

TO THE EDITOR IN CHIEF:

April 22, 1986

Professor W. Michael Reisman's editorial, *Has the International Court Exceeded its Jurisdiction?* (80 AJIL 128 (1986)), should not be allowed to stand without calling attention to an exaggeration that amounts to a complete misreading of text.

In arguing that the compromissory clause of the FCN Treaty between the United States and Nicaragua, which gives the Court jurisdiction over disputes as to "the interpretation or application" of the Treaty, does not present an independent ground for the Court's jurisdiction in *Nicaragua v. United States*, Professor Reisman says that the Court's majority, "for some reason not apparent on the face of the Judgment, ignored Article XXI(1)(d) of the Treaty." That article provides: "The present treaty shall not include the application of measures . . . (d) necessary to fulfill the obligations of a Party for the maintenance or restoration of international peace and security, or necessary to protect its essential security interests." Then Professor Reisman makes his surprising conclusion: "In the face of such explicit language, it is difficult to see how any tribunal could use the Treaty to subject to its own jurisdiction matters that had been expressly excluded."

"*Expressly excluded*"? There is absolutely nothing in the language Professor Reisman quotes that justifies such a conclusion. Far from it. The language almost cries out for "interpretation or application" under the compromissory clause. For example:

- (1) What "obligations" is the United States "fulfilling" when it claims an "essential security interests" exception?
- (2) How much of what the United States did in and around Nicaragua was essential to its security?
- (3) How does the mining of Nicaraguan harbors contribute to the essential security interests of the United States?

A party to the Treaty clearly has the right to judicial interpretation of Article XXI(1)(d). Even if ultimately the United States prevails on what we might call the "Reisman interpretation" of this article, that possibility in no way diminishes the Court's *jurisdiction* so to determine.

Perhaps Professor Reisman has in mind the argument that has sometimes been made in this connection that, after all, an FCN treaty was never meant or intended to apply to military hostilities. Therefore, invoking it in the *Nicaragua* case is inapposite, and Article XXI(1)(d) underscores the point.

This is an argument that can be made concerning the interpretation of the FCN Treaty. Whether or not it is a good argument, it clearly goes to the scope of the Treaty and therefore is a matter for judicial determination under the "interpretation or application" part of the compromissory clause.

And it is not even a very good argument. Imagine for a moment that a nonlawyer is asked the question, "Would a treaty that establishes friendship, commerce and navigation between two countries be violated if one of the two countries surreptitiously lays mines in the harbor of the other country that result in the destruction of a number of commercial vessels?" Only a lawyer, or maybe only a lawyer from New Haven, could be imagined to answer this question: "No, because the parties obviously did not intend the treaty to cover major breaches of friendship, commerce or navigation; their

expectation was only that minor irritations would come within its prohibitions.”

With all my respect for my coeditor, Professor Reisman, I think this time he has failed to respect the ordinary meaning of language.

ANTHONY D'AMATO

W. Michael Reisman replies:

The interpretation of international agreements, always a challenging and often a controversial task, has been measurably facilitated by the Vienna Convention on the Law of Treaties. Article 31(1) of the Convention instructs: “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.” The “ordinary meaning” of the terms of Article XXI(1)(d) of the United States–Nicaragua FCN Treaty is quite plain. As for its object and purpose, the provision could serve no purpose if it did not protect the United States from third-party decision in matters relating to its national security.

With due respect, the issue is not whether one is a lawyer from New Haven, but whether one can read.

TO THE EDITOR IN CHIEF:

May 9, 1986

Sandra Maviglia¹ states that Mexico's recent decision² to permit up to 100 percent foreign ownership in certain industries, including high-technology industries, represents a “rational plan” and an attitude toward foreign investment that has “reached an equilibrium.”³ There are those of us who would disagree.

There is little dispute that Mexico sorely needs transfers of foreign capital and technology. But implementing foreign investment incentives through a series of far-reaching exceptions to Mexico's 1973 Foreign Investment Law (FIL) will probably be ineffective and may even be dangerous to Mexico's stability. Ms. Maviglia correctly points out that it was probably more feasible for the Mexican Government to make its new allowances to foreign investors through an existing, flexible framework than to enact new legislation. But she does not question Mexico's use of the FIL.

The FIL simply was not designed to allow foreign investment. When it was enacted, the FIL culminated over 60 years of consistent attempts by Mexico to reduce and restrict foreign control over its economy and resources. Mexico is now relying on the FIL to facilitate a policy which is antithetical to the FIL's original purpose.

A much better vehicle for attracting needed foreign investment would be Mexico's Foreign Trade Zones (FTZs). Used worldwide by developed

¹ Maviglia, *Mexico's Guidelines for Foreign Investment: The Selective Promotion of Necessary Industries*, 80 AJIL 281 (1986).

² NATIONAL FOREIGN INVESTMENT COMMISSION OF MEXICO, GUIDELINES FOR FOREIGN INVESTMENT AND OBJECTIVES FOR ITS PROMOTION (1984); see also *Heavy Industry, Computer Firms Named: Mexico Invites Foreign Investors*, Wash. Post, Feb. 27, 1984, §C, at 3, col. 1.

³ Maviglia, *supra* note 1, at 304.