found that a simple and natural voice was often the most appropriate. For example, 'pedir' is used to designate the *petitum* which, together with the *causa petendi*, identifies the action and thus defines the subject matter of the proceedings (Rule 22).[18]

Other times there is no plain language, but only the purely technical word, as in the case of 'litisconsorcio', the plurality of claimants or defendants.

However, we do not always use the technical term. In Spanish, to challenge a witness is technically called 'tachar'. We preferred not to put the word 'challenge' through the filter of our conceptual apparatus and forensic resonance.

In the case of the *turns of phrase*, our aim was to ensure that the discourse flowed easily and naturally in Spanish. This meant occasionally rearranging the phrase, as in Rules 30 and 38, where we changed the order of the phrase completely:

> Rule 30. *Litigation capacity of natural persons*
>
> (2) Anyone who has the capacity to exercise rights or obligations in their own name under the substantive law shall be deemed to have litigation capacity.
>
> Artículo 30. *Capacidad procesal de las personas físicas*
>
> 2. Tienen capacidad procesal quienes estén en el pleno ejercicio de sus derechos civiles conforme a lo establecido en el derecho sustantivo.
>
> Rule 38. *Necessary joinder of parties*
>
> (1) A proceeding must be brought by or against parties jointly
> where either the joint nature of the legal right or the substantive law requires a judgment to bind all of the joined parties in the same terms.
>
> Artículo 38. *Litisconsorcio necesario*
>
> 1. Cuando, por el carácter indivisible del derecho o por exigencia de una norma sustantiva, la sentencia hubiera de afectar a varios sujetos de forma conjunta, deberán todos ellos demandar o ser demandados conjuntamente.

In some cases, it was necessary to combine several sentences into a single unit to maintain continuity, as the Spanish period tends to be longer than the English one. In Rule 26, for example, we removed two periods:

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[17] 3. '*Dicho del lenguaje: sin mezcla de voces ni giros extraños*'.

[18] See Spanish code of civil procedure, Article 399.

> Rule 26. *Applicable law*
>
> (2) The court must determine the correct legal basis for its decision.
> This includes matters determined on the basis of foreign law.
> It may only do so having provided the parties a reasonable opportunity to present their arguments on the applicable law.
>
> Artículo 26. *Fundamentos de derecho*
>
> 2. El tribunal determinará las normas de derecho aplicables, incluyendo, en su caso, normas de derecho extranjero, y siempre asegurándose de que las partes hayan tenido oportunidad de formular sus alegaciones al respecto.

We even allowed ourselves to be playfully guided by memories and resonances (we would say 'concordancias' to evoke a famous work by a great Spanish jurist from the nineteenth century).[19] For example, we liked to replace the English full stop with a Spanish semicolon followed by 'but not' ('pero no'), a structure that appears at least sixteen times in the *Código civil*.[20] For instance, Rule 27(1):

> Rule 27. *Sanctions for non-compliance with rules and court orders*
>
> (1) The court shall disregard factual allegations, modifications of claims and defences, and offers of evidence that are introduced later than permitted by these rules or by court orders, including those concerning amendment. Preclusion does not apply if the court could have taken notice of the party's failure or mistake and itself failed to raise with the parties whether they wished to seek an amendment or relief from sanction.
>
> Artículo 27. *Sanciones por inobservancia de normas procesales y resoluciones judiciales*
>
> 1. El tribunal inadmitirá cualesquiera alegaciones de hecho, modificaciones de las pretensiones o proposiciones de prueba formuladas fuera del plazo previsto en estas Reglas u otorgado por el tribunal; pero no operará la preclusión si el tribunal, habiendo tenido conocimiento a tiempo del retraso al que se exponía una parte, se abstuvo de invitarla a subsanarlo.

[19] GARCÍA GOYENA, F., *Concordancias, motivos y comentarios del Código civil español*, Madrid: Sociedad Tipográfico-Editorial, 1852.

[20] Some of those articles that most directly affect civil procedure include: *1813. Se puede transigir sobre la acción civil proveniente de un delito*; pero no *por eso se extinguirá la acción pública para la imposición de la pena legal. 1816. La transacción tiene para las partes la autoridad de la cosa juzgada*; pero no *procederá la vía de apremio sino tratándose del cumplimiento de la transacción judicial. 1825. Puede también prestarse fianza en garantía de deudas futuras, cuyo importe no sea aún conocido*; pero no *se podrá reclamar contra el fiador hasta que la deuda sea líquida. 1912. El deudor puede solicitar judicialmente de sus acreedores quita y espera de sus deudas, o cualquiera de las dos cosas*; pero no *producirá efectos jurídicos el ejercicio de este derecho sino en los casos y en la forma previstos en la Ley de Enjuiciamiento Civil. 1935. Las personas con capacidad para enajenar pueden renunciar la prescripción ganada*; pero no *el derecho de prescribir para lo sucesivo. 1975. La interrupción de la prescripción contra el deudor principal por reclamación judicial de la deuda, surte efecto también contra su fiador*; pero no *perjudicará a éste la que se produzca por reclamaciones extrajudiciales del acreedor o reconocimientos privados del deudor.*

We can also compare the original and translation of Rule 140(2) to illustrate this:

> Rule 140. *Time limit to apply to set aside a default judgment*
>
> (2) The court may extend the time limit under Rule 140(1) where the defendant can show good reason for their non-compliance. No application to set aside can, however, be brought more than one year and, in cross-border cases, two years after the default judgment was entered.
>
> Artículo 140. *Plazo para solicitar la rescisión de la sentencia en rebeldía*
>
> 2. El tribunal podrá prorrogar el plazo del apartado anterior si acredita el demandado razón legítima que le hubiese impedido actuar; pero no cabrá rescisión transcurrido un año, o dos en situaciones transfronterizas, desde la fecha en que se hubiera dictado la sentencia en rebeldía.

The same can be said of 'doing or not doing something' (Rule 132), 'hacer o no hacer alguna cosa'. This immediately brings us back to Article 1088 of the *Código civil*, where we find this 'some thing' ('alguna cosa'), so simple and elegant.[21]

Another example is the word 'rules'. We chose 'artículo' because it is traditionally and universally used in Spanish, and because it seems more accurate: it distinguishes the external, conventional divisions of a legal text from the *regulae juris* they may contain.

(Incidentally, 'article' is also used by English lawyers, at least since Jeremy Bentham began to use the word. The word 'article' also appears in the English normative production of the EU, ELI, UNIDROIT, UNCITRAL, the Hague Conference on Private International Law, etc.).

We even went a step further and translated the 'Parts' and 'Sections' into which the rules are divided as 'Capítulos' and 'Títulos', the usual way of referring to the subdivisions of a piece of legislation in Spanish—on both sides of the Atlantic.

(This raises another problem. A legal language is only applicable to one legal system, not necessarily to all legal systems that use the same language.[22] Although there is a standard or canon of learned legal Spanish, the specific nuances of legal Spanish vary according to the Spanish-speaking jurisdiction in question. When in doubt, we avoided making too many exceptions to the standard legal Spanish. The European nature of the Model Rules should not make the Spanish version any less universally Hispanic,

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[21] Spanish civil code, Article 1088: *Toda obligación consiste en dar, hacer o no hacer alguna cosa.*

[22] DE GROOT, G.-R., 'Legal Translation', in SMITS, J. M. (ed.), *Elgar Encyclopedia on Comparative Law*, Cheltenham: Edward Elgar, 2012, pp. 538-549, at 538.

something like a local *Spanish of Spain*. The *Código Procesal Civil Modelo para Iberoamérica*[23] proved useful for this purpose.)

Regarding 'case management', the central part of the procedural model proposed by the Model Rules, we broke it down into a periphrasis, 'gestionar e impulsar el proceso', in an attempt to capture the vast semantic field of 'case management' in English and in the Rules:

> Artículo 4. *Deberes del tribunal. Deber general de gestión e impulso procesal*
>
> Es responsabilidad del tribunal gestionar e impulsar el proceso de modo activo y eficaz, …

We also struggled with appeals. In Spanish we make an almost intuitive distinction between ordinary and extraordinary appeals, but both are clearly 'recursos'. This was crucial in deciding to translate the 'first appeal' and the 'second appeal' as 'primer recurso' y 'segundo recurso'. As these terms are not the most expressive or graceful, we considered using a periphrasis such as 'recurso de primer grado' y 'recurso de segundo grado'. In fact, this would reflect the linguistic structure of a historical Spanish appeal, the 'recurso de segunda suplicación', which was heard by the Royal and Supreme Council of the Indies in Madrid against judgments handed down by the highest court of the respective American viceroyalty or captaincy. In the end, however, we opted for 'primer recurso' y 'segundo recurso', which have the advantage of reflecting the relatively schematic nature of the Rules as a model law.

A brief note on the use of Latin in legal English and in our own languages may be of interest. Latin is a fundamental part of the rich English legal tradition, as it is on the continent. But sometimes Latin expressions there have taken on a meaning of their own—a meaning that is perfectly correct on *that* side of the Channel, but which does not quite fit in with the semantic field of the same Latin word on *this* side of the Channel.

Thus, what in English legal Latin is called 'inter partes' or 'ex parte' (literally 'between the parties' or 'from one party') is better expressed in Spanish legal Latin as 'inaudita parte debitoris' ('not having heard the debtor') or 'inaudita altera parte' ('not having heard the other party'), often shortened to 'inaudita parte'. Nor is the expression 'inter partes' ('between the parties') free from ambiguity, since it appears to be widely used

[23] Código Procesal Civil Modelo para Iberoamérica.

in Europe in the private rather than the procedural sphere to refer to the relative effect of contracts *between the parties*, as opposed to property and *in rem* securities, which are opposable *erga omnes* ('towards all').

The Latin terminology used in English law may derive from a national development of these terms in the history of English law. But Latin is an essential part of the common legal heritage of Europe: if used at all, the more widely accepted terminology of the *jus commune* should prevail over national usages.

(In only one case did we introduce a Latin expression that was not in the English text: 'recurso per saltum' to translate 'leapfrog appeal', which would have been a somewhat exotic literal translation to a Spanish ear.)

4. An Augustinian method for the interpretation of the Model Rules?

Let's fast forward from the past to the future, when we have already translated the Model Rules into three, ten, fifteen different languages, although English and French remain the original versions. This is reminiscent of the EU with its twenty-four official languages,[24] all of which help to clarify the meaning of the text and must be considered when interpreting and applying the law.[25]

This approach is known as the Augustinian method of interpretation: the use of multiple versions of the same law to gain insight into its intended meaning and prevailing logic. The term refers to the method developed by St Augustine in the fourth century of comparing different translations when interpreting Scripture.[26]

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[24] Bulgarian, Croatian, Czech, Danish, Dutch, English, Estonian, Finnish, French, German, Greek, Hungarian, Irish, Italian, Latvian, Lithuanian, Maltese, Polish, Portuguese, Romanian, Slovak, Slovenian, Spanish, and Swedish.

[25] See OST, F., *Traduire. Défense et illustration du multilinguisme*, Paris: Fayard, 2009. See also ŠARCEVIC, S., 'Legal Translation and Translation Theory: A Receiver-Oriented Approach', paper presented in *La traduction juridique: Histoire, theorie(s) et pratique / Legal Translation: History, Theory/ies, Practice,* Bern/Geneva: ASTTI/ETI, available at: https://www.tradulex.com/Actes2000/sarcevic.pdf, accessed 7 April 2025, p. 5; PICHONNAZ, P., 'Challenging Textual Interpretation in Multilingual Legal Systems', *French Journal of Legal Policy*, 1:1 (2023), pp. 4-5; PICHONNAZ, P., 'Legal Interpretation in Multilingual States: An Opportunity', *Journal of Comparative Law*, 124:12 (2017), pp. 124-141; DE BENITO, M., JEULAND, E., 'Translation', in DE BENITO, M. (ed.), *Colloquies on European Civil Procedure*, The Hague: Brill, 2025 (forthcoming).

[26] See ROBERTSON, C. D., *Multilingual Law. A Framework for Analysis and Understanding*, London: Routledge, 2018; SOLAN, L. M., 'The Interpretation of Multilingual Statutes by the European Court of Justice', *Brooklin Journal International Law*, 34:2 (2009), pp. 277-301, at 281. See also SOLAN, L. M., 'Interpreting Multilingual Laws: Some Costs and Benefits', in KJAER, A. L., LAM, J. (eds.), *Language and*

The ECJ applies the Augustinian method when faced with a difficult question of interpretation: it seeks to unveil the *mens legis*, the intention of the legislator, by considering at least a selection of the twenty-four authentic versions of EU legislation:

> It must be borne in mind that community legislation is drafted in several languages and that the different language versions are all equally authentic. An interpretation of a provision of community law thus involves a comparison of the different language versions.[27]

Following the Bishop of Hippo, and to paraphrase Wittgenstein,[28] let's break down the boundaries of our legal language and thereby expand the boundaries of our legal world.

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[27] *CILFIT and Lanificio di Gavardo SpA v. Ministry of Health,* Judgment of the Court of 6 October 1982, case 283/81, ECLI:EU:C:1982:335, para. 18.

[28] WITTGENSTEIN, L., *Tractatus Logico-Philosophicus* (translation by OGDEN, C. K.), London: Kegan Paul, Trench, Trubner & Co.; New York: Harcourt, Brace & Co., 1922, para. 5.6, at 74: '*die Grenzen meiner Sprache bedeuten die Grenzen meiner Welt*', 'the limits of my language mean the limits of my world'.

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