I. Introduction

The question as to whether treaties may be amended by subsequent practice had kept the ILC very busy in the course of its elaboration of the Draft Articles on the Law of Treaties. Professor Zemanek implicitly addresses this problem in his article on ‘Court-Generated State Practice’, in which he concludes that it is not the court or supervisory organ that creates state practice, but rather the reaction of states to a decision of such a body. In that way, a court or supervisory organ can only initiate or catalyze the creation of state practice.¹ This view is also confirmed by the relative legal effect of court decisions since, as confirmed by Article 59 of the Statute of the International Court of Justice, they are binding only upon the parties to the dispute, with certain variations concerning intervening states. Accordingly, states not parties to a dispute are not bound by a decision resulting from it. Such states maintain their discretionary power to conform to the decision or not. It will always remain up to them to act in conformity with the relevant decision, notwithstanding the risk of a later negative judgment should a state’s own acts later be judged as not in conformity with the first judicial decision. Accordingly, courts can possibly determine the interpretation only of those treaties to which all parties to the dispute are bound, mostly only bilateral, but hardly multilateral treaties.

The conclusion offered in Zemanek’s contribution seems to assume that the subsequent practice of states is able to modify a treaty. However, Zemanek frames this result in a distinct way by arguing that it is not the treaty that

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¹ See Karl Zemanek, in this volume, at 14.
is modified by subsequent practice, but the obligation(s) resulting from the treaty.\(^2\)

II. Austria’s Position Regarding Draft Article 38 of the Text of the ILC on the Law of Treaties

In this regard, his view differs from that of the ILC itself, which coined this problem as ‘modification of treaties by subsequent practice’. This formulation was the title of draft article 38 of the Draft Articles on the Law of Treaties as submitted by the ILC to the General Assembly.\(^3\) This draft article read as follows:

**Article 38. Modification of treaties by subsequent practice**

A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions.

At the Conference on the Law of Treaties held in Vienna during 1968-1969, various amendments regarding this draft provision were proposed by Finland,\(^4\) Japan,\(^5\) Venezuela,\(^6\) the Republic of Vietnam\(^7\) and France\(^8\) in the Committee of the Whole. The amendments tabled by Finland, Japan, Venezuela and the Republic of Vietnam were identical and proposed a deletion of this provision, whereas France proposed to add an introductory sentence to the existing text. Finally, a roll-call decision on the first four proposals was taken which resulted in 53 votes in favour of, and only 15 against the deletion, with 26 abstentions. Accordingly, this article was dropped and not recommended to the Conference.\(^9\)

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\(^4\) UN Doc A/CONF.39/C.1/L.143.


\(^6\) UN Doc A/CONF.39/C.1/L.206.

\(^7\) UN Doc A/CONF.39/C.1/L.220.

\(^8\) UN Doc A/CONF.39/C.1/L.241: This text proposed, as an introductory phrase of this provision, an insertion of the text: ‘Provided its provisions or the conditions of its conclusion are no bar […]’.

\(^9\) UN Doc A/CONF.39/11/Add.2, at 158.