

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

In the arbitration proceeding between

**ABH HOLDINGS S.A.**

**Claimant**

**v.**

**UKRAINE**

**Respondent**

**(ICSID Case No. ARB/24/1)**

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**PROCEDURAL ORDER NO. 2**

**On Transparency and Confidentiality**

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***Members of the Tribunal***

Prof. Bernard Hanotiau, President of the Tribunal

Mr. Francis Xavier SC, Arbitrator

Prof. Sean D. Murphy, Arbitrator

***Secretary of the Tribunal***

Mr. Yuichiro Omori

***Assistant to the President of the Tribunal***

Ms. Iris Raynaud

October 7, 2024

## **I. PROCEDURAL BACKGROUND**

1. On July 22, 2024, the Tribunal circulated a draft of this order (“Draft PO2”) for discussion by the Parties.
2. On August 28, 2024, the Parties commented on Draft PO2.
3. On September 12, 2024, the first session was held. During the first session, the Parties and the Tribunal discussed the Parties’ comments on Draft PO2 and the draft Procedural Order No. 1.
4. On September 23, 2024, the Tribunal circulated a revised version of Draft PO2 for the Parties’ further comments.
5. On September 30, 2024, the Parties confirmed that they had no further comments on the revised version of Draft PO2.
6. This Procedural Order No. 2 contains the Parties’ agreements and the Tribunal’s decisions concerning the transparency regime governing this case.

## **II. LEGAL FRAMEWORK**

7. The legal framework applicable to these proceedings is determined by the Agreement between the Belgo-Luxembourg Economic Union and the Government of Ukraine on the Reciprocal Promotion and Protection of Investments dated May 20, 1996, which entered into force on July 27, 2001 (“BIT”), the ICSID Convention, and the 2022 ICSID Arbitration Rules. ICSID Arbitration Rules 62-66 contain provisions concerning the publication of the award, orders and decisions, other documents filed in the proceedings, transcripts and recordings of hearings, open hearings and the definition of confidential or protected information.
8. In accordance with ICSID Arbitration Rule 1(2), the Parties may agree on other rules governing transparency and confidentiality of this proceeding.
9. In this case, the BIT is silent with respect to transparency /confidentiality. Therefore, the applicable provisions are those set out in Article 48(5) of the ICSID Convention and ICSID Arbitration Rules 62-66 as amended/supplemented by Section III of this Order.
10. In accordance with ICSID Arbitration Rule 66 confidential or protected information is information which is protected from public disclosure:
  - (a) by the instrument of consent to arbitration;
  - (b) by the applicable law or applicable rules;
  - (c) in the case of information of a State party to the dispute, by the law of that State;
  - (d) in accordance with the orders and decisions of the Tribunal;
  - (e) by agreement of the parties;
  - (f) because it constitutes confidential business information or protected personal information;

- (g) because public disclosure would impede law enforcement;
- (h) because a State party to the dispute considers that public disclosure would be contrary to its essential security interests;
- (i) because public disclosure would aggravate the dispute between the parties; or
- (j) because public disclosure would undermine the integrity of the arbitral process.

### **III. TRANSPARENCY RULES**

- 11. The Tribunal adopts the following transparency and confidentiality rules governing the proceedings.

#### **A. AWARD (ICSID ARBITRATION RULE 62)**

- 12. The Tribunal notes that the Parties disagree as to the publication by ICSID of the Award. Accordingly, ICSID Arbitration Rule 62 applies in this proceeding.

#### **B. ORDERS AND DECISIONS (ICSID ARBITRATION RULE 63)**

- 13. The Parties agree that ICSID shall publish the orders and decisions of the Tribunal or the Chairman of the ICSID Administrative Council, with any redactions agreed by the Parties or decided by the Tribunal, in accordance with Section G below.

#### **C. WRITTEN SUBMISSIONS (ICSID ARBITRATION RULE 64)**

- 14. The Tribunal notes that the Parties disagree as to the publication by ICSID of their written submissions. Accordingly, ICSID Arbitration Rule 64 applies in this proceeding.

#### **D. SUPPORTING DOCUMENTS (ICSID ARBITRATION RULE 64)**

- 15. The Parties agree that supporting documents, including exhibits, legal authorities, witness statements and expert reports (including annexes, appendices or exhibits thereto) shall not be published by ICSID, unless both Parties agree otherwise.

#### **E. OPEN HEARINGS (ICSID ARBITRATION RULE 65(1)-(2))**

- 16. The Tribunal notes that the Parties disagree as to whether hearings shall be open to the public. Accordingly, ICSID Arbitration Rule 65(1)-(2) applies in this proceeding.

#### **F. TRANSCRIPTS AND RECORDINGS OF HEARINGS (ICSID ARBITRATION RULE 65(3))**

- 17. The Tribunal notes that the Parties disagree as to the publication of recordings or transcripts of hearings. Accordingly, ICSID Arbitration Rule 65(3) applies in this proceeding.

#### **G. PROCEDURE FOR REDACTIONS - NON-DISCLOSURE OF CONFIDENTIAL OR PROTECTED INFORMATION (ICSID ARBITRATION RULE 66)**

- 18. With respect to publication pursuant to Sections B, C, D and F above, any confidential or protected information as defined in ICSID Arbitration Rule 66 and/or under Ukrainian law that is submitted to the Tribunal shall be protected from disclosure and publication in accordance with the procedure set forth below:

19. Within 14 days from the date of a decision or order, or the Parties' consent to the publication of a written submission, supporting document, final transcript or recording, a Party shall give written notice to the Tribunal and the other Party that it requests the non-disclosure of certain information it considers confidential or protected. The Parties agree, for the purpose of making a redaction request under this section, that the Chairman's Decision on the Claimant's Proposal to Disqualify an arbitrator dated July 15, 2024 was issued on the date of this Procedural Order. Absent such a notice within the 14-day timeline, and unless the Tribunal determines on its own initiative that certain information is not to be made public in accordance with ICSID Arbitration Rule 66 and/or under Ukrainian law, the Tribunal will authorize ICSID to publish the document or recording without redactions from the Parties.
20. Within 14 days of receipt of the notice referred to in paragraph 18, the other Party may raise objections to the proposed redactions.
21. If no objections are raised within the deadline established in paragraph 18, the Tribunal will authorize ICSID to publish the document or recording at issue with the requested redactions.
22. If objections are raised within the deadline established in paragraph 18, the Parties shall confer and seek to agree on redactions within 14 days of receipt of the objections to the proposed redactions. If the Parties reach an agreement, the Tribunal will authorize ICSID to publish the document at issue with the agreed redactions.
23. If objections remain unresolved, the disputed redaction requests and the objections thereto shall be submitted to the Tribunal in the form of the Transparency Schedule set out in Annex A to this Order.
24. If information is to be redacted from a document or recording in accordance with paragraphs 19, 20, or 21, the Parties shall provide a redacted version of the document. Upon receipt of the redacted document, the Tribunal will ask ICSID to publish the document.

On behalf of the Tribunal,

[signature]

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Prof. Bernard Hanotiau  
President of the Tribunal  
Date: October 7, 2024

**ANNEX TO PROCEDURAL ORDER NO. 2**  
**TRANSPARENCY SCHEDULE**

| [insert Party]                                     | Request [1] |
|--|-------------|
| Information sought to be protected from disclosure |             |
| Legal basis for protection                         |             |
| Comments   |             |
| Reply by opposing Party                            |             |
| Decision   |             |