Introduction

The field of investment treaty arbitration is caught between a principle and belief: tribunals are not bound by precedent and some system of precedent will emerge.

In the first decade of the new millennium, investment arbitration practitioners were enticed by the notion that investment law was developing towards a system of *quasi-*precedent in the decision-making process of investment tribunals. The theory was that although tribunals would never be bound by a strict *de jure* doctrine of precedent, a *de facto* doctrine was taking shape—tribunals would be mindful of or inspired by prior reasoning of other tribunals, and at least attempt to breathe consistency into their determinations of substantive principles.

Some authors were so bold as to assert that the world was witnessing an emerging “common law of investment protection.” The phenomenon of widely published investment awards and the intense debate amongst academics and practitioners were cited as drivers towards a shared understanding of the general tenets of a nascent common law. The exchange of ideas and the iterative process in which investment treaties were forged and tested through arbitration generated a body of case law from which subsequent tribunals could take the good from the past and build on it. It was hoped that this *de facto* doctrine of precedent would bring with it the benefits that users of legal systems

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3 *AES v Argentina* (Jurisdiction) ICSID Case No ARB/02/17, paras. 30–31.
crave—guidance, predictability, efficiency and uniformity; like cases being treated alike.⁴

On reflection, it appears that the phenomenon that was being identified was something different—not a common law as such, with a strict doctrine of stare decisis and a hierarchy of courts, but a jurisprudence constante borrowed from the civil law world—the emergence of a line of decisions being made in the same way that should determine the outcome of future cases.

At the start of this second decade, it is clear that no such jurisprudence constante is emerging. Instead, tribunals continue to issue diametrically opposed decisions on major issues of investment treaty protection. This paper will briefly illustrate this with a few key topics—cooling-off periods, most-favoured-nation clauses, and the treatment of costs—issues that are repeatedly tested in the case law and yet give rise to equal numbers of conflicting decisions.

In actuality, there is no such thing as a jurisprudence constante. Instead, we are witnessing the firm establishment of a jurisprudence non constante to use a term from the Tulip v Turkey Decision (see below): a condition in which awards will provide meagre guidance as to the likely outcome of future disputes.

**Cooling-Off Periods**

It is common for bilateral investment treaties (BITs) to call for a period of negotiations between an investor and the host State in an attempt to amicably resolve their dispute (a so-called “cooling-off period”) before resorting to costly and time consuming international arbitration. An issue that tribunals frequently face is whether cooling-off periods should be strictly construed as a condition precedent to the tribunal's jurisdiction, or whether the condition is merely procedural in nature and may be excused by, for example, the futility of such negotiations. Practitioners will search in vain for a coherent answer on this point in the decided cases.

In 1998, the Tribunal in *Sedelmayer v. The Russian Federation*⁵ permitted non-compliance with pre-arbitration procedures. The same approach was taken in 2001 in *Lauder v Czech Republic*—there was no evidence that negotiations would have been possible and the Tribunal held that insisting on a six month negotiation period was an “unnecessary, overly formalistic approach

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⁵ *Franz Sedelmayer v. Russia Federation*, Arbitration Award, 7 July 1998, paragraph 313.