[Federal Supreme Court of Switzerland]
Bundesgericht
Tribunal fédéral
Tribunale federale
Tribunal federal

4A_187/2020

Judgment of February 23, 2021

First Court of Civil Law

Composition
The Hon. Federal Judges Kiss,
presiding judge, Niquille and Rüedi.
Clerk: M. O. Carruzzo.

Participants in the proceeding
A._____, represented by Attorneys Jean-Marie Vulliemin, Jean Marguerat and Tomàs Navarro Blakemore, Appellant,

versus

1._____
2._____
3._____
4._____
5._____
6._____
7._____
8._____
9._____
10._____
11._____
12._____
13._____
14._____
15._____
16._____
17._____
18._____ all represented by Attorneys Nathalie Voser, Anya George, Sebastiano Nessi and Damien Clivaz,
19._____
20._____
21._____
22._____
23._____
24._____
25._____
26._____ all represented by Attorneys
Allen & Overy LLP, Respondents.

Subject
international arbitration,

civil appeal against the award rendered on February 28, 2020 by an Arbitral Tribunal sitting in Geneva (PCA No. 2012-14).

Facts:

A.
In 1997, A._____ passed a law establishing a special regime to promote renewable energy sources. The details of this special regime were regulated in several successive decrees. Decree no. xxx, issued in 2007, set the Feed-in-Tariff (FIT) for photovoltaic electricity. It provided an attractive FIT for the first 25 years of operation of the photovoltaic installations and a lower FIT for subsequent years. To compensate for inflation, the FIT could be adjusted annually based on the national consumer price index. To be able to sell the electricity produced at the FIT provided for in the said decree, renewable energy producers were required to register with the competent authority within a certain period. Following the adoption of the aforementioned decree, the twenty-six commercial entities mentioned in the heading of this judgment (hereinafter: the investors), all of whom have their registered offices or domicile in a Member State of the European Union (EU), made significant investments and took the necessary steps to be able to sell the electricity produced at the advantageous rate set in the decree.
As early as 2010, A._____ adopted various legislative measures affecting the remuneration of renewable energy producers. In 2013, it adopted a new regulation ending the previous incentives for photovoltaic installations.

B.

B.a. On November 16, 2011, the investors, on the basis of Article 26 (4) b) of the Treaty of December 17, 1994 on the Energy Charter (ECT; RS 0.730.0), introduced an arbitration proceeding against A._____ seeking, among other things, the payment of damages for the violation of art. 10 (1) ECT.

The Respondent moved to dismiss the claim in its entirety.
A three-member arbitral tribunal has been constituted under the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, under the authority of the Permanent Court of Arbitration (PCA), sitting in Geneva.

B.b. The arbitrators, after consultation with the parties, issued Procedural Order No. 4 on February 28, 2013, in which they decided, among other things, to split the proceeding and to first consider the five preliminary objections to the jurisdiction of the Arbitral Tribunal raised by the Respondent.
After receiving the parties' submissions and holding a hearing devoted to the examination of its jurisdiction, the Arbitral Tribunal issued, on October 13, 2014, an Award on Jurisdiction where in the operative part it declared itself competent to hear the dispute between the parties to the present proceeding.
In particular, the Arbitral Tribunal rejected the third ground for the lack of jurisdiction invoked by the Respondent, according to which intra-Community disputes between a company that has its registered office in an EU Member State and an EU Member State concerning investments covered by the ECT made by the former in the territory of the latter cannot be settled by arbitration (hereinafter: the intra-Community exception).
In interpreting the ECT in accordance with the rules of the Vienna Convention of May 23, 1969, on the Law of Treaties (RS 0.111), the arbitrators found that the EU, itself a party to the ECT, had not expressed any reservation with regard to the possibility of submitting an intra-Community dispute to the arbitration procedure provided in Art. 26 ECT. The EU's declaration of accession to the ECT does not provide for any special regime to be applicable to such disputes falling within the scope of the said treaty. The Arbitral Tribunal observes that the parties to the ECT have nevertheless expressly reserved certain provisions contained in other treaties, when they considered it necessary to regulate the relationship between the ECT and those treaties. It further notes that the ECT does not contain a "disconnection clause", allowing the member parties of a regional organization such as the EU to refrain from applying the rules of the ECT in their mutual relations. Neither the EU nor its members have therefore expressed any intention to exclude the dispute resolution mechanism of the ECT. Second, the arbitrators consider that Article 344 of the Treaty on the Functioning of the EU (TFEU), under which Member States undertake not to submit a

dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein, does not exclude recourse to arbitration. This rule applies only to disputes between two Member States. Indeed, the European treaties do not contain rules on arbitration between a Member State and an investor. Moreover, Article 344 TFEU does not *a priori* prevent the submission of certain disputes falling within the scope of the ECT that do not concern the interpretation or application of European law to an arbitral tribunal. Moreover, the Court of Justice of the EU (CJEU) does not have a monopoly in the field of interpretation and application of European law. Therefore, there is no incompatibility between the arbitration procedure under Art. 26 ECT and the role of the CJEU. The other elements put forward by the Respondent do not lead to a different conclusion. In particular, the position taken by the European Commission (EC) in various arbitration proceedings relating to intra-Community disputes cannot be regarded as an interpretation shared by all parties to the ECT as to the meaning to be given to certain provisions of that Treaty. At the end of their analysis, the arbitrators think they have jurisdiction under Art. 26 ECT to hear intra-Community disputes, while noting that such a solution is consistent with that adopted by other arbitral tribunals that have had to decide the same question.
The decision on jurisdiction was not the subject of a civil appeal or a request for review.

B.c. Following the issuance of this award, the Arbitral Tribunal continued its hearing of the case. On August 13, 2018, the Respondent requested the Arbitral Tribunal to consider a "new jurisdictional objection" based on "new facts" and to open a new hearing on this matter and to allow it to produce the following three documents in support of this objection (hereinafter collectively referred to as the Achmea documents):

- the CJEU decision dated March 6, 2018, in *Achmea v. Slovakia* (C-284/16), in which the CJEU ruled on the compatibility with the TFEU of the arbitration clause contained in a bilateral investment treaty;
- a July 19, 2018 communication from the EC, entitled "Intra-EU Investment Protection," calling on EU Member States to, among other things, "draw all necessary consequences from the Achmea judgment" by formally terminating their bilateral investment treaties;
- a fact sheet published on July 19, 2018, in which the EC points out that investor-state arbitration under bilateral investment treaties between EU member states is not compatible with European law.

After allowing two exchanges of written pleadings between the parties on these requests, the Arbitral Tribunal issued Procedural Order No. 19 (hereinafter PO 19) on October 15, 2018, entitled "Decision on the Respondent's Request to Open a New Jurisdictional Phase", in which it rejected the said requests. In the Order, it pointed out, among other things, that the Respondent had already raised several jurisdictional objections which had been set aside in the Award on Jurisdiction of October 13, 2014. According to Swiss law which is applicable to the *lex arbitri* ["law of arbitration"], "the 2014 Preliminary Award has thus *res judicata effect* or conclusive and preclusive effects comparable to *res judicata*"; PO 19, No. 27). In the opinion of the arbitrators, the Respondent is, in essence, seeking a re-examination of the previously rejected intra-community exception by reference to the Achmea documents. The Arbitral Tribunal considers that the documents referred to by the Respondent do not alter the nature of the objection already raised, but merely add possible legal arguments in support of it. That being the case, the alleged "new" plea of lack of jurisdiction is the same as the one already raised at the beginning of the proceedings, and therefore the conclusions reached by the Arbitral Tribunal in its award on jurisdiction are binding. The Arbitral Tribunal then makes some observations on the requirements for requesting a review of the award on jurisdiction, insofar as the parties have raised this point in their respective pleadings. It notes that such a request for review would be doomed to fail. In this respect, it points out in particular that the Achmea documents do not constitute "facts".
PO 19 was not the subject of a civil appeal or a request for review. Nor did the Respondent raise any objections to this order during the subsequent hearing of the arbitration case.

B.d. On February 12, 2019, the Respondent requested the inclusion in the arbitration case file of a Declaration of January 15, 2019, signed by twenty-two EU Member States, on "the legal consequences of the *Achmea* judgment of the Court of Justice and the protection of investments in the European Union" (hereinafter: the Declaration of the 22 member States).
After ordering a further exchange of written pleadings, the Arbitral Tribunal granted this request. On March 7, 2019, the Respondent requested that the Arbitral Tribunal review its jurisdiction ex officio in light of the Declaration of the 22 member states [...]. After hearing from the Claimants, the Arbitral Tribunal retained this request for a decision.

B.e. Under the terms of an award dated February 28, 2020, the arbitral tribunal found that the Respondent had violated Article 10(1) ECT and ordered it to pay various amounts to certain Claimants totaling more than EUR 91 million.
The arbitrators denied the request to reconsider the matter of their jurisdiction, stating, among other things, as follows (Award, No. 543-544):

"543. (...) It is undisputed that the Preliminary Award was not challenged. As a result, that award binds the Tribunal and has thus *res judicata* effect or conclusive and preclusive effects comparable to *res judicata*. The Tribunal stated this position on repeated occasions throughout these proceedings, including in Procedural Order No. 19 issued on 15 October 2018 ("PO19"). In PO19, the Tribunal denied...'s request to "open a new jurisdictional phase" as a consequence of the judgment rendered by the CJEU in *Achmea* and the related communication and fact sheet issued by the European Commission, as it considered that the Respondent was seeking to re-litigate the same intra-EU objection, which the Tribunal had already denied in the Preliminary Award on Jurisdiction.
544. The Tribunal considers that the situation is no different here, as the Respondent requests that the Tribunal "reconsider ex officio its jurisdiction" in relation to the same intra-EU jurisdictional defense which... raised at the outset of the proceedings and on which the Tribunal ruled in the Preliminary Award on Jurisdiction. In PO19, the Tribunal considered that the *Achmea* judgment, the EC communication, and the fact sheet did not change the nature of the intra-EU objection already resolved by the Tribunal, as its essence remained the same. It can reach no different conclusion in this instance. Indeed, the Declarations which... now invokes purport to provide an interpretation on "the legal consequences of the Judgment of the Court of Justice in *Achmea* and on investment protection in the European Union". Thus, in no way do they alter the intra-EU objection. They simply add possible legal arguments in support of it. This being so, the Tribunal is of the view that its holdings in the Preliminary Award on Jurisdiction in respect of the intra-EU jurisdictional objection continue to be binding upon the Tribunal and cannot be re-opened. This conclusion is further consistent with the accepted principle that the relevant time for determining jurisdiction is the date of initiation of the proceedings."

C.
On April 27, 2020, the Respondent (hereinafter the Appellant) filed a civil appeal with the Federal Supreme Court, together with a request for suspensive effect, for the purpose of setting aside the final award of February 28, 2020.
In their reply, respondents 1 to 3 and 5 to 9 concluded that the appeal should be dismissed to the extent that it was admissible and that the request for suspensive effect should be rejected.
Respondents 4 and 10 to 18 indicated that they did not intend to file submissions. The remaining respondent parties did not file a response and did not make a submission on the motion for suspensive effect.
The Arbitral Tribunal stated that it would refer to its award and would not take a position on the request for suspensive effect.
The Appellant filed an unsolicited reply, prompting a rejoinder from respondents 1 to 3 and 5 to 9.
Suspensive effect was granted to the appeal by presidential order of August 19, 2020.

On points of law:

1.
According to Art. 54 (1) LTF [*Loi sur le Tribunal Fédéral*: Federal Supreme Court Act], the Federal Supreme Court writes its judgment in one of the official languages, and as a general rule in the language of the decision being appealed. If the decision in question was issued in another language, the Federal Supreme Court uses the official language chosen by the parties. Before the Arbitral Tribunal, said parties used English and Spanish, whereas the Appellant used French in its statement of claim to the Federal Supreme Court, thus complying with Art. 42 (1) LTF in conjunction with Art. 70 (1) Swiss Federal Constitution [Cst.] (**ATF 142 III 521** recital 1). In accordance with its practice, the Federal Supreme Court will therefore render its judgment in French.

2.
In the field of international arbitration, appeals in civil matters are admissible against decisions of arbitral tribunals under the conditions provided for in Articles 190 to 192 of the Federal Act on Private International Law of December 18, 1987 (LDIP [*Loi fédérale sur le Droit International Privé*]; RS 291), in accordance with Article 77 (1) (a) LTF.
The seat of the arbitration is in Geneva. None of the parties had their registered offices or domicile in Switzerland at the relevant time. Therefore the provisions of chapter 12 of the Swiss Federal Law on Private International Law are applicable (art. 176 (1) LDIP).

3.

3.1. An appeal in international arbitration proceedings can only be lodged on one of the grounds listed exhaustively in Art. 190 (2) LDIP (art. 77 (1) (a) LTF).
An appeal against an arbitration award must comply with the requirement to state reasons as set out in Art. 77 (3) LTF in conjunction with Art. 42 (2) LTF and case law on the latter provision (**ATF 140 III 86** recital 2 and references). This presupposes that the Appellant discusses the reasons for the award and indicates precisely in what way it believes the author of the award has violated the law (Judgment 4A_522/2016 of December 2, 2016, recital 3.1). It may only do so within the limits of the admissible grounds of appeal against the award, i.e. only with regard to the complaints listed in article 190 (2) LDIP when the arbitration is of an international nature. Moreover, as this reasoning must be contained in the notice of appeal, the Appellant cannot use the procedure of asking the Federal Supreme Court to refer to the allegations, evidence and offers of proof contained in the pleadings in the arbitration case file. Likewise, the Appellant would be using the reply in vain to put forward arguments of fact or law that were not submitted in due time, i.e. before the expiry of the non-extendable time limit for appeal (art. 100 (1) LTF in conjunction with art. 47 (1) LTF), or to supplement, outside the time limit, an insufficient statement of reasons (judgment 4A_34/2016 of April 25, 2017, recital 2.2).

3.2. The Federal Supreme Court decides on the basis of the facts as stated in the award under appeal (cf. art. 105 (1) LTF). It cannot correct or supplement the arbitrators' findings ex officio, even if the facts have been established in a manifestly incorrect manner or in violation of the law (cf. art. 77 (2) LTF, which excludes the application of art. 105 (2) LTF). The arbitrator's findings on the course of the proceedings are also binding on the Federal Supreme Court, whether they relate to the parties' submissions, the facts alleged or the legal explanations given by the parties, statements made during the course of the proceedings, requests for evidence, or even the content of testimony or an expert opinion or information gathered during a visual inspection (judgment 4A_322/2015 of June 27, 2016, recital 3, and the precedents cited).
The task of the Federal Supreme Court, when presented with an appeal in civil matters against an international arbitral award, is not to rule with full cognition, as an appellate court would, but only to examine the question of whether or not the admissible complaints against the award are well-founded. Allowing the parties to allege facts other than those found by the arbitral tribunal, apart from the exceptional cases reserved by case law, would no longer be compatible with such a task, even if these facts were established by the evidence in the arbitration case file (judgment 4A_386/2010 of January 3, 2011, recital 3.2).

4.

4.1. The appeal in civil matters referred to in Art. 77 (1) (a) LTF in conjunction with Art. 190 to 192 LDIP is only admissible against an award. The appealable act can be a final award, which puts an end to the arbitration proceedings for a substantive or procedural reason, a partial award, which deals with a quantitatively limited part of a disputed claim or with one of the various claims at issue, or which puts an end to the proceedings with regard to one of the parties (**ATF 143 III 462**, recital 2.1; judgment 4A_222/2015 of January 28, 2016 recital 3.1.1), or even a preliminary or incidental award, which settles one or more preliminary questions of substance or procedure (on these concepts, cf. **ATF 130 III 755** recital 1.2.1 p. 757). On the other hand, a simple procedural order that can be modified or revoked in the course of the proceedings is not subject to appeal (**ATF 143 III 462** recital 2.1; **136 III 200** recital 2.3.1. p. 203; **136 III 597** recital 4.2; judgment 4A_596/2012 of April 15, 2013 recital 3.3).
In order to determine the admissibility of the appeal, what is decisive is not the name of the decision, but rather its content (**ATF 143 III 462**, recital 2.1; **142 III 284** recital 1.1.1; judgment 4A_222/2015, mentioned above, recital 3.1.1).

4.2. Art. 186 (3) LDIP provides that, as a general rule, the arbitral tribunal shall decide on its jurisdiction by an incidental decision. Although this provision expresses a rule, it is not mandatory and absolute, and its violation is not subject to any sanction (judgment 4A_222/2015, mentioned above, recital 3.1.2 and references). The arbitral tribunal may depart from this rule if it considers that the plea of lack of jurisdiction is too closely linked to the facts of the case to be judged separately from the merits (**ATF 143 III 462** recital 2.2; **121 III 495** recital 6d p. 503).

If the arbitral tribunal, having first examined the question of jurisdiction, declares that it does not have jurisdiction, thereby putting an end to the proceedings, it shall make a final award (**ATF 143 III 462** recital 3.1). When it dismisses a plea of lack of jurisdiction, by a separate award, it renders an incidental decision (Art. 186 (3) LDIP), regardless of what name is given to it (**ATF 143 III 462** recital 2.2; judgment 4A_414/2012 of December 11, 2012 recital 1.1). According to art. 190 (3) LDIP, this decision, which the parties must take immediately (**ATF 130 III 66** recital 4.3), can only be challenged before the Federal Supreme Court on the grounds of irregular composition (Art. 190 (2) (a) LDIP) or lack of jurisdiction (Art. 190 (2) (b) LDIP) of the arbitral tribunal. The complaints referred to in Art. 190 (2) (c) LDIP 190 (2) (c) LDIP may also be raised against incidental decisions within the meaning of Art. 190 (3) LDIP, but only insofar as they are strictly limited to

matters directly concerning the composition or jurisdiction of the arbitral tribunal (**ATF 143 III 462** recital 2.2; **140 III 477** recital 3.1; **140 III 520** recital 2.2.3).

5.

5.1. In the first part of its argument, the Appellant objects to PO 19 issued on October 15, 2018. According to said Appellant, the Arbitral Tribunal had, on this occasion, violated its right to be heard (Art. 190 (2) (d) LDIP) by refusing to examine its "new arbitration objection" and by rejecting its request for production of the Achmea documents intended to support the said objection. The Arbitral Tribunal also allegedly misapplied the principle of res judicata, by wrongly considering itself bound by the award on jurisdiction it had issued on October 13, 2014. Therefore, it violated the procedural public policy (art. 190 (2) (e) LDIP).

5.2. In the present case, the Arbitral Tribunal, before deciding on the merits, issued two decisions in relation to the question of its jurisdiction, namely the Preliminary Award of October 13, 2014 and PO 19. The Appellant did not directly challenge either of these decisions.

5.2.1. In the preliminary award, the three arbitrators dismissed the five objections to jurisdiction raised by the Appellant, including the intra-Community objection. Given that this incidental decision on jurisdiction, within the meaning of Art. 186 (3) and Art. 190 (3) LDIP, was not taken directly by the Appellant, it cannot be challenged at this stage.

5.2.2. Subsequently, the Appellant raised a plea of lack of jurisdiction, based on new facts, i.e. the Achmea documents. After having heard the views of the parties on this point, the Arbitral Tribunal issued PO 19 in which it dismissed the alleged new objection as well as the related procedural submissions, such as the authorization to produce the Achmea documents and the opening of an investigation into this new objection. It is therefore necessary to determine the nature of PO 19 and to draw the appropriate conclusions as to the admissibility of the complaints raised by the Appellant.
In order to classify the decision, it is necessary to disregard its name (procedural order). As for its content, PO 19 has nothing to do with a simple procedural order that can be modified or revoked during the course of the proceedings. Indeed, in this incidental decision, the Arbitral Tribunal refused to revisit the issue of its own jurisdiction and to order further proceedings on this point, as it rightly considered that the Appellant was seeking the re-examination of the same intra-Community exception already set aside in the award on jurisdiction of October 13, 2014. PO 19 is thus a decision that clearly relates to jurisdiction and which the Arbitral Tribunal in no way suggests would be of an interim nature. Such a decision, i.e. the refusal to re-examine a plea of lack of jurisdiction that has already been rejected, must be considered as an incidental decision on jurisdiction within the meaning of art. 186 (3) LDIP, whose purpose is to confirm the preliminary award on jurisdiction. The Appellant could and should therefore have challenged the PO 19 within 30 days. If we follow the argument developed in its appeal, it could then be argued that the arbitral tribunal had wrongly refused to enter into the matter of its new arbitration objection, thus violating art. 190 (2) (b) LDIP. As to the origin of this violation, it could have reproached the arbitrators not only for having refused to take into consideration the documents produced in support of the said objection, i.e. the Achmea documents, but also for having disregarded the principle of res judicata by considering itself bound by the preliminary award. The Appellant's complaints, based on the violation of Art. 190 (2) (d) and (e) of LDIP , concern points that are intrinsically linked to the jurisdiction of the Arbitral Tribunal. Consequently, the Appellant could and should have raised them immediately by directly challenging PO 19. Since it did not do so, it is now precluded from invoking any of these complaints.

6.
In a second part of its argument, the Appellant criticizes the arbitrators for having made a final award that allegedly infringed its right to be heard (art. 190 (2) (d) LDIP) and would have been contrary to procedural public policy (art. 190 (2) (e) LDIP).

6.1. In its final award, the Arbitral Tribunal rejected a new request by the Appellant for an ex officio review of its jurisdiction with regard to the Declaration of the 22 member states. It did so for the same reasons as those that led it to reject the new objection to jurisdiction in PO 19. In this respect, the two awards are of the same nature and differ only in their incidental or final character. With regard to the rejection of said request, the final award could have been the object of the lack of jurisdiction complaint of the Arbitral Tribunal (art. 190 (2) (b) LDIP). However, the Appellant does not make such a claim in its appeal. In its reply, it certainly puts forward, for the first time, a plea relating to subjective arbitrability.

Any such attempt to lodge a complaint on the grounds of lack of jurisdiction in the reply is immediately doomed to fail. The appeal is therefore inadmissible to the extent that it relates to matters that fall directly within the jurisdiction of the Arbitral Tribunal.
It is questionable whether the Appellant, insofar as it is contesting the refusal of the Arbitral Tribunal to reconsider its award on jurisdiction of October 13, 2014, in the final award, can raise the claims of violation of the right to be heard and of procedural public policy, even though it did not raise the claim that the arbitrators lacked jurisdiction. This seems very dubious, since in so doing the claimant is only contesting the procedure relating to the rejection of its request for reconsideration of the arbitral tribunal's jurisdiction, or the reasons for this rejection, without questioning the implicit confirmation by the arbitrators of their jurisdiction. Regardless, both complaints, assuming they are admissible, must be rejected in any event.

6.2.

6.2.1. The Appellant, to support the complaint that its right to be heard had been violated, alleges that the contested award constitutes a denial of justice because the Arbitral Tribunal, by misapplying the principle of res judicata, refused to examine the new objection to arbitration that it had raised.

6.2.2. Such a plea is clearly wrong. In the present case, the Appellant, on March 7, 2019, requested that the Arbitral Tribunal reconsider its jurisdiction ex officio. After ordering a further exchange of pleadings on this issue, the arbitrators rejected this request and set out the reasons for this in the award under appeal. The Arbitral Tribunal therefore ruled on the request for reconsideration of its jurisdiction that had been submitted to it. In these circumstances, the arbitrators cannot be accused of violating the Appellant's right to be heard or of having been guilty of denial of justice.

6.3.

6.3.1. The Appellant claims that the Arbitral Tribunal violated procedural public policy by misapplying the principle of res judicata. Indeed, the arbitrators allegedly wrongly considered that the objection to jurisdiction raised last by the Appellant did not constitute a new ground of lack of jurisdiction but rather an attempt to obtain a new decision on the objection of the same nature already considered in the context of the award on jurisdiction of October 13, 2014. By wrongly characterizing the Declaration of the 22 member states produced by the Appellant as a legal argument and not a factual one, the Arbitral Tribunal would have considered itself unduly bound by the award on jurisdiction and would thus have refused to take this new factual element into consideration. Finally, the arbitrators wrongly considered that the decisive moment for assessing their jurisdiction was the date of the commencement of the arbitration and not the date of the final award.

6.3.2. Public policy, within the meaning of Art. 190 (2) (e) LDIP, contains two elements: substantive public policy and procedural public policy. The latter, which is the only one at issue here, guarantees the parties the right to an independent assessment of the claims and facts submitted to the Arbitral Tribunal in a manner consistent with the applicable procedural law. There is a violation of procedural public policy when fundamental and generally recognized principles have been violated, leading to an unbearable contradiction with the sense of justice, so that the decision appears incompatible with the values recognized in a state governed by the rule of law (**ATF 132 III 389** recital 2.2.1). This guarantee is subsidiary: it can only be invoked if none of the grounds provided for in Art. 190 (2) (a-d) LDIP come into play. It is a precautionary norm for procedural defects that the legislator would not have considered when adopting the provisions of the other letters of art. 190 2 LDIP (**ATF 138 III 270** recital 2.3).
An arbitral tribunal violates procedural public policy if it rules without regard to the res judicata effect of an earlier decision or if it departs in its final award from the opinion it expressed in a preliminary ruling on a preliminary question of substance (**ATF 136 III 345** recital 2.1 p. 348; **128 III 191** recital 4a p. 194 and the authors cited). Final awards have the material authority of res judicata. As for preliminary or incidental awards, which settle preliminary questions of substance or procedure, they do not have the authority of res judicata; nevertheless, unlike simple procedural orders or directives which may be modified or revoked during the course of the proceedings, such awards are binding on the arbitral tribunal from which they emanate (**ATF 128 III 191**, 4a; **122 III 492** 1b/bb and references).

6.3.3. Considered in the light of the above principles, the complaint must be rejected. It must be emphasized at the outset that the explanations given by the Appellant in its written submissions are singularly lacking in clarity and are, moreover, of a markedly appellatory nature. In any event, the arguments presented by the Appellant do not in any way demonstrate that the arbitrators ruled without taking into account a previous decision or that they deviated, in their final award, from a previous

preliminary award, which is the only thing that matters here when it comes to establishing whether there is a potential conflict with procedural public policy. Under the guise of an alleged violation of the principle of res judicata, the Appellant in fact merely criticizes the reasons underlying the Arbitral Tribunal's decision not to reconsider its jurisdiction, without, however, calling into question the very principle of the Arbitral Tribunal's jurisdiction, since it does not at any time raise the complaint of lack of jurisdiction. In this case, the arbitrators considered that they were bound by the award on jurisdiction that they had previously made. In these circumstances, they cannot be accused of having made an award that is incompatible with procedural public policy, regardless of the reasons underlying that decision.
Otherwise, insofar as it criticizes the arbitrators for having considered that they should have examined their jurisdiction at the time of the initiation of the arbitration proceedings and not at the time of the pronouncement of the award, the Appellant formulates a complaint which does not fall within the principle of res judicata, but which relates to the jurisdiction of the Arbitral Tribunal. However, the Appellant does not raise the complaint of lack of jurisdiction in its appeal. There is therefore no need to examine this question.

7.
Ultimately, the appeal must be rejected to the extent that it is admissible.
The Appellant, as the unsuccessful party, shall pay the court costs (art. 66 (1) LTF) and shall pay to the respondents 1 to 3 and 5 to 9, joint and several creditors, an indemnity for costs (Art. 68 (1) and (2) LTF). The other respondent parties are not entitled to costs.

For these reasons, the Federal Supreme Court rules as follows:

1.
The appeal is dismissed to the extent that it is admissible.

2.
The legal costs, set at CHF 200,000, are to be borne by the Appellant.

3.
The Appellant shall pay, to the respondents 1 to 3 and 5 to 9, joint and several creditors, an indemnity of CH 250,000 for expenses.

4.
This judgment shall be communicated to the parties' representatives and to the Arbitral Tribunal sitting in Geneva.

Lausanne, February 23, 2021

On behalf of the First Civil Court of
the Federal Supreme Court of
Switzerland

Presiding Judge: Kiss

The Clerk: O. Carruzzo