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'Three Grades of Evil': Nabokov, Wittgenstein and the Perils of Treaty Interpretation

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'THREE GRADES OF EVIL': NABOKOV, WITTGENSTEIN AND THE PERILS OF TREATY INTERPRETATION

Alessandra Asteriti

Abstract:

The article investigates the interpretative practice of investment tribunals in the light of Wittgenstein's theory on rule following and usage, to advance the hypothesis that arbitral tribunals run the risk to interpret the language of the treaties so as to effect a *deracination* of their terms. In order to do so, the article employs Vladimir Nabokov's reflections on the perils of translation, contextually arguing that the incorporation in investment treaties of language developed in specific domestic frameworks (i.e. United States' constitutional jurisprudence) is an example of semantic hegemony accompanied by hermeneutic conformity on the part of tribunals.

Keywords: Legal theory; law and linguistics; investment law; investment arbitration.

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The meaning of a word is its use in the language.

Ludwig Wittgenstein¹

A. Introduction

The Russian novelist Vladimir Nabokov wrote an insightful article on the perils of literary translation, where he described the ‘three grades of evil’ that can befall a translation:

Three grades of evil can be discerned in the queer world of verbal transmigration. The first, and lesser one, comprises obvious errors due to ignorance or misguided knowledge. This is mere human frailty and thus excusable. The next step to Hell is taken by the translator who intentionally skips words or passages that he does not bother to understand or that might seem obscure or obscene to vaguely imagined readers; he accepts the blank look that his dictionary gives him without any qualms; or subjects scholarship to primness: he is as ready to know less than the author as he is to think he knows better. The third, and worst, degree of turpitude is reached when a masterpiece is planished and patted into such a shape, vilely beautified in such a fashion as to conform to the notions and prejudices of a given public. This is a crime, to be punished by the stocks as plagiarists were in the shoebuckle days.

In this article, I use Nabokov's *taxonomy of evil* to analyse investment arbitration awards, focusing on the third grade described by Nabokov as the worst, that he ascribes to the sin of *conformity* (as opposed to first two, which can be summarised as *ignorance* and *malicious ignorance*).

¹ LWittgenstein, *Philosophical Investigations* (Blackwell, 1968) [1953] para. 43.

A considerable number of international investment arbitrations is based on treaties;² their interpretation by tribunals is a form of translation, as law possesses its own language, and its interpretation is both an exercise of application of the abstract norm to the concrete case, and a form of exegesis of the legal text.³ The interpretation of treaties is regulated by the Vienna Convention on the Law of Treaties (VCLT), signed in 1969 and entered into force in 1980, but applicable to treaties generally, at least in its main provisions as recognised to be customary international law. Investment tribunals have been accused of paying ‘lip service’ to the VCLT’s general rule of treaty interpretation as expressed in its Article 31.⁴ This article argues that Article 31 leaves too much scope to the dangers of conformity to the notions and prejudices, not of the public at large, which was the concern of Nabokov as a novelist, but of the restricted public of investment arbitrations on the one hand, and of the arbitrators themselves on the other. Contextually, I will also argue that the incorporation in investment treaties of language developed in specific domestic frameworks (i.e. United States’ constitutional jurisprudence) is an example of semantic hegemony accompanied by hermeneutic conformity on the part of tribunals. In order to develop this argument, I will employ Wittgenstein’s reflections on rule following and usage, to advance the hypothesis that arbitral tribunals run the risk to interpret the language of the treaties so as to effect a *deracination* of their terms.

Section Two of the article provides an outline of interpretative practice in investment tribunals; in Section Three, the theoretical argument is presented, while Section Four is dedicated to a case study, the text of the Expropriation Annex in the United States Model Bilateral Investment Treaty (BIT). Finally, Section Five offers some concluding remarks.

B. The investment dispute settlement system and the Vienna Convention on the Law of Treaties

Investment disputes originate from a claim, normally by the investor,⁵ of a breach of the investment contract or treaty; investment tribunals are then directed to solve the dispute according

² For recent information about the volume of investment arbitrations, see UNCTAD, *IIA Issues Note – Recent Developments in Investor-State Dispute Settlement (ISDS)*, No. 1 (April 2014). The ICSID Secretariat provides numbers of their arbitrations on their website, [https](https://icsid.worldbank.org/ICSID/ICSID.nsf/0/55F5F5F5F5F5F5F5F5F5F5F5F5F5F5F5) (last visited 31 October 2014), under the heading ‘ICSID Caseload Statistics.’ The interpretation of multilingual treaties draws an even closer analogy, where legal exegesis is weighed down by the perils of cultural contingency.

³ On treaty and legal interpretation, seen from a comparative perspective, see DF Vagts, ‘Treaty Interpretation and the New American Ways of Law Reading’ 4 *European Journal of International Law* (1993) 472 (with further bibliography); a more focussed treatment within investment law in M Waibel, ‘International Investment Law and Treaty Interpretation,’ in R Hoffmann and C Tams, *From Clinical Isolation to Systemic Integration* (Nomos, 2011) 29. On the ‘art of interpretation,’ see recently J Klabbers, ‘Virtuous Interpretation,’ in M Fitzmaurice, O Elias & P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, 2010) 17.

⁴ T Wälde, ‘Interpreting Investment Treaties: Experiences and Examples,’ in C Binder, U Kriebaum, A Reinisch & S Wittich, *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (Oxford University Press, 2009) 725, 728.

⁵ There have been so far only two disputes where the investor was the defendant; see *Republic of Equatorial Guinea v. CMS Energy Corporation and Others*, ICSID Case No. CONC(AF)/12/2; and *Gabon*

to the applicable law, including the treaty or contract and other sources contained in the relative contractual or treaty clause; when there is no agreement between the parties on the governing law of the dispute, tribunals will usually apply the law of the host country, plus the rules and principles of international law applicable in the relation between the parties.⁶ While tribunals are bound to apply a certain set of rules and are limited in their jurisdiction by the instrument applicable to the dispute, they normally enjoy more leeway in the interpretative approach adopted.⁷ Their interpretative freedom is nonetheless limited by the conditions set by the applicable treaty and by general rules of international law. As International Investment Agreements (IIAs) are instruments of public international law, they are to be interpreted by arbitration tribunals in accordance to the main rule of interpretation codified in the VCLT,⁸ and, as appropriate, to other interpretative principles derived from domestic legal systems and recognised as principles of international law.⁹ Article 31 VCLT provides as follows:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
 - (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
 - (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
 - (c) any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.¹⁰

v. Société Serete SA, ICSID Case No. ARB/76/1. There are also cases where states asserted a counterclaim, which are not included here.

⁶ See for example Article 42 ICSID Convention. T Bagic, *Applicable Law in International Investment Disputes* (Eleven International Publishing, 2005).

⁷ See OK Fauchald, 'The Legal Reasoning of ICSID Tribunals – An Empirical Analysis', 19(2) *European Journal of International Law* (2008) 301.

⁸ 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331. Many investment tribunals, but by all means not all, refer to the rules codified in the VCLT at the outset of their interpretative work; see for example *Phoenix Action Ltd v. Czech Republic*, ICSID Case No. ARB/06/5, Award 15 April 2009, paras 75-77 and especially *Hrvatska Elektroprivreda dd v. Republic of Slovenia*, ICSID Case No. ARB/05/24, Decision on the Treaty Interpretation Issue, 12 June 2009, (*Hrvatska Elektroprivreda*) Chapter V (Relevant Principles of Treaty Interpretation).

⁹ Wälde (2009).

¹⁰ Article 32 provides for supplementary means of interpretation on limited grounds: 'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

The general rule in Article 31 VCLT provides a holistic approach (or one could say, a compromise) to treaty interpretation that subsumes the three main canons, textual, teleological and purposive.¹¹ As noted by the *Aguas del Tunari* Tribunal,

Interpretation under Article 31 of the Vienna Convention is a process of progressive encirclement where the interpreter starts under the general rule with the (1) ordinary meaning of the terms of the treaty, (2) in their context and (3) in light of the treaty's object and purpose, and by cycling through this three step inquiry iteratively closes in upon the proper interpretation.¹²

The focus of this article points to the dichotomy between textual and teleological interpretation as the most apt at unmasking the ways in which language interfaces with political and legal meanings (incidentally, the dichotomy between teleological and purposive serves the same function in stressing the tension between a progressive and an originalist interpretation of the same text). This dichotomy however does not account for a further tension in investment arbitration between a commercial approach to dispute resolution and a public (international) law approach.¹³ The epistemic community of investment arbitrators is formed largely by professionals trained in the world of commercial arbitration, where the approach to dispute resolution is characterised by a focus on procedure and the facts and limited engagement with legal analysis, including of the authorities and context. However, the choice is not always so simple; for example, Jan Paulsson in his Separate Opinion in the *Hrvatska Elektroprivreda* Arbitration, noted how an extreme teleological approach can be put at the service of a commercial bias well beyond the text of the treaty:

The permissible context is *the context of the terms* of the treaty and *not the context of the treaty generally*, in the way desired by the “total context” proponents. This is precisely how the textualist approach carried the day when the VCLT was signed in 1969. [...] As far as I can discern, the minority's Decision proceeds in ignorance of this fundamental and much-discussed constraint on the freedom of international judges and arbitrators to interpret treaties. [...] They seem to ignore that they are allowed to refer only to the context *of the terms* of the Treaty, i.e. the internal consistency of the text as one whole. This fundamental error, it seems, has freed the majority to impose its vision of commercial

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable.’

¹¹ Article 31(1): ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose’. See most recently R Gardiner, *Treaty Interpretation* (Oxford University Press, 2008) 8 and 33 ff. The singular ‘rule’ points to the unitary character of the process of interpretation, rather than restricting the number of rules or principles of interpretation.

¹² *Aguas del Tunari SA v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Respondent's Objections to Jurisdiction, 21 October 2005, para. 91. See also *Hrvatska Elektroprivreda*. The ILC, in its Commentary on the Draft Articles on Interpretation, put it this way: ‘All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation.’ United Nations Conference on the Law of Treaties: Official Records: Documents of the Conference, A/CONF39/11/Add.2, 39, para. 8.

¹³ See Wälde (2009) 725.

reasonableness on the entire history of Krsko NPP. This is not what States submit themselves to when concluding a Treaty. The majority's vision of commercial logic leads them to all manner of reading between the lines of the Treaty and of various more or less related, more or less contemporaneous, and more or less superseded documents.¹⁴

This is almost ironic, as I have noted above how interpretative practice in commercial arbitrations tends to favour the textualist approach.¹⁵ In fact, the *Hrvatska Elektroprivreda* Tribunal approvingly quoted a judgment in a commercial case decided in the English court, where Justice Simon stated:

It is clear that the proper approach to the interpretation of Treaty wording is to identify what the words mean in their context (the textual method), rather than attempting to identify what may have been the underlying purpose in the use of the words (the teleological method).¹⁶

And added:

The proper approach is to interpret the agreed form of words which, objectively and in their proper context, bear an ascertainable meaning. This approach, no doubt reflecting the experience of centuries of diplomacy, leaves open the possibility that the parties might have dissimilar intentions and might wish to put different interpretations on what they had agreed. When considering the object and purpose of a treaty a court should be cautious about taking into account material which extends beyond what the contracting parties have agreed in the preamble or other common expressions of intent, see article 31.2(a) and (b).¹⁷

The majority panel then declared to have reached the interpretation of the agreement between the Parties 'as a result of construing the words of the 2001 Agreement as prescribed by Articles 31 and 32 of the VCLT. Nothing more and nothing less.'¹⁸ It also added, controversially, that 'No greater or lesser force resides in a term by virtue of the relative magnitude of the clarity with

¹⁴*Hrvatska Elektroprivreda*, Individual Opinion of Jan Paulsson, paras 44 ff. It should be noted though that this dispute is not based on a comprehensive IIA, but on a specific Governing Agreement signed in 2001 by Croatia and Slovenia to solve certain issues related to the delivery of electricity produced by a nuclear power plant.

¹⁵It has been proposed that *low legitimacy* judicial institutions, such as investment tribunals, tend to rely on literal textual interpretative strategies, while *high legitimacy* judicial institutions, such as permanent courts, tend to employ teleological interpretation more freely. Of course the legitimacy of the judiciary has generated an immense amount of scholarship. A more focused approach on investment tribunals, and one of the first to vocalise the 'legitimacy crisis of investment arbitration, in SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions,' 73 *Fordham Law Review* (2004-2005) 1521. This article does not take an explicit position on this distinction between high and low legitimacy institutions, but in any event it seems a bit of a circular argument, where the starting point in classifying the judicial bodies is crucial in analysing their interpretative strategies, and vice versa.

¹⁶*Czech Republic v European Media Ventures SA* [2008] 1 All E.R. (Comm) 531, para. 16.

¹⁷*Ibidem*, para. 19.

¹⁸*Hrvatska Elektroprivreda*, para. 176.

which it has been (or has not been) written.¹⁹ As noted by Paulsson in his Individual Opinion, this statement would be ‘nothing less than revolutionary’ if reflective of the reality of treaty interpretation.²⁰ In fact, ever since Hart’s remarks on the ‘open texture’ of the law,²¹ the general agreement has been precisely the opposite, even if different consequences can flow from it.²² The over-reliance of the Tribunal on ‘contextual’ arguments *sensu lato* (i.e., including not only reading the terms of a particular provision of the treaty in its context, as dictated by Article 31(1) VCLT but also, interpreting the treaty in its context, which, out with the conditions specified in Article 31(2) VCLT – agreements related to the treaty – should not include the general political, social and economic context of the treaty) allows the ‘commercial reasonableness’ to win the day.²³ The choice of this case seems counter-intuitive: here is an investment tribunal having recourse not to the textual interpretation associated with this sort of dispute resolution body, but to an extreme form of teleological interpretation. The crucial factor is that the Tribunal itself defends its interpretation as a proper exercise of textual interpretation (‘Nothing more and nothing less’).

Arguably, the distinction between interpretative approach is somewhat overstated, with the choice reflecting more the status of the decision-making body, rather than being dictated by it. In other words, any interpretative exercise can be successfully argued as being textual or teleologic, depending on the favoured approach in the community of belonging of the court or tribunal. Therefore, the justification of the approach is more revealing of the prejudices of that interpretative community (what it finds acceptable) than an accurate reflection of the work actually performed by the tribunal, as the previous case shows.²⁴

In order to frame the analysis of the case study properly, the next section will deal with the main thrust of the argument, taking inspiration from Nabokov’s comments and Wittgenstein’s reflections on interpretation and rule-following.

C. Conformity and deracination: from Nabokov to Wittgenstein

Treaty interpretation is undertaken by many different actors, at many levels. It is principally an activity undertaken by states in their role as masters of the treaty. So it is the parties themselves in

¹⁹*Hrvatska Elektroprivreda, ibidem.*

²⁰*Hrvatska Elektroprivreda*, Individual Opinion, para. 22.

²¹ These are discussed in more detail in the next Section.

²² Additionally to the literature cited in the next Section, see also B Bix, *Law, Language and Legal Determinacy* (Oxford University Press, 1995).

²³ The contextual criteria of Article 31(3), including the notorious ‘relevant rules of international law applicable in the relations between the parties’ listed at Article 31(3)(c), are not strictly on the same level as the rule in Article 31(1), as apparent by the limitation of Article 31(3) *incipit* (There shall be taken into account).

²⁴In the article, I do not necessarily problematise this distinction, but it is worth noting that several potential contradictions lay undisturbed at the basis of it. For example, the well-known effectiveness principle (*ut res magis valeat quam pereat*) dictates that all terms of a legal text be given effective meaning. Now, there is an obvious tension between this and the highly ritualistic character of legal language, replete with repetitions and figures of speech such as hendiadys, metaphor etc.

the first instance who act as treaty interpreters in their executive, legislative and judicial practice and produce authoritative interpretations, when acting in concert with the other treaty parties. International courts and tribunals are duty-bound to take such interpretative utterances into account; equally, parties to the treaty are under an obligation to respect the terms of the treaty until and unless a different interpretation is agreed upon. This *performative* interpretation – i.e., the interpretation that is intrinsic to the implementation of the treaty by its parties – is other than the *forensic* interpretation required of courts and tribunal when there is a dispute as to the performance of the treaty. States also participate in forensic interpretation to the extent that they are parties not only to the treaties, but also to the judicial or arbitral proceedings that might arise from them.²⁵ Before considering the consequences of this distinction, it might be useful to point out a maybe banal point, i.e. that legal interpretation presents a crucial difference to literary interpretation, as it has to take into account the *multiplicity of voices* reflected in the legal text, which contrasts to the singularity of the authorial voice in a literary text. Domestic legislation contains parliamentary compromises and amendments; international treaties are by definition the result of, at the very least, a dialogue, and often, with multilateral treaties, a cacophony of contrasting voices. In fact, it could be argued that the clarity of a text is inversely proportional to the number of participating voices. While ambiguity is an authorial choice in a literary text – or at least mostly so, as I distinguish ambiguity from interpretative choices – it is often an unintended or conscious necessary consequence of drafting compromises and political wranglings, to be solved *ex post facto* by performative or forensic interpretation.²⁶

The distinction between the performative and forensic interpretation of the treaties, or of any legal text for that matter, which I offer here, constitutes a useful entry point into the argument made in this article. The argument departs from Nabokov's third grade of evil, which I have conceptualised as a sort of *hermeneutic conformity*. In order to better grasp both the distinction and the point of departure, it is useful to consider Wittgenstein's reflections on rule-following. In his *Philosophical Investigations*, he wrote:

[T]here is a way of grasping a rule which is *not* an *interpretation*, but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases. Hence there is an inclination to say: every action according to the rule is an interpretation. But we ought to restrict the term "interpretation" to the substitution of one expression of the rule for another.²⁷

The relevance of 'practice' in rule-following of course needs to be adjusted to account for the fact that the performative interpretation (practice) outlined above is accomplished by those who wrote

²⁵ On the double role of states in this regards, see for example the Dissenting Opinion of Sir Franklin Berman in *Empresas Lucchetti SA and Lucchetti Peru SA v. Republic of Peru*, ICSID Case No. ARB/03/4, Annulment Decision, 5 September 2007, paras 9 ff.

²⁶ Of course, paramount is also the consideration of the consequences of interpretation in a legal context as a normative environment, as opposed to a literary or generally communicative context, where the normative element is absent (there are no legal consequences to an incorrect interpretation).

²⁷ Wittgenstein (1968) para. 201. The distinction made here between interpreting rules through their application and providing a linguistic (therefore system-internal) interpretation nicely maps on the distinction between performative and forensic interpretation, *mutatis mutandis*.

the rules – i.e. the ‘masters of the treaty.’²⁸ Additionally, and crucially, I do not mean to adopt the positivist stance, whereby rule-following as practice defeats the interpretivist position of law as an evaluative and therefore morally charged activity.²⁹ What I mean to ‘salvage’ from Wittgenstein’s reflections is two-fold: on the one hand, his position on language, interpretation and rule-following as a form of practice, where interpretation, by itself, does not determine meaning;³⁰ on the other, the concept of language game in connection with the *forms of life*, by which I take it that Wittgenstein intended a community of ‘shared understandings.’³¹ As Fuller remarked in his critical essay on Hart’s positivism, ‘Wittgenstein’s posthumous *Philosophical Investigations* constitutes a sort of running commentary on the way words shift and transform their meanings as they move from context to context.’³² Fuller was interested in reaffirming the centrality of purpose, and therefore contingently of morality, in interpretation and in what he termed the ‘fidelity’ to law, against a positivist approach. This conscious shift between meaning and purpose is arguably a two way street: just as one is required to consider context in order to interpret correctly any legal term, so equally any legal term comes weighed down by its original context when it is transplanted from one context to another. It is a common preoccupation of legal theorists, as the exchange between Hart and Fuller shows,³³ to understand how meaning is affected by the *legalisation* and *juridification* of language.³⁴ In Hart’s famous example, what meaning can be attributed to the word ‘vehicle’ in the legal rule forbidding to take vehicles in a

²⁸ It is also important to note that Wittgenstein was not concerned either with legal interpretation, nor with rule-following by judges (who are not obeying a rule, they are applying it); this crucial distinction is enough to cast doubt on the use of Wittgenstein to ground the positivist approach to interpretation, for which see the footnote below.

²⁹ For the positivist ‘reading’ of Wittgenstein’s rule following, see A Marmor, *Positive Law and Objective Values* (Clarendon Press, 2001); T Endicott, ‘Putting Interpretation in Its Place,’ 13 *Law and Philosophy* (1994) 451. A useful summary of the interpretivist position by S Berteau, ‘Remarks on a Legal Positivist Misuse of Wittgenstein’s Later Philosophy,’ 22 *Law and Philosophy* (2003) 513.

³⁰ Wittgenstein (1968) para. 23: ‘Here the term “*language-game*” is meant to bring into prominence the fact that the *speaking* of a language is part of an activity, or of a form of life.’ *Ibidem*, para. 202. Also, para. 198: ‘any interpretation still hangs in the air along with what it interprets, and cannot give it any support. Interpretations by themselves do not determine meaning.’

³¹ See Wittgenstein (1968) para. 241: “‘So you are saying that human agreement decides what is true and what is false?’ – It is what human beings *say* that is true and false; and they agree in the *language* they use. That is not an agreement in opinions but in form of life.’ On the difference between *form of life* and *forms of life* in the *Philosophical Investigations*, I follow B Blix, ‘The Application (and Mis-Application) of Wittgenstein’s Rule-Following Considerations to Legal Theory,’ III(2) *Canadian Journal of Law and Jurisprudence* (1990)107, 112, quoting R Haller: ‘Rudolf Haller has shown that Wittgenstein uses this phrase in at least two different ways: 1) (in the singular, *Lebensform*) to summarise “the common human way of acting”, that which is distinctly and universally human; and 2) (in the plural, *Lebensformen*) to emphasise diversity between societies and even between different communities within a single society.’ It is equally important to maintain the distinction between contingent agreements on meaning and shared understandings derived from a common *Lebensform*; see Bix (1995) 16: ‘we must distinguish the agreements that partly constitute the meanings of particular terms and the background conditions of the natural world and social practices which are “the framework within which our language-games are played, not part of the games themselves.”’

³² L Fuller, ‘Positivism and Fidelity to Law – A Reply to Professor Hart,’ 71 *Harvard Law Review*(1958)630, 669.

³³ HLA Hart, ‘Positivism and the Separation of Law and Morals,’ 71 *Harvard Law Review* (1958)593; for Fuller’s rejoinder, see Fuller (1958).

³⁴ By which I mean of course the use of language in a legal or judicial context.

public park?³⁵ His equally famous formulation of a ‘core of settled meaning’ and a ‘penumbra of debatable cases’³⁶ seems to straddle between linguistic interpretation and application of legal rules in a way that is not particularly helpful for those interested in the way language and meaning work in a legal context.³⁷ Neither, at least at this stage, is Fuller’s retort helpful to our argument; his main point, that ‘[it is not possible] to interpret a word in a statute without knowing the aim of the statute’³⁸ is crucial to the thrust of his argument about morality, but takes for granted that contextual interpretation serves the purpose of understanding the meaning of a word in its legal context, without discounting the reality of that word in its wider ‘real world’ context, or, in Wittgenstein’s terms, in its form of life.³⁹ My point, rather, is that there is a process of de-contextualisation and re-contextualisation when a word or a rule is transplanted from one *legal* context to another *legal* context – in the example I use in the next section, from the United States’ constitutional jurisprudence to their IIAs.⁴⁰ In this process, the conformism so lamented by Nabokov takes on a more sinister tinge, because in the process of interpreting the legal rule in compliance with the general rule of interpretation as detailed in the VCLT- and in a commercial context, as we have seen, this will normally take the form of a literal interpretation – investment tribunals unwittingly or not transport its legal context. It is an act of *deracination* that goes beyond cultural blindness, of which for sure investment tribunals are also guilty. In fact, what I am describing is a process that has long taken place in international law, where general principles are normally distilled from domestic legal systems through a comparative analysis. As known to any international lawyer, the Statute of the International Court of Justice⁴¹ recognises these general principles as a source of law in its Article 38:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the *general principles of law recognized by civilized nations*;⁴²

³⁵ Hart (1958)607.

³⁶ *Ibidem*.

³⁷ As noted by Fuller (1958) 661-662. Fuller dismisses the notion that Hart might be simply referring to the difference between easy cases, where the application of the legal rule is clear-cut, and hard cases, when there is a penumbra of uncertainty, and rather prefers the explanation that words have a settled core and a penumbra of meaning, only to reject this as a mistaken assumption based on an overestimation of the value of individual words in the interpretative process. As an aside, in a passage immediately following one that is referred to by Hart in his article, and picked up by Fuller in his rejoinder, Wittgenstein notes: ‘...is a blurred concept a concept at all? – Is an indistinct photograph a picture of a person at all? Is it even an advantage to replace an indistinct picture with a sharp one? Isn’t the indistinct one often exactly what we need?’ See Wittgenstein (1968) para. 71.

³⁸ Fuller (1958) 664.

³⁹ A commoner way of considering this, especially in the scholarly context, is to refer to epistemic communities. Or at least, this is a stepping stone towards the transfer of a term from life to law.

⁴⁰ For another example, see A Asteriti, ‘Social Dialogue, *Laval-Style*,’ 5(2) *European Journal of Legal Studies* (2013)58, 78.

⁴¹ And the Statute of the Permanent Court of International Justice before it, Article 38.

⁴² Statute of the International Court of Justice(1945) 1 *UNTS*993.

It is no secret that the presence of these general principles in most legal systems has more to do with legal colonisation than with any intrinsic commonality (even purged of the racialised ‘civilized nations’ aspect), as acknowledged by C Wilfred Jenks, in his *The Common Law of Mankind*, so that it was clear, to any mid-20th century international lawyer, that such commonality was the result of influence of the common and civil law systems.⁴³ It was equally predictable for the popularity of these general principles to wane in the wake of the decolonisation movements, only to have a resurgence with the universalist language of human rights.⁴⁴

An example of a domestic constitutional principle undergoing a process of migration and globalisation to the point of acquiring potentially the status of general principle is the proportionality principle; originally developed in Germany and raised to the level of constitutional principle by the *Bundesverfassungsgericht*, proportionality analysis has been adopted across the world, not only by other constitutional courts (for example, in Canada, South Africa and Israel) but also by international courts, such as most prominently the European Court of Human Rights and the Court of Justice of the European Union.⁴⁵ Interestingly, proportionality analysis has also reached the exclusive world of investment arbitration;⁴⁶ this process of diffusion has not been completely uncontroversial, and amongst the criticisms, the most pointed has been directed precisely at ‘boundary crossings’ in a decontextualised and decontextualising fashion.⁴⁷

In the following case study, a narrower approach is taken, by considering how words migrate between legal regimes, and the problems of translation they both encounter and engender. Specifically, the case study focuses on provisions on indirect expropriation in the recent (2004 and 2012) United States Model BITs.

D. A case study: – the US model BIT’s annex on regulatory expropriation

⁴³ CW Jenks, *The Common Law of Mankind* (Praeger, 1958). On how the ‘general principles of law recognized by civilised nations’ got to be inserted in the Statute of the Permanent Court of International Justice, see for example M Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press, 2004) 161–162.

⁴⁴ For the use of general principles (seen as the expression of *jus naturale*) in a human rights context, see Judge AA Cançado-Trindade’s Concurring Opinion in the Advisory Opinion *Juridical Condition and Rights of Undocumented Migrants*, OC-18/03 of September 17, 2003, Series A, No. 18, Sections IV–VI.

⁴⁵ The literature on proportionality is, once again, vast. See by way of introduction, R Alexy, ‘On the structure of legal principles, 13(3) *Ratio Juris* (2000) 294.

⁴⁶ See for example B Kingsbury and S Schill, ‘Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest - The Concept of Proportionality’, in S Schill (ed.) *International Investment Law and Comparative Public Law* (Oxford University Press, 2010) 75; more recently, A Stone Sweet and G della Cananea, ‘Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez,’ *Yale Law School, Public Law Research Paper No. 607*, May 2014; available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2435307&download=yes (last visited 31 October 2014).

⁴⁷ JE Alvarez, ‘Beware: Boundary Crossings’, forthcoming in T Kahana and A Schnicov (eds), *Boundaries of Rights, Boundary of State*, available at [http://www.law.yale.edu/documents/pdf/sela/Bewareboundarycrossings_nofootnotes_\(2\).pdf](http://www.law.yale.edu/documents/pdf/sela/Bewareboundarycrossings_nofootnotes_(2).pdf)

The protection against expropriation has traditionally been IIAs' *raison d'être*. In time, the criteria for identifying an expropriation have shifted, with indirect, or regulatory, expropriations becoming the cause of concern for investors and host states alike.⁴⁸ This shift in the object of the rule has not, until recently, generated an equal shift in the legal response, with the remedies for direct expropriations and nationalisations being considered applicable for regulatory expropriations as well;⁴⁹ the attention has instead focused on the scope of the protection, i.e. on the distinction between non-compensable *bona fide* governmental actions, and compensable regulatory measures, where it is acknowledged that it would not be justifiable to burden only some property owners for measures enacted in pursuance of a legitimate public interest. As noted, IIAs have traditionally been quite laconic on the matter, normally not distinguishing between direct and indirect expropriation for the purposes of establishing liability.⁵⁰ As a consequence, a considerable amount of disquiet has been engendered by the application of the expropriation provision in the NAFTA in a series of arbitrations, exemplified by the remark made by the Canadian Judge who reviewed the notorious *Metalclad* Award, the most blatant case of successful indirect expropriation claim: 'The Tribunal gave an extremely broad definition of expropriation for the purposes of Article 1110.This definition is sufficiently broad to include a legitimate rezoning of property by a municipality or other zoning authority.'⁵¹

In 2004, in response to anxieties resulting from the first ten years of application of the NAFTA and its investment chapter, the United States and Canada introduced in their model BITs, by way of Annexes, a definition of regulatory expropriation.⁵² Annex B (Expropriation) of the US Model BIT provides as follows:

The Parties confirm their shared understanding that:

4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(last visited 31 October 2014).⁴⁸ Indirect or regulatory expropriation can be defined as the effect on property of regulatory measures where there is neither transfer of title nor of value between the investor and the state. The topic has generated an immense literature; see by way of introduction UNCTAD, *Expropriation, Series on Issues in International Investment Agreements II* (United Nations, 2012).

⁴⁹ The suggestion has been advanced to adjust the *quantum* of compensation for regulatory takings to reflect either contributory negligence by the investor, or the recognition of the legitimacy of the measures; see A Asteriti, 'Regulatory Expropriation Claims in International Investment Arbitrations: A Bridge Too Far?', in AK Bjorklund (ed.), *Yearbook on International Investment Law & Policy 2012-2013* (Oxford University Press, 2014) 451, 460.

⁵⁰ See for example Article 5 of the 1990 United Kingdom – Argentina BIT: 'Investments of investors of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Contracting Party on a non-discriminatory basis and against prompt, adequate and effective compensation.'

⁵¹ *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, para. 100.

⁵² The clause is also added in the most recent version of the US Model BIT, the 2012 one, available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (last visited 31 October 2014).

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

- (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
- (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
- (iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.⁵³

The language of paragraphs 4(i) to (iii) is modelled on the United States Supreme Court's Judgment in *Penn Central v. New York*, where the Court set up the classic test for the factual *ad hoc* assessment of a regulatory takings claim concerning a partial taking.⁵⁴ In it, the Court laconically stated:

In engaging in these essentially *ad hoc*, factual inquiries, the Court's decisions have identified several factors that have particular significance. *The economic impact* of the regulation on the claimant and, particularly, *the extent to which the regulation has interfered with distinct investment-backed expectations* are, of course, relevant considerations. So, too, is *the character of the governmental action*.⁵⁵

The Court did not elaborate on the criteria, which have since engendered a considerable debate.⁵⁶ The most problematic of the criteria is the third listed by the Court, the *character* of the governmental action, as there is no agreement on what exactly that is, beyond a general fairness or due process requirement.⁵⁷

⁵³ A similarly worded Annex is appended to the CAFTA's Investment Chapter, Annex 10-C. The model treaty was used for the US-Uruguay Treaty, entered into force in 2006, and the US-Rwanda Treaty, signed in 2008.

⁵⁴ *Penn Central Transportation Co v. New York*, 438 US 104 (1978) (*Penn Central*). The Court was influenced by the theoretical grounding provided by F Michelman in his seminal article, "Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" 80 *Harvard Law Review* (1967) 1165.

⁵⁵ *Penn Central*, *supra*, 124 (emphasis added).

⁵⁶ There is a vast bibliography on the Takings Clause and on the *Penn Central* Court's take on it; on the first, see for example R Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard University Press, 1985) and R Epstein, *Supreme Neglect. How to Revive Constitutional Protection for Private Property* (Oxford University Press, 2008); on the second, RS Radford and LA Wake, 'Deciphering and Extrapolating: Searching for Sense in *Penn Central*,' 38 *Ecology Law Quarterly* (2011) 731.

⁵⁷ With reference to this criterion, the Court unhelpfully added that: "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government, [citation omitted], than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 124. Such a statement seems to categorically exclude partial regulatory takings from the purview of the 5th Amendment. A recent analysis of this criterion is in *Lingle v. Chevron*, 544 US 528 (2005).

The *Penn Central* criteria have since been included in several IIAs;⁵⁸ through this inclusion, the Court's approach to regulatory takings might undergo a process of internationalisation and crystallisation, whereby it can evolve into a general customary law rule rather than special custom, similarly, *mutatis mutandis*,⁵⁹ to the process undergone by the Hull standard of compensation, which went from expressing the position of the United States with respect to the Mexican expropriation policy to being included in most IIAs.⁶⁰

As an example of the deracination risk inherent to the migration of legal concepts across jurisdictions, the transposition of the 'character' criterion from the jurisprudence of the US Supreme Court to the language of IIAs, which guarantee access to international arbitration without the need to exhaust domestic remedies, is particularly troubling. Discussing the scope of the *Penn Central* character criterion, the Supreme Court quoted Justice Holmes' famous remark that "...while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking"⁶¹ commenting that "[...] [a] court cannot determine whether a regulation goes "too far" unless it knows how far the regulation goes."⁶² The Court quoted this famous *dictum* from Justice Holmes contextually to its treatment of the third *Penn Central* criterion to argue that the mode in which an administrative measure is implemented has to form part of its assessment and is crucial in determining the ripeness of the claim. The Court consequently argued that the ripeness of a claim might be dispositive, if the government has not had the chance to address the perceived wrong through the appropriate administrative and judicial remedies. Even discounting the problem of conceptualising investment tribunals as international judicial review panels,⁶³ how are tribunals supposed to interpret the reference to the 'character' of the measure? Claims of regulatory expropriation would by definition never be *ripe* as this is interpreted in US jurisprudence, since IIAs do not normally require the exhaustion of domestic remedies in order to establish the admissibility of a claim neither do they impose other regulatory

⁵⁸ Annex B of the 2004 US Model BIT; Annex B.13(1) of the 2004 Canada Model BIT; Annex 3 of the India-Singapore Comprehensive Economic Cooperation Agreement; Annex 10-C of the CAFTA-DR; Article 5(b) of the Indian Model BIPA; Annex 10-D of the Chile-US FTA; Annex 11-B of the Australia-US FTA; Annex 2.3 of the 2009 ASEAN Comprehensive Investment Agreement. On the influence of takings jurisprudence and its constitutionalization in international investment law, see D. Schneiderman, *Constitutionalizing Economic Globalization*, (Cambridge University Press, 2008) Chapter 2.

⁵⁹ Hull's statement was in the context of an international dispute, and it was meant to illustrate what he thought the customary rule on expropriation was (or ought to be); the *Penn Central* criteria originate in domestic constitutional law. Nonetheless, it is precisely the goal of the US to transfer its jurisprudence on to the international plane, in response to generally expressed anxieties about the possibility that the US 'no greater rights' doctrine is not respected and foreign investors under the NAFTA are granted more rights than US investors under the US Constitution; see Schneiderman (2008) 73-74, and the conclusions of the Bipartisan Trade Promotion Authority Act of 2002, 19 USC §§ 3803-3805 (2002).

⁶⁰ US Secretary of State Cordell Hull's statement was in response to a note by the Mexican Foreign Secretary on the existence in international law of the requirement of compensation for "expropriations of a general and impersonal character." Excerpt of Hull's statement in M. Whiteman, (ed.), *Digest of International Law*, vol. 8 (Government Printing Office, 1967) 1020.

⁶¹ *Pennsylvania Coal Co. v. Mahon*, 260 US 393 (1922).

⁶² *Palazzolo v. Rhode Island*, 533 US (2001).

⁶³ As advocated by Thomas Wälde in his Separate Opinion in *International Thunderbird Gaming Corporation v. United Mexican States*, NAFTA/UNCITRAL, Award, January 26, 2006, para. 37.

ripeness requirements.⁶⁴ This *aporetic* circumstance points to the dangers of extrapolating language that is organic to the system that generated it; this deracination of the law, intended as uprooting, goes beyond cultural differences.⁶⁵ It is the point of the act of uprooting to deny the very significance of cultural differences, in a typical hegemonic move. In other words, the ‘character’ criterion as assessed by the US Supreme Court serves, amongst others, the purpose in American constitutional jurisprudence to assess the ripeness of a claim and to give the government the chance to remedy an administrative malpractice or an incorrect decision without engaging issues of constitutional significance. In an international arbitration, this function is completely lost, as the ripeness of the claim has nothing to do with the *iter* of the claim in the domestic courts; an investor’s claim can be escalated immediately from the local level to the constitutional level of an investment arbitration, where, instead of acting as a protection of governmental measures against unripe claims, the criterion is used to assess those same measures against other, vaguely defined standards of appropriateness and legitimacy. This is by no means an indictment of a comparative approach to the development of international rules; neither is it meant to indicate that the adoption of American takings jurisprudence will automatically result in a decrease in host States’ regulatory power. In fact, the *Chemtura* Tribunal, while applying the NAFTA’s Chapter 11, seemed influenced by the US Model BIT, which adopts the *Penn Station* criteria for regulatory takings. And yet, the Tribunal decided against the investor, finding that the regulatory action did not meet the ‘substantial deprivation’ test; in an important *obiter dictum*, the Tribunal clarified that, had the deprivation been substantial, the claim would have nonetheless failed on a police powers exception, which would have relieved Canada of its obligation to pay compensation.⁶⁶ The *dictum* reflects Annex B of the 2004 US Model BIT.

These comments are only meant to keep us alive to the dangers of too easy an adoption of criteria devised for other systems of adjudication, and constitutional ones especially. It has been argued

⁶⁴ The majority of IIAs allowing for the arbitration of investment disputes, and the ICSID Convention, are *lex specialis* for what concerns the obligation to exhaust domestic remedies. As an example of the tension between the ‘ripeness requirement’ in US takings law and the procedural requirements of NAFTA; see V Been and JC Beauvais, ‘The Global Fifth Amendment? NAFTA’s Investment Protections and the Misguided Quest for an International “Regulatory Takings” Doctrine,’ 78 *New York University Law Review*(2003) 30, 83 ff. See also what the Tribunal had to say in *Glamis Gold Ltd. v. The United States of America*, UNCITRAL, Award, 16 May 2009, paras 330 ff.

⁶⁵ I should note that some IIAs and FTAs introduce extra text to explain and clarify what is meant by character; for example, the 2008 ASEAN-Australia-New Zealand FTA contains the following clarification at Article 1(c) of the Annex on Expropriation and Compensation: ‘the character of the government action, including its objective and whether the action is disproportionate to the public purpose.’ Others, like the 2007 Japan-Chile Strategic Economic Partnership Agreement, add that one element is the non-discrimination requirement (Annex ((b)(iii)). Nonetheless, it should be added that, 1) just as many instruments do not add any clarification; 2) the original US wording can be imported through the MFN clause in other instruments; and, 3) these additions confirm rather than disprove the potential hegemonic pull of the US version.

⁶⁶ At para. 266 of the Award: ‘Irrespective of the existence of a contractual deprivation, the Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent’s police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by an increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State’s police powers and, as a result, does not constitute an expropriation’.

that the *Penn Central* criteria found their place in U.S. investment instruments in order to minimise the risk that foreign investors would have access to higher protection than that available to U.S. citizens.⁶⁷ Be that as it may, it certainly constitutes an attempt by the U.S. legislature to ‘imprint’ constitutional jurisprudence into international protections against regulatory expropriations, where these might affect the rights of American citizens against the rights granted to foreigners.

The first application of the regulatory expropriation criteria derived from the *Penn Central* test by an arbitration tribunal is in the *RDC* Award, delivered in June 2012.⁶⁸ The dispute concerned a concession agreement for the provision of railway services in Guatemala. One of the contracts was the object of a *Lesivo* Declaration by the Guatemalan Government, which the claimant argued had amounted to an indirect expropriation of the contractual rights.⁶⁹ In its analysis, the Tribunal performed the classic *ad hoc* enquiry familiar to scholars of Fifth Amendment case law, in order to ascertain if the *Lesivo* Declaration’s character, purpose and interference with investment-backed expectations amounted to an indirect expropriation of the investment. Notwithstanding the detailed review of the facts, the conclusion reached by the Tribunal, that the *Lesivo* Declaration did not amount to an indirect expropriation, depended almost exclusively on the *effect*, which the Tribunal determined “not to rise to the level of an indirect expropriation.”⁷⁰

It is noteworthy that the Tribunal did not make an argument on analogy with the US jurisprudence from which the criteria originate, nor did it cite US cases as authority, despite having adopted the methodology that both underpins and logically results from the criteria as worded in US law. Its approach, relying on the ordinary meaning of the treaty terms without any further inquiry into their domestic origin, is in accordance with the general rule of interpretation as per Article 31 of the VCLT; however, it might nonetheless mask an interpretation that is dependent on the original meaning of the terms as used in a US constitutional context, without any jurisprudential support or explicit recognition.

⁶⁷ In compliance of the Trade Promotion Authority Act of 2002, according to which: ‘....Recognizing that United States law on the whole provides a high level of protection for investment, consistent with or greater than the level required by international law, the principal negotiating objectives of the United States regarding foreign investment are to reduce or eliminate artificial or trade-distorting barriers to foreign investment, while ensuring that foreign investors in the United States are not accorded greater substantive rights with respect to investment protections than United States investors in the United States, and to secure for investors important rights comparable to those that would be available under United States legal principles and practice...’ (19 USC 3801, § 2012(b)(3)).

⁶⁸ *Railroad Development Corporation v. Republic of Guatemala*, ICSID Case No. ARB/07/23, Award, June 29, 2012 (*RDC*).

⁶⁹ A *lesivo* is a “measure adopted by the executive branch where the Government agrees to declare [a] [c]ontract [...] *lesivo* because it causes harm to the State, and instructs and authorizes the Attorney General to take measures to cease its obligatory character.” *RDC*, para. 33.

⁷⁰ *RDC*, para. 56.

E. Concluding remarks

This article aims to open the discussion on an issue that I consider of great importance, i.e. the interpretation of treaty terms across legal regimes and jurisprudential cultures, and takes as an example the adoption of the US constitutional jurisprudence in the US Model BITs. As is well known, the presence in most IIAs of Most-Favoured-Nations clauses allows provisions to travel across treaties, so that a clause in a US treaty might be invoked by investors in a dispute arising under another treaty altogether, increasing the likelihood of individual clauses being incorporated in numerous other IIAs. The article points to the risk of *deracination* of language that is intrinsic to such processes of transmigration. Nabokov identified conformity as the greatest evil in literary translation. In investment arbitration, the apparent conformity of investment arbitrators adopting a literal approach to interpretation – conformity to the interpretative culture of commercial arbitration – hides a more dangerous conformity to the *semantic hegemony* of US legal culture. Contextually, the article argues for a careful and attentive consideration of the words in their context, and the effect that their transfer into another legal context has to their meaning, beyond the simplistic dichotomy between literal and teleologic interpretation, and taking into due account the diverse constitutional traditions that generated them.