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Managing the Risks of International Agreement

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MANAGING THE RISKS OF INTERNATIONAL AGREEMENT. By *Richard B. Bilder*. Madison, Wis.: The University of Wisconsin Press. 1981. Pp. xi, 302. \$22.50.

Treaties are inherently risky. Nations that enter international agreements often expose themselves to a risk of loss or injury. Even if the treaty is fully performed, one nation may find that it made a bad deal and that the treaty's intrinsic value does not outweigh its costs. The possibility that a signatory may inadequately perform or ignore the obligations imposed on it by the treaty further complicates the situation and magnifies the risks of international agreement. If these risks cannot be reduced to tolerable levels, negotiations may break down and the benefits of international cooperation will be lost.

The premise of *Managing the Risks of International Agreement* "is that nations can often overcome the obstacles that risks pose for cooperation through the appropriate use of risk-management techniques" (p. 3). Richard Bilder, a law professor formerly associated with the State Department's Office of the Legal Adviser, points out the importance of risk management in securing effective international agreements and begins to define the role of lawyers in the preparation of international agreements. Although many of the techniques that Bilder suggests are derived from private contractual transactions,¹ lawyers and diplomats cannot ignore important differ-

1. See, e.g., Macneil, *A Primer of Contract Planning*, 48 S. CAL. L. REV. 627 (1975).

ences between private and international agreements. The risk of loss from nonperformance of a private contract, for example, is mitigated by an independent judicial system that stands ready (albeit imperfectly) to compensate wronged parties. But only rarely is a third party available to enforce international agreements. The lawyer, therefore, must ensure not only that a treaty is negotiated, but also that its objectives are achieved. Controlling the risks of nonperformance is particularly important.

Controlling the risks of nonperformance can also be particularly difficult. The lack of an effective judicial system requires international lawyers to be more creative in controlling these risks than attorneys who negotiate private contracts. Although a nation's foreign policy may require it to maintain the expectation that it will honor its international obligations (p. 8), sovereignty creates the possibility that any given agreement will be breached. Bilder illustrates, often by example, a number of ways to minimize this possibility.

If nations do not trust each other, it is very difficult to negotiate peace agreements and other types of treaties. The 1975 and 1979 Egypt-Israel peace treaties therefore contained a variety of devices to protect the parties from the risk of the other's nonperformance. Among the techniques used were articles governing the time of performance, a breakdown of the overall performance into reciprocal step-by-step performance, buffer and demilitarization zones, early warning systems, and third-party guarantees (p. 103). When nations clearly distrust each other, their failure to include provisions of this kind may cause one to question whether they seriously intend to comply with the obligations. The 1973 United States-North Vietnam Truce Agreement exemplifies this (p. 124). The treaty contained detailed risk management provisions concerning two sets of obligations: first, the obligation of North Vietnam to release some 600 U.S. prisoners; and second, the United States's commitment to withdraw its troops from Vietnam and to remove its mines from North Vietnamese harbors. Bilder suggests that the rest of the treaty may have served only a face-saving function for the United States (pp. 110-12).

Lawyers and diplomats drafting international agreements can ensure the adequacy of performance in other ways as well. Most importantly, states should attempt to reduce the probability that another nation could gain from nonperformance. This can sometimes be accomplished by conditioning one's own performance on performance by the other side. A state could thus endeavor to make the other state perform first, arrange for the simultaneous exchange of performances, withhold further performance in the event of breach, or break the arrangement into parts. Since it can be difficult to persuade one party to perform first, breaking the arrangement

down into a series of small, discrete transactions, with each nation's performance of each segment conditioned on the other's performance of the previous segment, is perhaps the most practical approach. This was used successfully in the 1975 Egypt-Israel Sinai agreement. Alternatively, a state can structure an agreement to make nonperformance of a treaty by another state costly. A wide variety of political, military, and economic sanctions could be used to deter nonperformance. Bilder acknowledges several problems with sanctions: They may impose costs on the nation imposing them and may lead to increased intransigence rather than to compliance. As with most of the book's suggestions, no clear standard can be established for when sanctions are appropriate.

Both the risk of nonperformance and the risk of miscalculation of that agreement's value can be controlled by allowing nations broad flexibility to escape their obligations. Such flexibility may be provided, for example, by nonbinding arrangements, equivocal agreements, conventions of limited size and scope, and treaties authorizing unilateral withdrawal. An agreement containing a provision that effectively allows a state to change its mind is not useless. The Helsinki Accord, Bilder observes, was understood by the signatory powers not to involve a "legal" commitment (p. 33). Such a treaty allowed an agreement to be reached between East and West in the sensitive area of human rights. At the very least, the Accord established a basis for further negotiations by providing for a review conference. The continued observance of the Nuclear Test Ban Treaty (p. 52), which allows signatory powers to withdraw from the treaty unilaterally, demonstrates that states tend to view nonbinding agreements as actual commitments. It is doubtful whether states would have entered either the Helsinki Accord or the Nuclear Test Ban Treaty without first finding some method to control the risks of their involvement.

The risk that a state will miscalculate the costs and benefits of a treaty can also be controlled by limiting the treaty's value or providing for its revision. Bilder suggests several methods for controlling a treaty's value. For example, the level of performance under the treaty may be tied to a specific objective standard. This was done in the International Coffee Agreement of 1962, where states agreed to a fixed ratio of export quotas (p. 87). The "value" of an agreement is perhaps more easily identified in an economic setting. It is not surprising, therefore, that the treaties surveyed in this section of the book tend to be commercial in nature. Consequently techniques to control the value of the treaty developed in private contracts are more directly applicable to commercial treaties than to purely political arrangements. Providing expressly for revision of an agreement is another important way for a state to control the risk of an international convention. Treaties establishing international organizations,

for example, frequently provide for a review conference. Provisions that allow revision of a treaty ensure a state's right to question the continued balance and equity of the agreement. Obviously, such a provision affords little protection against a decline in value unless it is accompanied by the right to withdraw if a state's proposals for revision are rejected.

Bilder, of course, concedes the limitations of the risk-management techniques surveyed. No risk management technique is fool-proof. More importantly, these techniques have their own costs and risks. Attempting to incorporate them into a treaty may complicate or even frustrate sensitive negotiations by introducing additional problems. Perhaps the greatest problem with applying the techniques is that proscriptive rules are not possible in this area. Negotiation, especially in the international field, is an art, not a science.

Managing the Risks of International Agreement essentially catalogues a number of risk-management techniques. The student encountering the law of treaties for the first time might find that this book could be profitably read in conjunction with the Vienna Convention on the Law of Treaties.² It provides a good introduction to the difficulties involved in negotiating and drafting an international agreement. The book is well-footnoted and contains useful references to a number of treaties and other international agreements. Bilder's text is largely descriptive, not analytic, and most diplomats and international lawyers will have encountered the treaty clauses discussed in this book elsewhere.³

2. 63 AM. J. INTL. L. 875 (1969); 8 I.L.M. 679 (1969).

3. See, e.g., THE TREATY MAKER'S HANDBOOK (H. Blix & J. Emerson eds. 1973).